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Awareness of National Security Issues and Response [ANSIR]

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https://fas.org/irp/ops/ci/index.html
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Key Findings

This annual examination by US government agencies of the threat of foreign economic collection and industrial espionage is conducted in compliance with Congressional mandate. Information obtained during the past year showed no reduction in attempts by foreign government, corporations, and individuals to acquire US proprietary economic information:

- The increasing value of trade secrets in the global and domestic marketplaces and the corresponding spread of technology with dual applications have contributed to a significant increase in both incentives and opportunities for economic espionage.
- Foreign counties continue to target items in all 18 categories of the Department of Defense Militarily Critical Technologies List. The most sought-after critical technology categories in 1999 in rank order were information systems, sensors, lasers, electronics, and aeronautic systems technologies.
- In addition to activities in the United States, foreign collectors also operate against US economic interests in their respective countries and in third countries. These activities conducted outside US territory are more difficult to identify and counter.

Background

The Intelligence Authorization Act for Fiscal Year 1995, Section 809(b), Public Law 103-359 requires that the President annually submit to Congress updated information on the threat to US industry from foreign economic collection and industrial espionage. This report updates the brochure Foreign Economic Collection & Industrial Espionage Remains a Threat-Are You a Target, 1999.

The Authorization Act specifies that these annual reports examine three aspects of the threat to US industry: the number and identity of the foreign governments believed to be conducting industrial espionage, the industrial sectors and types of information and technology targeted by such espionage, and the methods used to conduct espionage.

In coordinating a community-based response to the stated requirement, the National Counterintelligence Center (NACIC) requested the assistance of the Intelligence Community and the private sector. The following government components provided information for this report:

- Air Force Office of Special Investigations.
- Central Intelligence Agency (CIA).
- Defense Intelligence Agency (DIA).
- Defense Security Service.
- Department of the Army.Department of Energy (DOE).
- Department of State, including the Bureau of Intelligence and Research and the Bureau of Diplomatic Security.
- Federal Bureau of Investigation (FBI).
- National Reconnaissance Office.
- National Security Agency (NSA).
- Naval Criminal Investigative Service.
- US Customs Service.

In addition to information provided by the Intelligence Community, NACIC officers also interviewed a number of industrial security specialists from selected Fortune 500 companies, representing different sectors of the US economy.

There are no agreed upon definitions of economic or industrial espionage. For the purposes of this report NACIC will heed to the US Attorney General's definition of economic espionage as "the unlawful or clandestine targeting or acquisition of sensitive financial, trade, or economic policy information; proprietary economic information; or critical technologies." This definition excludes the collection of open and legally available information that constitutes the overwhelming majority of economic collection. Aggressive intelligence collection that is entirely open and legal may harm US industry but is not espionage. This, however, can help a foreign intelligence service identify and fill information gaps, which in some cases may be a precursor to economic espionage.

Industrial espionage is defined as activity conducted by a foreign government or by a foreign company with direct assistance of a foreign government against a private US company for the purpose of obtaining commercial secrets. This definition does not extend to activity of private entities conducted without foreign government involvement, nor does it pertain to lawful efforts to obtain commercially useful information, such as information available on the Internet. Although some legal actions may be a precursor to clandestine collection, they do not constitute industrial espionage. Some countries have a long tradition of ties between government and industry; however, it is often not easy to determine what is foreign government- sponsored espionage, a necessary requirement under the Economic Espionage Act, Title 18 U.S.C., Section 1831.

Another term used in this report is proprietary technology and economic information, the definition of which is information not within the public domain and that which the owner has taken some measures to protect. Generally, such information concerns US business and economic resources, activities, research and development, policies, and critical technologies. Although it may be unclassified, the loss of this information could adversely affect the ability of the United States to compete in the world marketplace and could have a detrimental effect on the US economy, ultimately weakening national security. Commonly referred to as "trade secrets," this information typically is protected under both state and federal laws.

Overview of the Threat to US National Security

In a world that increasingly measures national power and security in economic as well as military terms, the United States continues to be threatened by the theft of proprietary economic information and critical technologies. The risks to sensitive business information and advanced technologies have dramatically

increased in the post-Cold War era as foreign governments-both former adversaries and allies-have shifted their espionage resources away from military and political targets to commerce. The information they seek is not simply technological data but also financial and commercial information that will give their countries a competitive edge in the global economy.

During the past year, foreign governments, corporations, and individuals have continued to collect economic, technological, and trade secret information through a variety of legal and illegal means. The global spread of technology and the corresponding increase in the value of trade secrets have contributed to a significant increase in both the incentives and opportunities for conducting such activity. Much of what these foreign rivals (and allies) seek is in the public domain. Just as with traditional political-military espionage, however, trends in the collection of open-source information can be important indicators of strategic objectives that might ultimately be met by resorting to collection methods that are not legal. This report notes such trends.

Targeted US Defense Information and Technology

A review of reported suspected targeting incidents against critical technologies categorized in the Department of Defense (DoD) Militarily Critical Technologies List (MCTL), Part I: Weapons Systems Technologies in 1999 reaffirmed that all 18 categories of critical technologies continue to be the subject of foreign interest for military and economic exploitation. The 18 categories are, in order of suspected targeting: information systems; sensors and lasers; electronics; aeronautics; armaments and energetic materials; marine systems; guidance, navigation, and vehicle; signature control; space systems; materials; manufacturing and fabrication; information warfare; nuclear systems technology; power systems; chemical-biological systems; weapons effects and countermeasures; ground systems; and directed and kinetic energy systems. In 1999 as in 1998, foreign governments and commercially sponsored entities continued to target US companies involved in developing weapon components, new technologies, and technical information. Figure 1 illustrates the four categories with the highest percentage of reported targeting and the subcategories most often reported as being targeted in 1999. The DoD MCTL can be viewed on the Internet at www.dtic.mil/mctl/.

Figure 1: Most Frequently Reported Targeted Technology [a]

Information Systems
HF, VHF military radios
Encryption devices (KYU-5, KG-84, KY-57)
Satellite communications (SATCOM) systems
Signal processing
Sensors and Lasers
Underwater acoustics
Infrared (IR) detectors
Airborne and ground radar
Imagery dissemination software
Digital terrain data
IR imagery
Optical night-vision products
Photonics
Thermal-imaging camera
Antisubmarine warfare and electro-optical sensors
Passive communications intercept and electronic intercept receivers
Electronics
Airborne switching and logic devices
Control units for missile launchers
Flight control systems for military drones
High voltage systems for night-vision goggles, tank sights, and rifle scopes
Hybrid electronic circuit amplifier used in radar jamming, Tempest/hardening of equipment, integrated circuits, transducers, semiconductors, and VHF/UHF SATCOM repeaters
Aeronautics Systems Technology
F-110/F-120 state-of-the-art engines
F-22 fighter planes
Chinook helicopter
Aerial gunnery target system
F/A-18 Hornet
C-130J
Engine safety systems for aircraft
Gas turbine engines
Brazing and welding techniques in aircraft manufacturing
R&D efforts in increasing engine efficiency

[a] (U) Technology headings are listed in rank order.

Attempt To Acquire Laser Gun Sights and Potassium Cyanide

On 30 September 1999, the Department of Commerce imposed a $10,000 civil penalty on Laser Devises, Inc., a Monterey, California, exporter, to settle allegations that the company attempted to illegally ship laser gun sights to Taiwan. Commerce alleged that in March 1995 Laser Devices attempted to export US-origin laser gun sights to Taiwan without the required Commerce authorizations.

On 30 September 1999, Commerce imposed a $5,000 civil penalty on Gilbert & Jones, Inc. of New Britain to settle allegations that the company exported potassium cyanide to Taiwan without the licenses required by the Export Administration Regulations. Commerce's Bureau of Export Administration alleged that on two occasions-one in 1994 and the other 1995-Gilbert & Jones, Inc., exported US-origin potassium cyanide to Taiwan without obtaining the required export licenses.

The extent of foreign interest in specific categories of technology varied dramatically from country to country. Contrary to private industry's belief, the leading-edge technologies are not the only technologies being targeted. Countries with less developed industrial sectors often prefer older "off-the- shelf" hardware and software. They will also seek military technologies that are at least a generation old because such technologies cost less, are easier to procure, and are more suitable for integration into their military structures.

More developed and traditional threat countries seem to seek technical information that will enable them to disable, copy, neutralize, or cause significant change to US military systems. By contrast, other countries often seek command, control, and decisionmaking systems, and information on major ground, airborne, and seaborne weapon systems, sometimes to enhance interoperability.

Figure 2: Percentage of Targeting

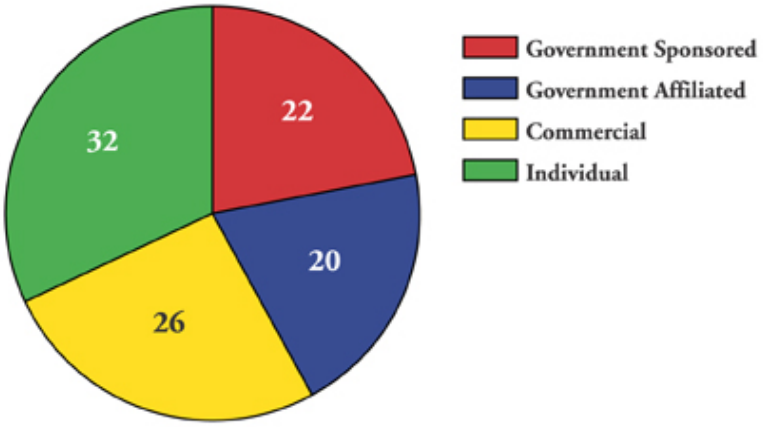

Figure 2 illustrates the origins and the associated percentages of the targeting. According to US defense industry reporting, targeting connected to commercial and individual foreign collectors accounted for 58 percent of the total suspicious activity. Government-sponsored targeting, including military and other official government activity, accounted for 22 percent of suspicious activities. Targeting activities by government-affiliated entities - including institutes, laboratories, and universities-accounted for another 20 percent.

The majority of the technology targeted in 1999 consisted of components rather than complete systems. This collection trend is associated with both developed and developing countries and seems to be driven by a requirement to upgrade existing platforms, rather than obtain new systems.

Collection Methods

Foreign collectors seldom use one method of collection; they combine collection techniques into a concerted effort that includes legal and illegal methods, while becoming more innovative in the new millennium. Specialized training and instruction courses in business intelligence collection methodology are becoming increasingly available. Such courses provide instruction on how to conduct HUMINT operations, including how to develop, create, and maintain dossiers and psychological profiles on potential sources; exploitation and elicitation techniques; debriefing methodologies; competitor targeting, including how to exploit industrial conventions, seminars and meetings; and real-world practical exercises.

In addition to traditional HUMINT recruiting strategies, studies of economic espionage consistently identify two primary techniques as the methods used to acquire economic intelligence:

- Open-Source Collection
  - Requesting information through e-mail or letters.
  - Exploiting Internet discussion groups.
  - Exploiting multinational conferences, business information exchanges, or joint ventures.
  - Misleading open-source collection.

- Illegal Collection
  - Acquisition of export-controlled technologies.
  - Theft of trade secrets, critical technologies, and critical information in host country.
  - Agents recruitment, co-optees, and US volunteers.

Open-Source Collection

Requesting Information Through E-Mail or Letters. Request for information is the most often reported method of operation by foreign collectors to obtain trade secrets, critical technologies, and sensitive and classified information. The use of e-mail is the vehicle of choice to solicit information, and the use of e-

mail is becoming more common in countries with limited or highly restricted public Internet access. However, use of postcards and letters for information requests continues.

The majority of the suspicious requests reported by industry are indirectly solicited. Requests can be linked to information available on Internet Web sites, in advertisements, in articles in trade journals, and in marketing materials at trade shows and seminars. The requests range from legitimate inquiries to those clearly seeking information that is restricted or sensitive. The inquiries may start as mundane solicitations for price lists, catalogues, published papers, research assistance, or for assistance in finding employment. Requests become suspicious when they originate from embargoed countries, pose questions that would reveal sensitive or classified information, or indicate that the requester is trying to evade export control or security procedures. Persistent requests from the same source also raises suspicion.

Company annual reports, patent data, corporate and government Internet sites, and marketing materials are exploited. Open-source research can inadvertently provide a collector with sensitive or restricted information, or assist in further targeting efforts by identifying industry and government relationships with specific technologies and activities. Many foreign collectors are technically astute and diligent readers of company publications; they attend industry conferences and trade shows; and they exploit professional contacts through memberships in trade and professional associations.

Highly assertive collection efforts are dubbed by some government agencies and private industry as aggressive open-source collection or AGGROS.

Exploiting Internet Discussion Groups. The anonymity of the Internet makes it a perfect medium for collection attempts using e-mail, search engines, and discussion groups. One technique is the exploitation of listserv, an e-mail-based discussion group organized along topics of interest and open to anyone. Subscribers who join a list may send an e-mail message to the list.The message in turn is sent to all members of the group by the listserv, which provides subscribers with e-mail addresses of all other members. This procedure facilitates a discussion involving research advice on specific technical challenges, which are permanently archived and searchable. Such exchanges can pose a serious threat to economic and technological security for two reasons. First, it is not uncommon for concepts, research, development, testing, and evaluation of a technology to take place in an open or unclassified environment. This is particularly significant when it comes to sensitive but unclassified or dual-use technologies and proprietary information. Second, a foreign national involved in collecting information on future programs or in acquiring research being conducted in another country could have an e-mail address from within the United States.

Avery Dennison: Target of Trade Secret Theft

In April 1999, two Taiwan executives and a Taiwan company were found guilty of violating Title 18 U.S.C. Section 1832 (Theft of Trade Secrets). Pin Yen Yang, president of Four Pillars Company, and his daughter Hwei Chen "Sally" Yang were accused of stealing adhesive formulas and innovations from Avery Dennison Corporation with the help of an Avery Dennison employee. This case marks the first conviction of foreign individuals or a foreign company that has gone to trial under the Economic Espionage Act.

On 5 January 2000, a Youngstown, Ohio, federal judge sentenced Pen Yen Yang to two years probation along with six months of home detention for violating the 1996 Economic Espionage Act. Mr. Yang's daughter was sentenced to one-year probation on the same charge. The Yangs each faced a maximum penalty of 10 years in prison and $250,000 in fines. Four Pillars, itself also was fined $5 million by a US District Court for accepting the pilfered secrets.

In February 2000, a jury verdict in US District Court, Cleveland awarded Avery Dennison at least $40 million in damages in a civil case against Four Pillars. The judge increased the award to $80 million.

Exploiting Multinational Conferences, Business Information Exchanges, or Joint Ventures. International technical and academic conferences, both home and abroad, offer an excellent venue for foreign collectors to obtain information and to spot and assess experts in a given field of interest. Many contractors involved with US Government and DoD contracts attend such conferences on behalf of their companies' commercial interests and thus can become targets of foreign collection. There have been many instances when US participants at international conferences have been contacted at a later date and asked to provide information on a given technology or proprietary data. Probing for information outside the scope of the

conference is also a common activity. Often these approaches play on cultural commonalties as a reason to cooperate.

Misleading Open-Source Collection. Practitioners of economic and industrial espionage may employ legal, but misleading steps to hide a collector's true interest, affiliation, or location. For example, a collector may use public access Internet connections found at public libraries and educational institutions for browsing Web sites. This type of activity can protect the collector's identity and provide a means to "lose" the requester's individual inquiry amongst the multitude of requests generated from the public and educational computers. A public library presents a disarming persona, and the credibility of an educational institution inadvertently adds a measure of legitimacy to a request. Such misleading measures reduce the chance of a request raising suspicions and being reported to security personnel, while increasing the likelihood that a request will receive a response. Other misleading techniques include routing e-mail through one or more countries to hide the true point of origin and using contacts established through membership in professional organizations and at conference to unwittingly broker foreign visits or obtain the required information.

Illegal Collection

Acquisition of Export-Controlled Technologies. The unlawful acquisition of export-controlled technologies by foreign collectors is of growing concern. Methods of operation employed to circumvent the export-control process include: the use front companies within the United States and abroad, the illegal transportation of goods to an undisclosed end user by utilizing third country cut-outs or false end-user certificates, and the purchase of an exportable version of a product and then having it modified during the manufacturing process to meet the specifications of the export-controlled version. In 1999, for example, a US company reported that it received a telephone call from an individual in New York who wanted to purchase thousands of dollars worth of computer equipment, under a United Nations program, for shipment to Jordan. Several minutes into the conversation, the perspective buyer admitted that the computers were to be transshipped from Jordan to Iraq, an embargoed country.

Theft of Trade Secrets, Critical Technologies, and Critical Information. The theft of trade secrets, critical technologies, and critical information knows no boundaries. As recent cases indicate-from the insider threat, to laptop computer thefts, to hotel room intrusions abroad-foreign entities employ a wide range of redundant and complementary methods of operation. The perpetrators of economic and industrial espionage include traditional foreign intelligence services, state-sponsored educational and scientific institutions, and independent, nonstate-sponsored companies and individuals. The increased identification of nonstate sanctioned industrial espionage, however, should not be viewed as the demise of traditional foreign intelligence service clandestine espionage. US businessmen traveling abroad routinely report incidents of suspected targeting. Their briefcases and laptop computer have been tampered with, or outright stolen; they have reported excessive elicitation by foreign officials at border crossing points, and their hotel rooms have been searched.

Agent Recruitment, Co-optees, and US Volunteers. US persons with access to trade secrets, critical technologies, and classified information are potential recruits to aid in foreign collection operations. Some become unwitting facilitators by brokering foreign visits, the process of using a third party to arrange visits that circumvent official visitation procedures. In addition, foreign collectors have enticed US experts to present papers overseas as a means to exploit their knowledge of export-controlled information, or to facilitate their recruitment as agents or co-optees.
Foreign intelligence services and other government-sponsored entities continue to employ traditional clandestine espionage methods to obtain US trade secrets, critical technologies, and critical information. These methods include agent recruitment, US volunteers, and co-optees.

Responding to the Challenge

National Counterintelligence Center

In a rapidly changing but still-hostile world, NACIC coordinates the US Government's effort to identify and counter foreign intelligence threats to US national and economic security. Operating under the auspices of the National Security Council, NACIC draws it staffing from counterintelligence and security professionals from the FBI, CIA DIA, NSA, the Office of the Secretary of Defense, the armed services, the Department of State, and DOE. In addition to producing the Annual Report to Congress on Foreign Economic and Industrial Espionage, NACIC's activities include a proactive industry outreach program. The NACIC outreach mission provides industry with threat awareness materials (literature, posters, videotapes, and briefings), and it sponsors regional awareness seminars and security fairs. For information on NACIC's

activities and educational materials, visit the NACIC Internet Web site at http://www.nacic.gov.

Federal Bureau of Investigation

The FBI's public voice for espionage, counterintelligence, counterterrorism, as well as for economic espionage and cyber and physical infrastructure protection, and all national security issues is the Awareness of National Security Issues and Response Program (ANSIR)-this is the FBI's national security awareness program. ANSIR is designed to provide unclassified national security threat and warning information-specifically related to foreign-sponsored or foreign-coordinated intelligence-to US corporate security directors and executives, law enforcement, and other government agencies. The ANSIR program focuses on the "techniques of espionage," giving industry representatives tangible information to help them identify their own vulnerabilities. These techniques include the compromise of industry information through "dumpster diving" (searching through trash and discarded materials) where foreign intelligence services and competitors may try to obtain corporate proprietary information. They many also include listening devices that could be as simple as using a police scanner used to tune in the frequency of the wireless microphone being used in a corporate boardroom.

Each of the FBI's 56 field offices has an ANSIR coordinator who meets regularly with industry leaders and security directors for updates on current national security issues within their jurisdiction. Dissemination nationwide occurs through ANSIR e-mail and ANSIR fax networks. ANSIR fax was the first initiative by the US Government to provide 25,000 individual US corporations with critical technologies or sensitive economic information targeted by foreign intelligence services or their agents. ANSIR e-mail increased the capacity to over 100,000 recipients, which is expected to accommodate every US corporation that wishes to receive information from the FBI. Through the ANSIR program and the discussion of techniques of espionage, corporations are able to learn from the experiences of others enabling them to protect their commercial technologies.

For additional information concerning the FBI, visit its Internet Web site at http://www.fbi.gov. Information on the ANSIR Program can be obtained from the Web site http://www.fbi.gov/ansir/ansir.htm or sending an e-mail to ansir@leo.gov.

US Customs Service

The US Customs Service, as the principal law enforcement agency charged with enforcement of US international trade laws at its national borders, is the first line of defense in preventing illicit trafficking in strategic and controlled commodities, and in enforcing international economic sanctions and embargoes. It is the only border agency with an extensive air, land, and marine interdiction force and with an investigative component supported by its own intelligence branch. Illicit trafficking in weapons of mass destruction and their delivery systems, conventional weapons and firearms, dual-use technology, and stolen property and trade secrets pose serious threats to the United States, its economy, and its international partners. The US Customs Service's Internet Web site is http://www.customs.treas.gov.

US Department of Commerce, Bureau of Export Administration

The primary roles of the Bureau of Export Administration's (BXA) export enforcement program are to prevent the illegal export of dual-use items; investigate and assist in the prosecution of violators of the Export Administration Regulations (EAR) and the Fastener Quality Act (FQA); and inform and educate exporters, freight forwarders, and manufacturers of their enforcement responsibilities under the EAR and FQA. Export enforcement personnel also work closely with

the BXA's Office of Chief Counsel and the US Attorneys Offices in bringing enforcement actions against violators of the EAR. A list of denied persons contains information on the names and addresses of firms and individuals denied access to US goods, in addition to the reasons for the denial action. The BXA's Internet Wed site is http://www.bxa.doc.gov.

Overseas Security Advisory Council

The Department of State established the Overseas Security Advisory Council (OSAC) to foster the exchange of security-related information between the US Government and US private sector operating abroad. Administered by the Bureau of Diplomatic Security, OSAC has developed into a successful joint venture for security cooperation. OSAC maintains an Internet Web site that provides timely news items and travel warnings at http://www.ds-osac.org.

Department of Energy: Economic Espionage

Threat Assessment

The DOE's Office of Counterintelligence (OCI) is currently engaged in a threat assessment on economic espionage with an emphasis on Cooperative Research and Development Agreements (CRADAs). CRADAs are agreements between one or more federal laboratories and one or more nonfederal parties under which the government, through its laboratories, provides personnel, facilities, or other resources with or without reimbursement. As an outcome of the threat assessment, OCI will make recommendations that will reduce the opportunities for economic espionage within the DOE.

Department of Defense

Within the DoD are agencies tasked with protecting technology and supporting cleared defense contractors. Cleared defense contractors are encouraged to contact the appropriate local representatives of these agencies: the Defense Security Service, the Air Force Office of Special Investigations, the Naval Criminal Investigative Service, and the Army Intelligence and Security Command.

Conclusion

As long as the United States remains the world's leading industrial power and US industry continues to lead the world in technology development, the United States will remain a prime target of foreign economic collection and industrial espionage. Indeed, economic collection against the United States, including the theft of trade secrets and competitive business information is likely to intensify in the new millennium as the race to control scarce resources and global markets intensifies. Not only have traditional allies and adversaries increased their economic collection activities against the United States, but as developing countries emerge as potential new economic competitors, they can be expected to increase their collection efforts against US targets, as well. Traditional allies as well as adversaries have increased and will continue to pursue economic collection activities against the United States.

Private industry and the counterintelligence community will continue to face the challenge of distinguishing legitimate competitive collection activities from those whose ultimate aims are the illegal transfer of trade secrets and critical technologies. It is the scrutiny of open-source collection that frequently reveals other illegal activities or intentions. Among economic collectors, malicious intentions may be more difficult to detect, but the increasing competition for limited global resources suggests that the problem will only increase.

Additional factors make the true extent of economic espionage difficult to measure. Successful espionage seldom comes to light, and even when economic espionage is discovered, companies are often reluctant to report to authorities that they have been the victim of such activity because of the embarrassing publicity and legal complications that may follow. The findings of a recent survey sponsored by PricewaterhouseCoopers indicate that Fortune 1,000 companies sustained losses in the billions in 1999 from the theft of their proprietary information. Some of the other key findings of this survey indicate:

- The greatest known losses to US companies involve information concerning the manufacturing processes and research and development.
- The global Internet and proliferation of information systems have significantly increased the risks to corporate proprietary information.
- On-site contract employees and original equipment manufacturers are now perceived as the greatest threat to proprietary information.
- The majority of companies have not effectively met the challenge of providing a framework for safeguarding proprietary information.
- Most companies lack a mechanism and process by which to assess the value of proprietary information.
- The leading collectors of technical intelligence are most interested in the following information: classified US defense information-information systems, sensors and lasers, electronics, and aeronautic systems technologies-trade information, and commercial technologies. Collection efforts, either open-source or illegal collection are gradually increasing.

For Immediate Assistance

Here is who to contact if further assistance is required in the following:

- Industrial espionage: the local office of the FBI.
- Export violation: the local office of US Customs Service.
- Export control: the local office of the Department of Commerce, Bureau of Export Administration.

Appendix

Private Industry Survey

Officers of the National Counterintelligence Center contacted nearly a dozen selected Fortune 500 companies to obtain their views on the problem of foreign economic collection and industrial espionage. Following is a distillation of corporate responses to questions concerning their experience.

Is foreign economic information collection and/or industrial espionage a problem for your company or industry?

Yes. Each day America is driven more and more by information. Proprietary information is the chief competitive asset, vital to both our industry and our society. Our livelihood and our national strength depend on our ability to protect industrial and economic data. As the marketplace evolves and new technology is developed, information collectors are seeking competitive information we believe is intended to be used to gain competitive advantage over US corporations in several fields.

To what extent, if any, has your company and/or industry experienced aggressive economic information collection or industrial espionage by foreign entities?

Espionage can go on for years without a specific incident to trigger the situation; therefore, it is difficult to estimate the extent of economic information collection and/or industrial espionage by foreign entities. The economic resources of a potential enemy and their disposition offer it a selection of a range of possible or probable course of action. Suspicious activity-such as using excessive Xerox paper, reading technical manuals on a Saturday evening, wandering through restricted areas, and aggressively recruiting employees-has been observed.

What are the types of information or technology being targeted?

o Export-controlled information.
o Government programs.
o National Missile Defense.
o Unclassified and open-source information.
o Neurological technology.
o Leverage technology.
o Business plans.
o Pharmaceutical intellectual property.
o Formulas and research.
o Manufacturing process.
o Computer storage, memory, source codes, processors, and encryption.

What are the collection techniques employed?

Employees-not only disgruntled employees-contractors, consultants, and adversaries are viewed as great threats. Using today's technology, information can be downloaded into small disks and readily removed from the premises.

US companies' new initiative proprietary information tends to be contained in such an electronic format making it more vulnerable to economic espionage. Other collection techniques include:

- Breaking away from tour groups.
- Attempting access after normal working hours.
- Different personnel appear at the last minute.
- Theft of laptops.
- Customs holding laptops for a period of time.
- Requesting technical information.
- Social gatherings.
- Conferences and symposiums.
- Trade shows.
- Dumpster diving (searching through trash and discarded materials).
- Nonencrypted Internet messages.

Who are the most active collectors?

- China
- Japan
- Israel
- France
- Korea
- Taiwan
- India

What initiative has your company or industry taken to counter foreign economic collection?

Senior business leaders, who have acknowledged that economic espionage is a real problem and it may affect the bottom line, have developed initiatives ranging from better control of physical security and access by foreign nationals - such as limited access-being in compliance with government contracts, and developing strong proprietary safeguards.

Although there is no absolute defense against covert attack, being alert to the possibility of danger and adherence to reasonable and prudent precautionary measures tend to reduce the threat. In this effort, businesses have developed security briefings, educational pamphlets, technical training, and on-line security information.

Are there any examples or case histories of aggressive foreign collection or industrial espionage you would be willing to share?

In August 1999, an employee of an aerospace engineering company approached the Security/Ethics Officer with a counterintelligence issue related to an overseas trip to China. The employee admitted that he had an outside business arrangement in the works with an individual from the West Coast. Under advisement from the FBI and US Customs Service he was asked to cooperate with his business associate. The technology at risk was a highly sensitive infrared camera, which can be used in missile guidance systems. The business associate was accused of violating the US Arms Export Control Act, which regulates defense articles (military weapons and munitions), defense services, and related technical data.

What should the US Government do to better support the private sector in countering this threat?

The US Government should foster the development of closer relations with the private sector, get to know the threat information needs of business, and help prevent companies inadvertently pairing up or doing business with those who are known to present a threat. Government must also do a better job of understanding and identifying what the United States must protect. In other words, identify the economic and technological "crown jewels" that we all must protect.

Industry security specialists find it difficult to convince their senior managers that the threat from foreign economic collection is a real and persistent one. This often means that the necessary resources to enhance protection and security are not allocated. They blame the government, in part, for not showing sufficient interest in their plight. To capture the attention of senior corporate managers and have them allocate sufficient resources into efforts enhancing security, the US Government should institute a more robust program to reach out to the business community, targeting senior corporate leadership with timely, credible, and specific information on the threat. Dated and anecdotal information will not do. To get buy-in from senior corporate management, government must be prepared to take some risks and share some relevant threat information in a timely manner. This has to be part of a continuing dialogue if there is to be partnership between government and the private sector.

Government must gain a better understanding of how businesses are run and the way businessmen think. There must also be a significant effort to better educate judges, prosecutors, and government investigators concerning business trends and techniques. This education would foster the development of new approaches to investigations, prosecution, and adjudication that are more responsive to the needs and limitations of business. Businesses find that economic espionage complaints, when handled in foreign counterintelligence investigative channels rather than criminal investigative ones, become immediately classified and, much to the frustration of the business involved, inaccessible.

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Counterintelligence

Are You A Target?

As a result of the global shift toward economic and technological competition, some foreign countries are becoming increasingly engaged in economic and industrial espionage. **Foreign targeting of US technology and economic and proprietary information is a growing concern.** Economic and industrial espionage against the United States by foreign entities, both government-sponsored and private, threatens US economic competitiveness and results in the loss of millions of US dollars and thousands of jobs annually.

The United States continues to be the preeminent world power. It has vital economic interests and military responsibilities around the globe. The protection of trade secret information, critical technologies, and proprietary information is an integral part of US economic security. Due to the importance of maintaining US economic competitiveness, current policy is to treat foreign threats to the economic well-being of the United States as a national security issue. **As a result, economic security is directly linked to, and inseparable from, national security.**

Foreign countries, including some traditional allies, continue their attempts to collect information against US interests. While foreign efforts persist, the US Intelligence Community has detected no significant change from past patterns in both the nature and extent of the threat or in the type of technologies being targeted and collection methods employed. As in previous years, over a half dozen nations continue to be the most active collectors of US proprietary information and critical technologies. These nations gather information through both open and legal means as well as through clandestine efforts. They target industries, the US Government, and US persons in an effort to support their nations' economic and military priorities and to avoid the time and expense of advanced research and development.

Targeting and Collection

Military Force modernization, economic competition, and commercial modernization drive foreign collection efforts. As a result, dual-use technologies - those with civilian and military applications - are consistent targets of foreign collection.

Clandestine collection efforts continue; however, consistent with traditional espionage operations, a significant majority of foreign collection is initially conducted through legal and open means. This activity may be a precursor to economic espionage.

Practitioners of economic and industrial espionage seldom use one method of collection. Instead, they employ a number of collection techniques in a concerted effort that combines legal and illegal, traditional and more innovative methods. Espionage and other illegal collection methods include agent recruitment, use of US volunteers and co-optees, surreptitious entry, theft, and computer intrusions. Legal collection methods include joint ventures, use of foreign students, scientific exchanges, Internet access, exploitation of cultural or ethnic affinity, mergers and acquisitions, visits to US facilities, and unsolicited requests for information.

Industrial Espionage

It is imperative that US companies have a well-rounded internal security system and corresponding policies to reduce the potential for loss of sensitive information. Nations that fear falling behind in technological expertise and efficiency may resort to theft as a way to level the playing field. In February 1999, the FBI and the US Chamber of Commerce announced that US companies lose about $2 billion a month to corporate espionage. About 95 percent of the losses go undetected or are suppressed by companies that do not want customers and shareholders to know of their vulnerabilities or fear they may be forced to reveal even more information in the discovery phase of a criminal action. Yet, unreported foreign economic espionage attempts or cases that are not prosecuted are likely to further embolden foreign adversaries.

1999 Landmark Cases

Avery Dennison Corporation
In April 1999, two Taiwan executives and a Taiwan company were convicted of theft of trade secrets under the Economic Espionage Act of 1996. Pin Yen Yan, president of Four Pillars Company, and his daughter Hwei Chen "Sally" Yang were accused of stealing Avery Dennison adhesive formulas and innovations with the help of an Avery Dennison employee. This case marks the first conviction of foreign individuals or a foreign company that has gone to trial under the Economic Espionage Act of 1996. The Yangs each face a maximum penalty of 10 years in prison and $250,000 in fines. Four Pillars Company could be fined up to $5 million.

Bristol-Myers Squibb
In April 1999, Hsu Kai-Lo, technical director of the Yuen Foong Paper Company of Taiwan, pleaded guilty to one count of conspiracy to acquire a trade secret. Hsu attempted to steal the formula for Taxol, a cancer drug patented and licensed by the Bristol-Myers Squibb Company. Another defendant, Jessica Chou, is believed to be in Taiwan and is considered a fugitive by US authorities. Taiwan has no extradition treaty with the United States.

The Year 2000 Problem

The extensive Y2K remediation efforts currently underway in the United States also offer significant opportunities for some countries to target US Government and private sector information systems for the purpose of gaining access to critical technologies and sensitive commercial and proprietary information. Some foreign-manufactured software, or foreign experts hired to fix Y2K problems, could pose a threat to the security of sensitive information.

The Economic Espionage Act of 1996

While the Economic Espionage Act of 1996 provides severe sanctions, it is company responsibility to take reasonable measures to safeguard trade secret information. To report violations or to obtain additional information about the Act, please contact the local **FBI Awareness of National Security Issues and Response** (ANSIR) coordinator. Telephone numbers for FBI field offices are listed in most telephone directories and on the FBI home page: www.fbi.gov.

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Key Findings

- Despite the adoption of the Economic Espionage Act of 1996, many foreign countries, including some traditional US allies, continue their attempts to acquire US trade secret information and critical technologies for military and commercial application, through both legal and illegal means.
- Updated information, as reported by the US Intelligence Community, reaffirms the findings of the 1997 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage to include the origin of the threat, collection targets, and methods of operation.

- Analysis of updated information indicates that eight countries are most actively targeting US proprietary economic information, trade secrets, and critical technologies. In an effort to more effectively qualify the threat, four of the 12 most active collectors listed in the 1997 Annual Report were taken off the 1998 Priority Country List.

- Collection efforts continue to be driven by military force modernization, economic competition, and commercial modernization using technologies with dual-use applications.

- Clandestine collection efforts continue; however, consistent with traditional espionage operations, a significant majority to foreign intelligence collection is initially conducted through legal and open means and may be a precursor to economic espionage.

Background

The *Intelligence Authorization Act for Fiscal Year 1995*, Section 809(b) requires that the President annually submit to Congress updated information on the threat to US industry from foreign economic collection and industrial espionage. This report updates the third *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage*, which was released in June 1997.

The Intelligence Authorization Act further specifies three aspects of the threat to US industry to be reported and any trends in that threat to include (1) the number and identity of the foreign governments conducting foreign industrial espionage; (2) the industrial sectors and types of information and technology targeted by such espionage; and (3) the methods used to conduct such espionage.

In coordinating a community-based response to the above requirement, the National Counterintelligence Center (NACIC) requested the assistance of the following 12 agencies:

- Air Force Office of Special Investigations (AFOSI).
- Central Intelligence Agency (CIA).
- Defense Intelligence Agency (DIA).
- Defense Security Service (DSS).
- Department of Commerce.
- US Customs.
- Department of Energy (DOE).
- Department of State.
- Federal Bureau of Investigation (FBI).
- National Security Agency (NSA).
- Naval Criminal Investigative Service (NCIS).
- US Army

Ten of the above agencies responded to the request for information. Of the 10 participating agencies, three had no new information to report. The remaining seven agencies provided incidents and trends relating to the continuing foreign economic collection against the United States.

Overview of the Threat

Strong US capabilities in a wide variety of cutting edge, technical, and scientific fields, and the open nature of the United States continue to make the United States the top target of foreign countries engaged in economic intelligence collection and espionage. Similarly, the development and production of trade secret information is an integral part of US trade, commerce, and business, and the security of trade secrets is essential to maintaining the health and competitiveness of critical segments of the US economy.

For the most part, foreign collectors do not distinguish between military technology, civilian technology, proprietary information, and trade secrets - they simply collect what they find to be of value.

Increasing economic competition has redefined the context for espionage as nations link their national security to their economic security. Intelligence services are expanding from their primary focus on military secrets to include the collection of economic intelligence. The United States is particularly vulnerable to the changing focus of foreign collection since American corporations and research centers

rely heavily on communications systems, computer networks, and electronic equipment to process and store information. The espionage threat is particularly troubling when the capabilities and experience of a foreign intelligence service support a US corporation's foreign competitor.

Economic crimes have a serious impact on a wide variety of US industries and businesses and therefore upon the economic well-being of the United States. Foreign governments and major foreign industrial sectors play a prominent role in their nation's business intelligence collection efforts. They actively target US persons, firms, industries, and the US Government to steal advanced critical technologies, trade secrets, proprietary information, and the results of research and development initiatives in support of their nation's commercial priorities and economic security agenda.

There have been progressive changes in three areas of foreign collection efforts targeting US interests:

- *Intelligence activity*. Intelligence collection activity is not limited to intelligence personnel. Increasingly, foreign-sponsored, non-intelligence personnel - to include foreign industry representatives, students, researchers, scientists, and foreign national "insiders" working in US firms - engage in clandestine activity that is harmful to the security and economic well-being of the United States.

- *Intelligence environment*. Significant advances in technology have allowed businesses and financial institutions to become prey of new age of criminals. The intelligence environment now includes the growing importance of maintaining the integrity of the United States' information infrastructure. At the same time, the growing use of computer networks and telecommunications for commerce and the storage and transmittal of sensitive information provides increased opportunities for technical collection.

- *Intelligence methodology*. Many traditional and nontraditional adversaries are technologically sophisticated and have modified their intelligence methodologies to use advanced technologies to collect US trade secrets and proprietary information.

Legal Collection Versus Espionage

There are no agreed-upon definitions of economic or industrial espionage. The US Attorney General defines economic espionage as *"the unlawful or clandestine targeting or acquisition of sensitive financial, trade, or economic policy information, proprietary economic information, or critical technologies."* This definition excludes the collection of open and legally available information that constitutes a significant majority of economic collection. Aggressive intelligence collection that is entirely open and legal may harm US industry but is not espionage. However, it can help foreign intelligence service identify information gaps and in some cases may be e precursor to economic espionage.

The statute that mandates this report defines industrial espionage as *"industrial espionage conducted by a foreign government or by a foreign company with direct assistance of a foreign government against a private US company and aimed at obtaining commercial secrets."* This definition does not extend to activities of private entities without foreign government involvement, nor does it pertain to lawful efforts to obtain commercially useful information, for example, through the Internet. While some of these legal activities may be a precursor to clandestine collection, it does not constitute industrial espionage. Some countries have along tradition of ties between government and industry; however, often it is not easy to determine what is foreign government - sponsored espionage - a necessary requirement under the Economic Espionage Act (Title 18 U.S.C., Section 1831).

The Cost of Economic Espionage

It is difficult to assess the dollar loss as a result of economic espionage and the theft of trade secrets. The US Intelligence Community has not systematically evaluated the costs. The American Society for Industrial Security (ASIS) conducted an intellectual property loss survey of Fortune 1,000 companies and 300 fastest growing companies. Despite an overall 12-percent response rate, responding companies reported $44 billion in known and suspected losses over a 17-month period during 1996-97.[(1)] The vast majority of these losses were in the suspected category.

Pacific Northwest National Laboratory, under contract by the FBI, has developed a methodology to objectively assess and determine the scope of economic loss resulting from the theft of intellectual property. This Economic Loss Model was first applied to the facts of a case involving the theft of intellectual property from a US corporation by a foreign competitor who, as a result of the theft, captured the market.[(2)] Using this tool, the misappropriation of intellectual property in this case resulted in over $600 million in lost sales, the direct loss of 2,600 full-time jobs, and a resulting loss of 9,542 jobs for the economy as a whole over a 14-year time frame. Analysis also determined that the US trade balance was negatively impacted by $714 million and lost tax revenues totaled $129 million. The Economic Loss Model will continue to be used on a case-by-case basis and may be used for court purposed to produce unbiased and independent loss estimates.

Effects of the Economic Espionage Act

Since the enactment of the Economic Espionage Act of 1996, US law enforcement has taken advantage of the changed legal structure to fill many gaps and inadequacies that formerly existed in federal law. Important partnerships have been formed between members of the US Intelligence Community, the law enforcement community and US industry, allowing for prompt detection and successful investigative efforts.

Five cases have been, or are currently being prosecuted under the Economic Espionage Act. US companies that have been the targets of trade secret theft under the Act include Gillette Company, Pittsburgh Plate Glass (PPG), Bristol Myers Squibb, Avery Dennison Corporation, and Joy Mining Machinery. In each case, a significant economic loss was prevented. To date, four individuals, involved in three cases, have pled guilty to Title 18 United States Code (U.S.C.), Section 1832 - theft of trade secrets. [(3)] However, no direct foreign government involvement has been proved in any of these cases. The other two cases involve the indictment of foreign national and one foreign business. In addition, an outstanding warrant presently exists for one Taiwan person. Prosecutions are still pending in these cases and investigation continues to fully determine the extent of foreign government involvement.

Each indictment and prosecution is a strong example of close cooperation between the US Federal Government and US industry. In furtherance of this cooperation, the FBI has undertaken a number of initiatives. The FBI's National Security Division sponsored a series of six regional Economic Espionage Conferences. These conferences brought together elements of US industry and Federal Government criminal and intelligence sectors that play a role in economic espionage matters. The FBI's Awareness of National Security Issues and Response Program (ANSIR) is designed to develop a nationwide communication network among corporate security professionals, law enforcement, and others on a variety of national security matters, to include economic espionage. In addition, the FBI is currently working with industry to develop an online system to facilitate the timely sharing of information concerning incident reports, threat profiles, and referrals between industry and the FBI. The FBI has also initiated efforts to include operative language from the Economic Espionage Act into the Federal Acquisition Regulation (FAR). The FAR provides uniform policies and procedures for acquisitions by executive agencies of the Federal Government.

The Department of Defense Counterintelligence Technology Protection Working Group was formed through joint efforts of DoD service CI agencies and the Counterintelligence Directorate, Office of the Secretary of Defense (OSD). The Working Group's purpose is to foster interagency cooperation to identify, coordinate, and facilitate the sharing of counterintelligence information and activities that support technology protection and critical technologies. The forum facilities the exchange of information on foreign government intentions, collection capabilities, and operations targeting US critical technologies, systems and subsystems. The group has attendees from all DoD elements, OSD, FBI, NSA, National Reconnaissance Office, NACIC, and other US Government agencies.

Origin of the Threat

A number of foreign countries, to include some traditional US allies, continue their collection efforts against the United States. This year, eight countries have been identified as nations most actively involved in the collection of US proprietary economic and industrial information.[(4)] These countries do not reflect the entire picture of targeting against US interests - only the most serious threat.

The 1997 *Annual Report* identified 12 countries, in no ranking order, that were believed to be the most active collectors of US proprietary information and critical technologies. The four countries that have been omitted from this year's list have not ceased their collection efforts entirely but are believed to pose a diminished threat to US interests.

A threat to US economic and industrial interests entails both intent and capability. All countries on this year's Priority Country List have the intent and capability to engage in economic collection and economic espionage. Hostile intent involves a willingness to effectively conduct economic espionage against the United States and the capacity to do so. An effective foreign collection program focuses on technology and information that can be used by a country's indigenous commercial and defense industries. In addition, a close relationship between government and business exists among many of the most active economic collector countries - a factor that helps to establish targeting priorities and promote effective dissemination of information. In addition, to have a sufficient negative effect on US industry, a foreign country must have the capability to exploit stolen technology and a base for profiting from it, such as a large economy, an advanced industrial sector, or a third-country buyer.

Targeted Information and Technology

Foreign collection efforts continue to be driven by military force modernization, economic competition, and commercial modernization using technologies with dual-use applications. Targeting dual-use technology provides foreign collectors with a high return on investment and a low probability that the United States will detect any diversion from it stated end use. A majority of collected information is restricted, sensitive and/or proprietary and its loss is detrimental to US economic interests. A smaller portion of collected information is classified in nature.

According to the DSS, US defense industry reporting of suspicious activity during 1997 revealed that foreign government and commercially sponsored entities continued to target weapon components, developing technologies, and technical information more intensely than complete weapon systems and military equipment. Less developed countries seek older technologies that cost less but still improve their military capabilities. More developed nations appear to seek more advanced technical information to copy or counter US military systems. A review of reported incidents of suspected targeting against critical technologies in 1997 has reaffirmed that all 18 categories of the DoD's Military Critical Technology List (MCTL) continue to be the subject of foreign interest for military and/or economic exploitation. The majority of MCTL categories are dual-use and include:

- Aeronautics Systems.
- Armaments and Energetic Materials.
- Chemical and Biological Systems.
- Directed and Kinetic Energy Systems.
- Electronics.
- Ground Systems.
- Guidance, Navigation, and Vehicle Control.
- Information Systems.
- Information Warfare.
- Manufacturing and Fabrication.
- Marine Systems.
- Materials.
- Nuclear Systems.
- Power Systems.
- Sensors and Lasers.
- Signature Control.
- Space Systems.
- Weapons Effects and Countermeasures.

Of the 18 technology categories listed on the MCTL, the DSS observed that the top five most sought-after technologies were (in order): Information Systems, Aeronautic Systems, Sensors and Lasers, Electronics, Armaments and Energetic Materials. In the past, DSS has emphasized only the top three sought-after MCTL categories; however, current reporting has changed only slightly from 1996 when sensor and laser technology surpassed aeronautics systems as the secondmost sought-after technology.

Under the five primary technology categories, several more specific areas of foreign interest in 1997 included:

Information Systems:

- Information security systems.
- Software/hardware.
- Transmission systems.
- Modeling and simulation.
- Command, control, communications, computers, and intelligence (C41).
- Intelligence systems.

Aeronautics Systems:

- Fixed-wing aircraft.
- Gas turbine engines.
- Unmanned aerial vehicles (UAV).
- Heads-up display.
- Aircraft stealth.
- Crew interface.

Sensors and Lasers:

- Focal plane array/infrared.
- Radar.
- Imagery.
- Electro-optic/night-vision devices.
- Acoustic.

Electronics:

- Microelectronics.
- Materials/components.
- Optoelectronics.
- Fabrication equipment.

Armaments and Energetic Materials:

- Advanced artillery munitions.
- Surface-to-air, antiship, and air-to-air missiles.

Collection Methods

There has been no visible change in foreign collection methods. Practitioners of both economic and industrial collection seldom use one method of collection. Instead, they combine a number of collection techniques in a concerted effort that combines legal and illegal, traditional, and more innovative methods. Foreign individuals, businesses, government entities, and intelligence-affiliated personnel conducted collection activity during 1997. These foreign interests were not always government sponsored and demonstrated various levels of suspicious activity.

Consistent with traditional espionage operations, a significant majority of foreign intelligence collection is initially conducted through legal and open means and may be a precursor to economic espionage. Foreign intelligence services and companies rely predominately on HUMINT collection when operating against US targets in the United States and abroad. Foreign collectors most likely avoid technical collection inside the United States because of the legal risks as well as the costs. However, most modern foreign intelligence and security services are capable of monitoring telephone, facsimile, and computer transmissions within their own country.

Espionage and Other Illegal Collection Methods

Investigations during 1997 indicate that foreign intelligence services and other government-sponsored entities continue to employ traditional clandestine espionage methods to obtain US trade secrets, critical technologies, and even open-source information. These methods include agent recruitment, US volunteers and co-optees, surreptitious entry, theft, and computer intrusions. According the to FBI, there has been a significant increase in its pending computer intrusion cases.

Legal Collection Methods

In addition to traditional espionage and other illegal activities, foreign governments, entities, and agents utilize various legal collection methods to target US economic and proprietary information that may be open source, proprietary, restricted, or even classified. As such, these methods do not necessarily involve illicit or illegal activity. Some of these legal activities may be a precursor to clandestine or illegal collection; however, they do not of themselves constitute evidence of illegal activity. Legal collection methods can include joint ventures, foreign students, scientific exchanges, Internet access, unsolicited requests for information, cultural targeting, mergers and acquisitions, and visits to US facilities.

US defense industry reporting of suspicious activity confirms that throughout 1997, a number of methods were used to collect defense-related information and technologies. Despite the legitimate nature of these collection practices, they may be an important element in a broader, directed intelligence-collection effort. The following collection methods were associated with potential collection efforts in 1997:

- Unsolicited requests for information.
- Exploitation of foreign US visits.
- Exploitation of joint ventures and research.
- Targeting visitors at international conventions, seminars, and exhibits.
- Acquisition of US technology and/or US companies.
- Solicitation and marketing of services.
- Foreign employees in a cleared facility.
- Targeting former US company employees.

According to US defense industry reporting to the DSS, the following five collection methods (in order) were most frequently associated with foreign activity in 1997.

Unsolicited Requests.
Since DSS began keeping statistics in 1995, reporting of unsolicited foreign requests for information has tripled. The requests have originated via e-mail, telephone, facsimile, and mail, and have come from foreign companies, individuals, government officials, and organizations. The use of the Internet has become the vehicle of choice for unsolicited requests as it provides an international, low cost, and anonymous medium to contact cleared contractor employees. In 1997, DSS saw a resurgence in the reporting of unsolicited requests for information by restricted countries.(5)

Visits to US Facilities.
Visitors continued to request information beyond the scope of approved discussions, broker appointments at additional companies or subsidiaries on short notice, and photograph sensitive production lines. Also reported with more frequency were the collection efforts by visiting foreign personnel involved in multinational training efforts. These visitors requested restricted and/or controlled technologies from their US counterparts.

According to a 1997 General Accounting Office report, thousands of scientists, researchers, and officials from Russia and China have gained access to the three US nuclear laboratories without security background checks. The report cited DOE labs - Lawrence Livermore, Los Alamos, and Sandia - for lax security. Some of the individuals allowed access to labs were later shown to have suspected foreign intelligence connections. The report focused on visits from 1994 - 1996 by citizens of 22 countries on DOE's "sensitive" country list.(6) A total of 5,472 visitors from those 22 countries came to DOE labs. Only 892 visitors, or 16 percent, were given background checks. Visitors from these sensitive countries gained access to areas where work can include technologies under government-export restriction, unclassified but sensitive information, and valuable equipment. Although DOE agreed with the report's

recommendations and is taking extensive steps to improve security, the Department challenged the notion that background checks ensure airtight security.

Joint Ventures and Research.
As with foreign national visits, joint efforts place foreign personnel in proximity to US personnel and afford potential access to S&T programs and information. A number of reports involved cleared US personnel being targeted while engaged in joint ventures overseas. There are further indicators that front companies may be using this method of operation as well.

International Conventions, Seminars, and Exhibits.
During such events, US participants reported possible telephone monitoring and hotel room intrusions. In addition, US technical experts have received invitations to share their knowledge in international forums. While many of these requests are benign, others are an effort to press US experts for restricted, proprietary, and even classified information.

Solicitation and Marketing of Services.
Consistent with past reporting, foreign individuals with technical backgrounds offered their services to cleared commercial and government research facilities, academic institutions, and defense companies. A new trend in 1997 involved foreign nationals who fabricated past work histories in an attempt to gain employment with cleared companies in unclassified positions. In addition, foreign software manufacturers solicited products to cleared US companies that had been embedded with spawned processes and multithreaded tasks.

Appendix - Case Summaries

Economic Espionage Act 1996
(Title 18 U.S.C., 1832)

Daniel and Patrick Worthing

Patrick Worthing and his brother Daniel were arrested by the FBI on 7 December 1996, after agreeing to sell Pittsburgh Plate Glass Industries (PPG) information for $1,000 to an FBI Special Agent posing as a representative of Owen-Corning. The FBI received information from PPG that an individual was attempting to sell company trade secrets to representatives of Owens-Corning Corporation, a primary PPG competitor.

Both subjects were charged under Title 18 U.S.C., Section 1832 (Theft of Trade Secrets). On 18 April 1997, because of his minimal involvement, Daniel Worthing was sentenced to six months of home confinement, five years probation, and 100 hours of community service. In June 1997, Patrick Worthing, who pled guilty to the charges against him, was sentenced to 15 months in jail and three years probation.

Hsu Kai-Lo and Chester H. Ho

On 14 June 1997, Hsu Kai-Lo and Chester H. Ho (naturalized US citizens) were arrested by the FBI for attempting to steal the formula for Taxol, a cancer drug patented and licensed by the Bristol-Myers Squibb (BMS) Company. Hsu and Ho were employees of the Yuen Foong Paper Manufacturing Company of Taiwan. On 19 July 1997, Hsu, Ho, and Jessica Chou (a Taiwan citizen who was actively involved in the attempted theft) were indicted on 11 counts. Two of the 11 counts were violations of Title 18 U.S.C., Section 1832 (Theft of Trade Secrets). Chou remains in Taiwan. Taiwan has publicly stated that it will not help the FBI bring Chou to justice in the United States. This case is in the pretrial stages. The US Department of Justice (DOJ) has appealed a trial judge's ruling on a key part of the Economic Espionage Act (Title 18 U.S.C., Section 1835) regarding protective orders for trade secrets.

This case represents an attempted theft of valuable trade secrets that could have had significant impact on the US economic position in the worldwide pharmaceutical market-place. If the Taiwan firm - Yuen Foong Paper Company - had obtained the synthetic Taxol formula, BMS would have lost approximately $200 million a year in revenue from the world market. Over the 10-year period this translates to a potential loss of $2 billion.

Pin Yen Yang, Hwei Chen Yang, and Four Pillars Company

On 5 September 1997, Pin Yen Yang and his daughter Hwei Chen Yang (a.k.a. Sally Yang) were arrested on several charges, including Title 18 U.S.C., Section 1832 (Theft of Trade Secrets). Also charged is Four Pillars Company, which has offices in Taiwan and is a registered agent in El Campo, Texas. It is alleged that Four Pillars Company, Pin Yang (Chairman of Four Pillars), Hwei Chen Yang, and Dr. Ten Hong Lee were involved in a conspiracy to illegally transfer sensitive, valuable trade secrets and other proprietary information from the Avery Dennison Corporation, Pasadena, California, to Four Pillars in Taiwan. (7)

Dr. Lee, a Taiwan native and US citizen, had been an Avery Dennison employee since 1986 at the company's Concord, Ohio, facility. Dr. Lee allegedly received between $150,000 and $160,000 from Four Pillars/Pin Yen Yang for his involvement in the illegal transfer of Avery Dennision's proprietary manufacturing information and research data over a period of approximately eight years. On 1 October 1997, a Federal Grand Jury returned a 21-count indictment charging Four Pillars, Pin Yen Yang, and Sally Yang with attempted theft of trade secrets, mail fraud, wire fraud, money laundering, and receipt of stolen property. They are awaiting trial. On 1 October 1997, Dr. Lee pled guilty to one count of wire fraud in exchange for his full cooperation in the US Government's case against the accused. Economic losses to Avery Dennison are estimated at $50-60 million.

Steven Louis Davis

On 23 January 1998, Steven Louis Davis pled guilty to federal charges that he stole and disclosed trade secrets concerning a new shaving system developed by the Gillette Company. Davis was employed by Wright Industries, a subcontractor of Gillette Company, which had been hired to assist in the development of the new shaving system. In February and March 1997, Davis made disclosures of technical drawings to Gillette's competitors Warner-Lambert Co., Bic, and American Safety Razor Co. The disclosures were made by facsimile and electronic mail. Although the FBI is aware that Davis reached out to one foreign-owned company (Bic), it is unclear if he was successful in disseminating trade secrets overseas. Davis was arrested on 3 October 1997 and was indicted on counts of Title 18, U.S.C., Section 1343 (Wire Fraud) and Title 18 U.S.C., Section 1832 (Theft of Trade Secrets). On 17 April 1998, Davis was sentenced to two years and three months in federal prison.

John Fulton

This investigation was based on information received from Joy Mining Machinery, a global coal mining company that manufactures and repairs technical components for longwall shearers (equipment that mechanically shears coal from the face of an underground coal wall). John Fulton approached a Joy employee in an attempt to purchase schematics for part of the longwall shearer system. Fulton, a former Joy employee, was currently operating United Mining Cable, a Joy competitor. The Joy employee became a cooperating witness in the case.

The cooperating witness made consensually monitored conversations in which Fulton offered to pay any amount of money for information pertaining to the chock interface unit of the longwall shearer. On 21 November 1997, Fulton paid the cooperating witness $1,500 for blueprints and a technical binder both of which were Joy proprietary items. Fulton was arrested by the FBI after the exchange and was charged with unlawfully attempting to obtain trade secrets (Title 18 U.S.C., Section 1832).

On 14 April 1998, Fulton pled guilty to one count of theft of trade secrets. He will be sentenced in September 1998.

Other Theft of Trade Secrets

Harold Worden

Harold Worden, a 28-year employee of Eastman Kodak Corporation, established his own consulting firm upon retirement. Worden subsequently hired many former Kodak employees and stole a considerable amount of Kodak trade secret and proprietary information that he later attempted to sell to Kodak rivals including corporations in the PRC. Worden pled guilty to one felony count of Title 18 U.S.C., Section 2314 (Interstate Transportation of Stolen Property). The *Economic Espionage Act of 1996* was not yet signed into

law. Worden was sentenced to one-year imprisonment, three months of home confinement with a monitoring bracelet, three years of supervised probation, and a $30,000 fine.

John Hebel

This investigation involved unauthorized intrusion into a voice-mail system by a disgruntled former employee. The victim was Standard Duplicating Machines Corporation (Standard), whose main competitor was the US affiliate, Duplo Manufacturing Corporation of Japan (Duplo). John Hebel was employed by Standard as a field sales manager from 1990 to 1992 when he was terminated. Hebel was subsequently hired by Duplo. Through an unsolicited phone call from a customer, Standard discovered that while employed at Duple, Hebel accessed Standard's electronic phone messaging system and used the information in Duplo's benefit to compete against Standard.

On 6 November 1996, Hebel was charged with one count of violating Title 18 U.S.C., Section 1343 (Wire Fraud). On 14 March 1997, Hebel was sentenced to two years probation. In addition, a civil suit was brought against Duplo by Standard with a final settlement closed to $1 million.

Footnotes

(1) It must be noted that this figure represents both domestic industrial theft and foreign economic espionage. In fact, only a small percentage of the ASIS reported dollar loss is a result of foreign competitors, foreign intelligence services, or foreign government-sponsored entities.

(2) Pacific Northwest National Laboratory conducted their analysis independent of US company auditors.

(3) Daniel and Patrick Worthing attempted to sell Pittsburgh Plate Glass information to an FBI undercover agent posing as a representative of Owens-Corning. Steven Davis stole and disclosed Gillette Company trade secrets to several Gillette competitors. John Fulton attempted to purchase proprietary, technical information from a cooperating witness employed at Joy Mining Machinery. All four have pled guilty to theft of trade secrets. See appendix for further case details.

(4) Participating CI agencies provided NACIC with compilations of incidents and trends that appeared to involve the targeting of US economic and industrial information during the past year. NACIC, as coordinator, compiled a master list of countries assessed to be most aggressively collecting against US interests. Because of each CI agency's differing mission, investigative responsibilities, and reporting criteria, one agency's list of foreign collectors could differ from that of another. NACIC's analytic effort in compiling a master list sought to ensure the integrity of submitted data and consistency with the assessment criteria.

(5) Restricted countries are those that normally do not do business with the United States or have embargoes placed on them.

(6) DOE's Sensitive Country List includes Algeria, Armenia, Azerbaijan, Belarus, China, Cuba, Georgia, India, Iran, Iraq, Israel, Kazakhstan, Kyrgyzstan, Libya, Moldova, Pakistan, Russia, Syria, Taiwan, Turkmenistan, Ukraine, and Uzbekistan.

(7) Avery Dennision Corporation is one of the largest manufacturers of adhesive products with more than 16,000 employees worldwide.

Annual Report to Congress on Foreign Economic Collection and Industrial Espionage

1997

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Key Findings

- The *Economic Espionage Act of 1996*, signed by President Clinton on 11 October 1996, will help to protect valuable US trade secrets.(1)
- Updated information, as reported from the US counterintelligence community, reaffirms the findings of the 1996 *Annual Report* and includes the origin of the threat, collection targets, and methods of operation.
- Traditional threat countries and a number of non-traditional threatcountries continue their collection of US trade secrets.
- The United States counterintelligence community has specifically identified the suspicious collection and acquisition activities of foreign entities from at least 23 countries.
- Analysis of updated information indicates that of those identified countries, 12 are assessed to be most actively targeting US proprietary economic information and critical technologies. This list has not changed since the 1996 *Annual Report on Foreign Economic Collection and Industrial Espionage*.
- The increasing value of trade secrets in the global and domestic marketplaces, and the corresponding spread of technology, have combined to significantly increase both the opportunities and motives for conducting economic espionage.
- Foreign collection continues to focus on US trade secrets and S&T information and products. Of particular interest to foreign collectors are dual-use technologies.
- While the clandestine efforts of foreign intelligence services continue, changes in collection methods of operation are evidenced by a transition from reliance on clandestine and illegal activity to overt and legal collection methods. This transition is not limited to commercially sponsored activity, but also includes foreign intelligence service activity.

Background

The *Intelligence Authorization Act for Fiscal Year 1995*, Section 809(b) requires that the President annually submit to Congress updated information on the threat to US industry from foreign economic collection and industrial espionage. This report updates the second *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage 1996*, which was released in May 1996.

In coordinating a community-based response to the above requirement, the National Counterintelligence Center (NACIC) requested the assistance of the following agencies:

- Air Force Office of Special Investigations (AFOSI).
- Central Intelligence Agency (CIA).
- Defense Intelligence Agency (DIA).
- Defense Investigative Service (DIS).

- Department of Commerce.
- Department of Customs.
- Department of Energy.
- Department of State.
- Federal Bureau of Investigation (FBI).
- National Security Agency (NSA).
- Naval Criminal Investigative Service (NCIS).
- US Army Intelligence and Security Command.

All of the above agencies responded to the request for information. Four agencies had no significant changes or new information to report. The remaining eight agencies provided numerous incidents and trends relating to the continuing foreign economic collection against the United States.

Structure of the Report

In accordance with the *Intelligence Authorization Act for Fiscal Year 1995*, which requires an annual update of the threat from foreign industrial espionage, Section 809(a) of the Act specifies three aspects of the threat to be reported. In the original language from the Act:

The threat to US industry of foreign industrial espionage and any trends in that threat, including:

1. The number and identity of the foreign governments conducting foreign industrial espionage.

2. The industrial sectors and types of information and technology targeted by such espionage.

3. The methods used to conduct such espionage.

As requested by Congress, this report updates the US Government's last report on foreign economic collection and industrial espionage. Set forth is a full range of potentially damaging collection efforts against US national and corporate interests by foreign intelligence services, government agencies, private firms and other foreign entities, some of which may be sponsored at their government's national level. Their collection efforts against US economic interests and the acquisition of US technological and proprietary information may be either legal or illegal. Despite the legal nature of a large portion of foreign economic collection, much of the data sought may be sensitive in nature and may include technical, financial, and/or proprietary commercial and government information.

The Economic Espionage Act of 1996

Background

On 11 October 1996, President Clinton signed the *Economic Espionage Act of 1996*, culminating a nearly two-year effort on the part of the FBI and US industry professionals to provide new legal tools to prosecute those who are guilty of economic espionage via the theft of trade secrets. In an effort to effectively deal with the threat, the Act resolves many gaps and inadequacies in existing federal laws by specifically proscribing the various acts defined under economic espionage and addressing the US national and economic security aspects of the crime.[(2)] The law also addresses the theft of trade secrets where no foreign involvement is found.

Trade Secrets

As defined in the Economic Espionage Act of 1996, the term trade secret refers to all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

- The owner thereof has taken reasonable measures to keep such information secret; and

- The information derives independent economic value, actual or potential from not being generally known to, and not being readily ascertainable through proper means by the public.

Before the enactment of the EEA, there was virtually no federal statute that outlawed the theft of trade secrets. Federal prosecutors were limited to using laws such as the Interstate Transportation of Stolen Property Act, the Computer Fraud and Abuse Act, and Mail and Wire Fraud statutes, to prosecute individuals for the theft of trade secrets. Due to the limitations and inadequacies of these laws in prosecuting the theft of trade secrets, it became evident that a federal statute was needed to specifically proscribe the various acts defined as economic espionage and to address the national security aspects of this crime.

Provisions

The EEA contains two separate provisions that make the theft or misappropriation of trade secrets a federal criminal offense. The first provision, under Section 1831, is directed toward foreign economic espionage and requires that the theft of a trade secret be done to benefit a foreign government, instrumentality, or agent. In contrast, the second provision, under Section 1832, makes criminal the commercial theft of trade secrets, regardless of who benefits.

Reflecting the more serious nature of economic espionage, a defendant convicted for violating Section 1831 can be imprisoned for up to 15 years and fined $500,000 or both. Corporations and other organizations can be fined up to $10 million. A defendant convicted for theft of trade secrets under Section 1832 can be imprisoned for up to 10 years and fined $500,000 or both. Corporations and other entities can be fined no more than $5 million. Prior to the passage of the EEA, Attorney General Janet Reno assured Congress in writing that the Department of Justice would require all prosecutions brought under the EEA be first approved by the Attorney General, the Deputy Attorney General, or the Assistant Attorney General of the Department of Justice's Criminal Division.

A defendant cannot be convicted under the EEA if it is proven that the elements of a trade secret were discovered through parallel development or reverse-engineering. In addition, the EEA does not apply to individuals who seek to capitalize on their lawfully developed knowledge, skills, or abilities. The EEA also does not prohibit legitimate economic collection or reporting by personnel of foreign governments by lawful means.

The EEA provides that the court, in imposing sentencing, "shall" order the forfeiture of any proceeds or property derived from violations of the EEA, and may order the forfeiture of any property used to commit or to facilitate the commission of the crime. While the EEA does not provide for civil forfeiture proceedings, it does authorize the government to file a civil action seeking injunctive relief.

Victims of trade secret thefts are often faced with the dilemma that by reporting the matter to law enforcement authorities the trade secret may be publicly revealed during criminal prosecution. In an effort to preserve the confidentiality of a trade secret, the EEA provides for the continued status of information as a trade secret and will prevent the unnecessary and harmful disclosure of such information.

The EEA should serve as a powerful deterrent and is a very important law enforcement and security management tool for protecting intellectual property rights. The EEA is not intended to convert all thefts of trade secrets into criminal cases; however, the EEA substantially raises the stakes in the arena of economic espionage.

Overview of the Threat

The development and production of trade secret information is an integral part of virtually every aspect of United States trade, commerce, and business. Hence, the security of trade secrets is essential to maintaining the health and competitiveness of critical segments of the US economy. The theft, misappropriation, wrongful receipt, transfer, and/or use of US trade secrets and other economic information, particularly by foreign governments and their agents or instrumentalities, poses a direct threat to the health and competitiveness of the US economy.

The ever-increasing value of trade secret information in the global and domestic marketplaces, and the corresponding spread of technology, have combined to significantly increase both the opportunities and motives for conducting economic espionage. As a consequence, foreign governments--through a variety of means--actively target US persons, firms, industries, and the US Government, to steal or wrongfully obtain trade secrets and other S&T information and products in order to provide their own economic and industrial sectors with a competitive advantage. This environment presents a new set of threats to our national security and challenges existing security, intelligence, counterintelligence, and law enforcement organizations and missions.

Foreign economic and industrial interests, both government and private, also collect economic information from US firms through standard business practices such as mergers and acquisitions, strategic alliances, and licensing agreements as well as gathering publicly available information. Although these activities are an accepted element of the business world and are largely peripheral to the scope of this report, a large body of reporting indicates that these activities generate a considerable portion of the technology and economic information obtained by our competitors. However, these activities clearly do not constitute illegal behavior.

Open-source collection activities include, but are not limited to, review of trade journals or corporate annual reports, market surveys, and attending conferences and symposia. Similarly, joint ventures and licensing agreements provide ideal opportunities to gather nonpublic information from US firms. In some instances, these types of collection efforts could be a precursor to illicit collection activities and may indicate the intelligence interest of foreign powers. At minimum, such activities and data gathered may be exploited by commercial and government analysts, research and development specialists, and officials involved with investments, acquisitions, and competitive marketplace negotiations--potentially to the disadvantage of US and private-sector interests.

Industrial Espionage and Trade Secret Theft

Technological advances are making corporate spying and theft easier and cheaper. Industrial espionage is most often carried out to gain access to corporate strategic plans, research and development information, and manufacturing process data. The power of computer technology has increased means for the theft and transfer of trade secret information. Computer age communications connectivity, commercial enterprise activities, and the posting and accessibility of corporate data on office workstations and home personal computers have made it extremely easy to copy and transfer valuable trade secret information surreptitiously. The theft of trade secrets--which encompasses all forms and types of financial, business, scientific, technical, economic and engineering information--is now a federal offense covered under the Economic Espionage Act of 1996.

Under the current counterintelligence guidance, the FBI has foreign counterintelligence responsibility in two areas directly related to economic and industrial espionage. The first area of responsibility is implementing counterintelligence programs designed to protect technologies listed on the National Critical Technologies List published by the Department of Commerce. Second, the FBI is tasked with investigating collection activities conducted by foreign intelligence services and industrial spies intended to gain access to trade secrets whose loss would undermine the strategic industrial position of the United States.

In recent years, several high-profile cases have involved foreign industrial espionage against US corporations. US companies targeted in the past have included: IBM, Corning, Inc., Honeywell Corporation, Eastman Kodak, 3M Corporation, AT&T, and General Electric. Most recently, in January 1997, under the Uniform Trade Secrets Act, General Motors won a $100 million settlement against a foreign automobile manufacturer for the activities of a General Motors executive who, in his move to the foreign firm, allegedly took with him plans for an advanced assembly line and other proprietary information.

The continued loss of trade secrets in key, high-technology industries could, over time, threaten the national security interests of the United States, and result in the loss of jobs and economic opportunity. Many US companies spend 25 to 30 percent of their budgets on research and development in hopes that they can develop products that will provide an edge in global markets.

The Cost of Economic and Industrial Espionage and Trade Secret Theft

It is difficult to assess the dollar loss as a result of economic espionage and the theft of trade secrets. The US Intelligence Community has not systematically evaluated the costs. The extent of the economic intelligence operations targeting US industries is especially difficult to ascertain. United States industry is reticent about publicly acknowledging cases of possible breaches of corporate security by their own employees, foreign intelligence services, or foreign competitor organizations. Nonetheless, recent studies by the US private sector estimate that the loss to businesses from theft and misappropriation of proprietary information runs in the billions of dollars each year. In particular, in its March 1996 study, The American Society for Industrial Security estimated that the potential losses from foreign and domestic trade secret theft for all American industry could amount to $2 billion a month.

Origin of the Threat

The FBI and other members of the counterintelligence community have reported that foreign intelligence activities directed at US critical technologies pose a significant threat to US national security. According to these agencies, even certain US allies are actively attempting to obtain US information through unauthorized means. During the past year, the US counterintelligence community has specifically identified the suspicious collection and acquisition activities of foreign entities from at least 23 countries. Of these, 12 have been identified as the countries most actively targeting trade secret information. [(3)] These countries are assessed to be the most aggressive in collection efforts directed against US proprietary economic information and critical technologies. In addition to overt and legal information-gathering activities, these countries are willing to employ clandestine and illegal methods to collect against US interests.

The number and identity of the 12 countries assessed by NACIC to be most actively targeting US information has not changed since the 1996 *Annual Report*, and as indicated last year, has increased only slightly from 10 to 12 countries since the 1995 *Annual Report*. It should be noted that the current list of 12 countries does not reflect the full picture of targeting against US economic interests--only the most serious threat.

Counterintelligence community updates reaffirmed the 1996 *Annual Report* findings. Reporting agencies cited a substantial amount of suspicious activity potentially involving economic and industrial espionage and/or intelligence collection. It is important to note that preliminary identification of a foreign entity does not prove knowledge or sponsorship by the government of that country. Despite this fact, the number and frequency of these cases, as seen below, reflects the need for greater attention.

Based on US defense industry reporting of suspicious activity, the Defense Investigative Service (DIS) has continued to observe trends of low-level collection interest and activity by foreign companies and governments. Traditional threat countries continued their collection activities. The counterintelligence community also observed continued collection by nontraditional threat countries. According to DIS, as the frequency and numbers of suspicious reports from cleared contractors continued to grow in 1996, the number of different countries involved in some form of suspicious contact also grew. Although the numbers of reported incidents and countries increased in 1996 over that reported by DIS in 1995, these incidents have been referred to the appropriate Intelligence Community agencies for investigation and analysis. Outcomes of these investigations remain pending and no conclusive judgments are possible at this time.

Targeted Information and Technology

Foreign collection continues to focus on US proprietary economic and technical information and products. Further, programs associated with dual-use technologies, those that can be used for both military and civilian applications, are consistent targets for both foreign government and foreign commercially sponsored collection activity.

A 1996 DIS summary of foreign contacts indicated that numerous foreign countries displayed some type of suspicious interest in one or more of the 18 technology categories listed in the Military Critical Technology List (MCTL), which is published by the Department of Defense. These major technology categories include:

- Aeronautics systems.
- Armaments and energetic materials.
- Chemical and biological systems.
- Directed and kinetic energy systems.
- Electronics.
- Ground systems.
- Guidance, navigation, and vehicle control.
- Information systems.
- Information warfare.
- Manufacturing and fabrication.
- Marine systems.
- Materials
- Nuclear systems.
- Power systems.
- Sensors and lasers.
- Signature control.
- Space systems.
- Weapons effects and countermeasures.

The majority of the technologies included in the MCTL are dual use. As a result, the loss or compromise of proprietary or embargoed information concerning these technologies can affect both the economic and national security of the United States.

According to the Department of Energy (DOE), foreign researchers have gained fully sanctioned access to numerous sensitive technologies during preapproved visits and assignments to DOE facilities. [(4)] According to the most recent DOE information, approximately 50,000 foreigners visited DOE facilities during 1994 and 1995. Such a volume of visitors, although legal and officially arranged, can present significant security concerns if sound risk management is not practiced. The pursuit of access to a particular program, technology, or US specialist by visiting researchers may be an espionage precursor.

DOE information indicates that the most frequently accessed sensitive technologies in 1994 and 1995 were ceramics, cermets, [(5)] and refractories, [(6)] which were accessed 148 times in 1994, and 155 times in 1995. DOE has specifically identified six additional sensitive technologies that have been accessed by foreign countries believed to engage in economic collection. These technologies are advanced automotive propulsion, composite materials, nuclear radiation sources, safeguards, superconductivity, and uranium enrichment.

The most frequently accessed "nonsensitive technologies" by foreign visitors and assignees to DOE facilities were environmental sciences-terrestrial in 1994, and biomedical sciences-basic studies in 1995.

According to DOE's most recent statistics, the four DOE facilities that host the most foreign visitors and assignees are Oak Ridge National Laboratory, Lawrence Livermore National Laboratory, Argonne National Laboratory-East, and Pacific Northwest Laboratory.

In addition, counterintelligence community reporting continues to reflect increasing trends of foreign collection activity involving proprietary strategic management information, to include bid proposals, price structuring, trade developments, marketing plans, and proposed US legislation affecting foreign firms operating in the United States.

Computer Crimes

In addition to trade secrets obtained from employees or company documents and publications, US Government and private-sector computer networks present an increasingly attractive target for illicit activities. Computer intruders can move freely without reference to state borders and can perform their tasks without gaining physical access to the system under attack. These factors make it more difficult to detect the theft of information and the origin of the intruder. Aside from stealing information, a computer intruder can also introduce a "virus" into a competitor's computer system to sabotage its operations.

According to a study conducted by the Computer Security Institute (CSI), a San Francisco-based association of information security professionals, computer crimes are soaring, and companies should be on the alert for security breaches. The *1997 Computer Crime and Security Survey* was conducted by CSI in

cooperation with the FBI's International Computer Crime Squad in San Francisco. Both CSI and the FBI stated that the results of this survey will be used to better understand the threat of computer crime and provide law enforcement with some basic information with which to address the problem more effectively.

According to the survey, about 75 percent of the 563 responding corporations, government agencies, financial institutions and universities surveyed by CSI reported financial losses in the past 12 months. Last year financial losses from financial fraud, computer viruses, sabotage, and theft of proprietary information and laptops were up seven percent and topped $100 million. Reflecting the increased competition in the global marketplace, over 50 percent of the respondents cited foreign competitors as a likely source of attack and 22 percent cited foreign governments as a likely source of attack.

The survey also showed that only 17 percent of the respondents reported crimes to law enforcement authorities. There appears to be reluctance on the part of the private sector to report allegations of computer and economic crime to law enforcement authorities. A large number of these crimes go unreported because of a company's fear of undermining the confidence of their shareholders, negative publicity, and further exposure of trade secret information during prosecution.

The FBI, in response to an expanding number of instances in which criminals have targeted major components of information and economic infrastructure systems, employs International Computer Crime Squads in selected offices throughout the United States. These squads investigate violations of the Computer Fraud and Abuse Act of 1986, including major computer network intrusions, privacy violations, industrial espionage, pirated computer software, and other crimes where the computer is a major factor in committing the criminal offense.

As a result of its 1994 Economic Counterintelligence Program, the FBI has developed a growing volume of information on foreign economic threats including the identification of those countries who pose these threats, their targets, and the methods they use. In response to the increase in computer crimes, the FBI established a Computer Investigations and Infrastructure Threat Assessment Center (CITAC) to provide analysis and support to all levels of the criminal justice system.

The Department of Defense (DOD) has received substantial Congressional funding for program initiatives in 1996 and 1997 to create a DOD Computer Investigations Training Facility (DODCITF) and a DOD Computer Forensics Laboratory (DODCFL). The DODCITF and the DODCFL will address the increasing risk of computer-based threats to defense technologies and military readiness. These DOD initiatives respond to the exponential growth in DOD's reliance on computer networks and the increased risks posed by computer intrusions; the growing number of computer-related incidents and investigations within the DOD; and the increasing volume of computer evidence collected and analyzed by DOD investigative organizations.

Because of the growing use of the Internet for commercial and financial transactions, more opportunities will be available for the computer intruder. While no security system is guaranteed to provide absolute protection, additional efforts in the area of information security could prevent substantial losses.

Collection Methods

Practitioners of economic and industrial espionage seldom use one method of collection; rather, they combine a number of collection techniques into a concerted collection effort that combines legal and illegal, traditional, and more innovative methods.

Espionage and Other Illegal Collection Methods

Traditional clandestine espionage methods, such as agent recruitment, US volunteers and co-optees, surreptitious entry, theft, SIGINT intercept, computer penetration, and other specialized technical operations continue to be used by foreign intelligence services targeting US interests.

Lawful Collection Methods

In addition to traditional espionage and other illegal activities, foreign governments, instrumentalities, and agents gather economic intelligence via numerous other methods. These methods involve legitimate practices that do not constitute illicit activity. While foreign governments and their entities have been known to turn legitimate transactions and business relationships into clandestine collection opportunities, often the overt collection of economic information is practiced for legitimate purposes. Although some of these legal activities may be a precursor to clandestine or illegal collection, they do not of themselves constitute evidence of illegal activity.

While most industry associations with foreign entities are in fact economically advantageous to the United States, a DIS summary of 1996 suspicious contacts that were reported by defense contractors, indicated that foreign entities employ a variety of legitimate collection methods in attempting to acquire US proprietary economic information. Despite the legitimate nature of these collection practices, they may be an important element in a broader, directed intelligence-collection effort. Last, the legitimate collection of economic information, in addition to clandestine methods that constitute economic espionage, depict the broad scope of a successful foreign economic intelligence-collection program.

Defense industry reporting continues to reflect increasing trends of foreign collection activity. As reported by DIS, foreign intelligence services and foreign private industries, which may or may not be sponsored by a foreign government, employ the following legal collection methods.

Unsolicited Requests for Information

According to DIS, the most frequently reported method of operation (MO) used by foreign entities is the unsolicited request for information. This method is simple, low cost, nonthreatening and low risk. The unsolicited request for information is a popular MO of countries against which the United States has imposed an embargo and of foreign entities who may attempt to disguise the end user through the use of front companies. A reported majority of suspicious unsolicited requests for information involved data covered under the International Traffic in Arms Regulations (ITAR) that could not be lawfully exported without a license.

A growing number of incidents involve mail, fax, phone, and Internet requests from a foreign entity to a cleared contractor. The Internet provides a direct line of communication for foreign-collection efforts. Internet access to a company's bulletin board, home page, and employees, provides foreign collectors with many avenues through which they can broaden their collection efforts.

Foreign collectors have also employed the use of marketing surveys to solicit information that often exceeds generally accepted terms. Surveys may solicit proprietary information concerning corporate affiliations, market projections, pricing policies, purchasing practices, and types and amounts of US Government contracts.

Inappropriate Conduct During Visits

Inappropriate conduct during visits was the secondmost frequently reported MO associated with foreign-collection activity. Once in a facility, collectors may attempt to manipulate the visit to satisfy their collection requirements. For example, visitors may ask questions or request information that is outside the scope of the approved visit. Unchecked, this MO usually results in the loss of technology, and is therefore considered to be a damaging form of collection activity.

Solicitation and Marketing Services

Foreign individuals with technical backgrounds may be solicited by, or may themselves seek to, market their services to research facilities, academic institutions, and even cleared defense contractors. This method of collection was reported to the DIS with greater frequency during the past year. In addition, US technical experts may be requested by foreign entities to visit a foreign country and share their technical expertise. Usually associated with alleged employment opportunities, there is also an increasing trend involving "headhunters" who solicit information from targeted employees. In these instances, such solicitation may be a ploy to access and gather desired information.

International Exhibits, Conventions, and Seminars

International exhibits, conventions, and seminars are rich targeting opportunities for foreign collectors. These functions directly link programs and technologies to knowledgeable personnel. At these venues, foreign collectors target US scientists and businessmen to gain insights into US products and capabilities. Consequently, US defense industry reporting indicates that collection activity at these events is usually expected, is commonplace, and most often involves overt open-source intelligence gathering.

The counterintelligence community has increasingly sought to make the private sector aware of the foreign collection threat and has conducted threat awareness briefings prior to such international symposia. Specific examples include counterintelligence and security awareness briefings for US industry representatives who planned to attend or support the Paris and Farnborough International Air Shows.

Joint Ventures and Front Companies

Joint ventures, joint research, and exchange agreements potentially offer significant collection opportunities for foreign entities. As with other MOs, joint efforts place foreign personnel in close proximity to US personnel and afford potential access to S&T programs and information. Through joint-venture negotiations, US contractors may reveal unnecessarily large amounts of technical data as part of the bidding process. In addition, a number of governments use front companies to gather intelligence and provide cover for intelligence operations.

Acquisition of Technology and Companies

Despite the existence of the Committee on Foreign Investments in the United States (CFIUS), foreign acquisition of technology and companies in the US defense industry continues to generate significant concerns regarding foreign access to US markets and sensitive proprietary information. CFIUS reviews foreign mergers and acquisitions of US firms to determine the impact on US national security and provides guidance on arrangements with foreign governments for advance consultations on prospective major foreign governmental investments in the United States. However, while it is beneficial for a foreign entity to notify CFIUS of its intent to purchase or merge with a US company that holds classified DOD contracts, it is not mandatory. Foreign investors in a US private-sector company need not notify CFIUS of their intentions.

Co-Opting of Former Employees and Cultural Commonalties

Incidents involving the co-opting of former employees who had access to sensitive proprietary or classified S&T information remains a potential counterintelligence concern. Frequently, foreign collectors will exploit cultural commonalties to establish rapport with their target. As a result, foreign collectors specifically target foreign employees working for US companies. Likewise, US defense contractor employees working overseas may be particularly vulnerable to foreign offers of employment as their contracts expire.

Open-Source Collection

The openness of the American society and the wealth of technical, scientific, political, and economic information available through the open media provide US adversaries with a vast amount of detailed, accurate, and timely information. The use of open-source information as an intelligence source has a number of benefits. It is relatively cheap to obtain, it is legal in the majority of instances, and it makes up the greatest volume of information accessible to an intelligence collector. Because of these benefits, open-source information has increasingly been exploited by many foreign entities, to include foreign intelligence services in an attempt to target the United States.

The global growth of the Internet has changed the accessibility and ease with which foreign collectors can gather data. Reporting indicates that foreign collectors have increased their direct connections with Internet service providers. Information available through electronic databases continues to expand as the number of databases and electronic bulletin board systems available to the public continues to grow dramatically. Bulletin board systems, some of which track sensitive US Government activities or provide information on proprietary activities performed by government contractors, have grown rapidly on the Internet.

Appendix

ECONOMIC ESPIONAGE ACT of 1996

Title 18 U.S.C. 1831 et. seq.
Sec. 1831 Economic Espionage

(a) In General.--Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly--

1. steals, or without authorization appropriates, takes, carries way or conceals, or by fraud, artifice, or deception obtain a trade secret;
2. without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;
3. receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained or converted without authorization;
4. attempts to commit any offense described in any of paragraphs (1) through (3); or
5. conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined not more than $500,000 or imprisoned not more than 15 years, or both.

(b) Organizations. Any organization that commits any offense described in subsection (a) shall be fined not more than $10,000,000.

Sec. 1832 Theft of Trade Secrets

(a) Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly --

1. steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtain such information;
2. without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
3. receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained or converted without authorization;
4. attempts to commit any offense described in paragraphs (1) through (3); or
5. conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.

(b) Any organization that commits any offense described in subsection (a) shall be fined not more than $5,000,000.

Sec. 1833 Exceptions to prohibitions

This chapter does not prohibit --

1. any otherwise lawful activity conducted by a governmental entity of the United States, a State, or political subdivision of a State; or
2. the reporting of a suspected violation of law to any governmental entity of the United States, a State, or a political subdivision of a State, if such entity has lawful authority with respect to that violation.

Sec. 1834 Criminal Forfeiture

(a) The court, in imposing sentence on a person for a violation of this chapter, shall order, in addition to any other sentence imposed, that the person forfeit to the United States --

1. any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and
2. any of the person's property used, or intended to be used, in any manner or part, to commit or facilitate the commission of such violation, if the court in its discretion so determines, taking into consideration the nature, scope, and proportionality of the use of the property in the offense.

(b) Property subject of forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by Section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except for subsections (d) and (j) of such section which shall not apply for forfeitures under this section.

Sec. 1835 Orders to Preserve Confidentiality

In any prosecution or other proceeding under this chapter, the court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedures, the Federal Rules of Evidence, and all other applicable laws. An interlocutory appeal by the United States shall lie from a decision or order of a district court authorizing or directing the disclosure of any trade secret.

Sec. 1836 Civil Proceedings to Enjoin Violations

(a) The Attorney General may, in a civil action, obtain appropriate injunctive relief against any violation of this section.

(b) The district courts of the United States shall have exclusive original jurisdiction of civil actions under this subsection.

Sec. 1837 Applicability to Conduct Outside the United States

This chapter also applies to conduct occurring outside the United States if --

1. the offender is a natural person who is a citizen or permanent resident alien, or organization organized under the laws of the United States or a State or political subdivision thereof; or
2. an act in furtherance of offense was committed in the United States.

Sec. 1838 Construction with Other Laws

This chapter shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret, or to affect the otherwise lawful disclosure of information by any Government employee under Section 552 of Title 5 (commonly known as the Freedom of Information Act).

Sec. 1839 Definitions:

As used in this chapter--

1. the term "foreign instrumentality" means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government;

2. the term "foreign agent" means any officer, employee, proxy, servant, delegate, or representative of a foreign government;

3. the term "trade secret" means all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if --

(a) the owner thereof has taken reasonable measures to keep such information secret; and

(b) the information derives independent economic value, actual or potential from not being generally known to, and not being readily ascertainable through proper means by, the public; and

4. the term "owner," with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.

CLERICAL AMENDMENT--The table of chapters at the beginning part 1 of Title 18, United States Code, is amended by inserting after the item relating to Chapter 89 the following:

90. Protection of trade secrets .....1831.

REPORTS--Not later than 2 years and 4 years after the date of the enactment of this Act, the Attorney General shall report to Congress on the amounts received and distributed from fines for offenses under this chapter deposited in the Crime Victims Fund established by Section 1402 of the Victims of Crime Act of 1984 (42 U.S.C. 10601).

Footnotes

(1) The definition of the term "trade secret" in the Economic Espionage Act is very broad and generally includes all types of information, however stored or maintained, which the owner has taken reasonable measures to keep secret and which has independent economic value.

(2) The *Economic Espionage Act of 1996* and its provisions are further discussed in detail under a separate heading. A reproduction of the Act can be found in the appendix of this report.

(3) This version of the report does not identify the specific countries. Each CI agency provided NACIC with compilations of incidents and trends that appeared to involve the targeting of US economic and industrial information during the past year. NACIC, as coordinator, compiled a master list of countries assessed to be the most aggressive collectors of US information. Due to each CI agency's differing mission, investigative responsibilities, and reporting criteria, one agency's list of foreign collectors could differ from that of another. NACIC's analytic effort in compiling a master list sought to ensure the integrity of submitted data and consistency with the assessment criteria used in its initial 1995 *Annual Report*.

(4) A sensitive technology is an unclassified subject/topic identified by DOE that involves information, activities, and/or technologies that are relevant to national security. Disclosure of sensitive subjects has the potential for enhancing foreign nuclear weapons capabilities, divulging military critical technologies, or revealing other advanced technologies.

(5) A heat-resistant, bonded mixture of ceramic material and a metal used in gas turbines, nuclear reactor mechanisms, and rocket motors, and so forth.

(6) Heat-resistant, hard to melt substances such as ores and metals.

Annual Report to Congress on Foreign Economic Collection and Industrial Espionage

May 1996

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ASIS Special Report: Trends in Intellectual Property Loss

Key Judgments

- Updated information reaffirms the 1995 Annual Report. Contributors noted little new in the origin of the threat, collection targets, or methods used in effecting economic collection and industrial espionage.
- Analysis of updated information reported by US counterintelligence (CI) agencies indicates that individuals, corporations, or government entities associated with at least 12 countries are assessed to be actively targeting US proprietary economic information and critical technologies. This includes all of the 10 countries previously identified in the 1995 *Annual Report.*
- The 12 countries assessed to be actively collecting against US interests have shown particular determination, and in most cases a willingness to use illegal and covert means, to collect US economic and technological information.
- Inquiries and investigations of suspicious incidents have increased significantly; there are tentative indications of an expansion of nontraditional collection targeting US industry.
- Foreign collection continues to focus on economic and S&T information and products. US Defense investigators noted a primary focus on information systems technology. Foreign government and

commercial collection continues to focus on dual-use technologies.

- Overt, open-source, and legal collection methods are most evident, but reliance on illegal, covert, and traditional espionage methods has not abated. Analysis suggests venues of collection efforts may be in flux as communications proliferate and marketplace expansion continues. These developments will provide more opportunities to access targeted information and technologies in the United States and globally.

- A special report released by the American Society for Industrial Security (ASIS) in March 1996 indicates that the loss of intellectual property is a growing problem for US business.

Background and Introduction

The *Intelligence Authorization Act for Fiscal Year 1995*, Section 809(b), requires that the President annually submit to Congress updated information on the threat to US industry from foreign economic collection and industrial espionage. This document updates the first *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage 1995*, which was released in July 1995.

For this first update, the Honorable Larry Combest, Chair of the House Permanent Select Committee on Intelligence (HPSCI), requested the following:

Having considered the issue, we believe it is appropriate for the President to convey the update to Congress in letter form. We believe the letter should provide new information pertaining to or information significantly changing the portion of the original report describing the nature of the threat. To the extent practicable, the letter should be unclassified, accompanied by a classified annex, if appropriate.

On the basis of this 12 February 1996 Congressional request, Nora Slatkin, Chair of the National Counterintelligence Policy Board, tasked the National Counterintelligence Center (NACIC) to draft a community-based response. Accordingly, the NACIC requested the assistance of the following Executive Branch agencies to provide the data necessary to update the previous report:

- Air Force Office of Special Investigations.
- Central Intelligence Agency; Counterintelligence Center.
- Defense Intelligence Agency.
- Defense Investigative Service (DIS).
- Department of Commerce; Office of Export Enforcement.
- Department of Customs; Office of Intelligence.
- Department of Energy; Counterintelligence Division.
- Department of State; Bureaus of Intelligence and Research and Diplomatic Security.
- Federal Bureau of Investigation (FBI); National Security Division.
- Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence; Director of Counterintelligence and Security Programs.
- Naval Criminal Investigative Service.
- National Security Agency.
- US Army Intelligence and Security Command.

Input from each of these agencies has been incorporated into this report. Most offices responded, however, that they had no significant new information to report since last year's report. The FBI, CIA, and DIS cited numerous incidents over the past year of continuing foreign economic collection and industrial espionage. While no new information was received that indicated a significant change in the assessed nature of the threat or the number of foreign countries assessed as most actively engaged in collection against US interests, the inputs clearly show such activity to be a continuing concern. The main body of this report addresses the nature of this concern and presents relevant findings and conclusions without identifying the specific countries involved. A listing of countries believed actively involved in targeting US economic and industrial interests is contained in a separate classified Annex B.

To underscore the level of national concern over this issue, on 28 February 1996, FBI Director Louis Freeh testified before a joint hearing of the Senate Judiciary and Intelligence Committees on the threat of economic espionage to the United States. FBI Director Freeh told the committees that he strongly supported a statute that would allow the US Government to better counter economic espionage against the US Government and US firms. In his unclassified prepared statement, FBI Director Freeh noted that the

number of economic espionage cases under FBI investigation has continued to increase. The three sections of this report correspond to the three aspects of threat required by Section 809(b) of the Intelligence Authorization Act of 1995 to be updated annually, which are specified in the original language from the Act :

Structure of the Report

The three sections of this report correspond to the three aspects of threat required by Section 809(b) of the Intelligence Authorization Act of 1995 to be updated annually, which are specified in the original language from the Act:

The threat to US industry of foreign industrial espionage and any trends in that threat, including:

1. The number and identity of the foreign governments conducting foreign industrial espionage.
2. The industrial sectors and types of information and technology targeted by such espionage.
3. The methods used to conduct such espionage.

This report updates the US Government's last report on "foreign industrial espionage" as specifically requested by Congress. It examines the full range of potentially damaging collection efforts against US national and corporate interests by foreign intelligence services, other government agencies, and private firms in two broad areas of concern-economic intelligence collection and illicit acquisition of technological and other proprietary information.

To better identify and quantify the foreign-sponsored threats to private industry, this report also briefly refers to findings contained in a 1996 special report titled *Intellectual Property Theft and Corporate Espionage* based on a survey by the ASIS. Although not sponsored by the US Intelligence Community, this private-sector report provides valuable insight on the trends and risks associated with intellectual property protection and loss, as viewed by 325 individual US corporations. Summarized findings particularly relevant to this update are provided in Annex A.

Origin of the Threat

Report on the threat to US industry of foreign industrial espionage and any trends in that threat, including the number and identity of the foreign governments conducting foreign industrial espionage.

During the past year, the US CI community has identified activities of individuals, corporations, or government entities from at least 12 countries that are most frequently the subjects of reports, allegations, and conclusive investigations for suspected economic and industrial espionage activity. These countries are assessed to be the most aggressive and deliberate in collection efforts directed against US proprietary economic information and critical technologies. They have shown particular determination, and in most cases a willingness to use illegal and covert means, to collect against US interests.

In addition, reporting agencies, particularly the FBI and DIS, cited a substantial number of suspicious incidents and investigations potentially involving economic espionage or industrial intelligence collection. While these reported incidents involve a diverse assortment of entities and an additional 26 foreign countries, outcomes of these investigations are pending, and no conclusive judgments are possible at this time.

Those entities assessed to be actively targeting US persons, firms, industries, and US Government activities do so in order to steal or wrongfully obtain critical technologies, data, and information. The increasing value of proprietary economic information in the global and domestic marketplaces, greater access to the "information superhighway," and the proliferation of new technology demands combine to increase both the opportunities and motives for conducting economic collection and industrial espionage.

In the area of US defense-industry reporting of suspicious activity, DIS and some of the military CI agencies reported continued low-level collection interest and activity by foreign companies and governments. For example, in 1995 some 249 CI issues were referred to DIS personnel by cleared Department of Defense (DOD) contractors and were significant enough for DIS to in turn refer them to

appropriate US CI agencies. Incidents cited by DIS included nine of the 10 countries reported by NACIC in the initial 1995 Annual Report and closely paralleled updated information submitted by the FBI and CIA. Updated incidents cited by Navy and Air Force CI components were also consistent with data reported by FBI and CIA. Other suspicious incident reporting from DIS involved an additional 17 foreign countries; referrals, investigations, and analysis of these data are ongoing.

In 1996, the FBI and ASIS also reaffirmed the increase in the reporting of domestic theft or misappropriation of proprietary economic information. An ASIS special report released in March 1996, *Trends in Intellectual Property Loss,* indicated that 74 percent of intellectual or proprietary property losses stemmed from the actions of "trusted relationships"-employees, former employees, contractors, suppliers, and so forth. More relevant for this update is the fact that participants in the ASIS survey also attributed losses to foreign competitors, foreign intelligence services, and foreign business partners. Some additional findings from this study are presented later in this section.

Through its Economic Counterintelligence Program, the FBI has developed significant information on the foreign economic threat-including the identification of the foreign governments who conduct foreign industrial espionage. In his 28 February 1996 statement before the Senate Judiciary and Intelligence Committees, FBI Director Freeh stated that, since the initiation of the FBI's Economic Counterintelligence Program in 1994, the FBI has observed a 100-percent increase in the number of suspected economic espionage cases currently under investigation-from 400 to 800 cases.

It should be noted that FBI investigations dramatically increased during the past year primarily because of recent changes in the FBI's CI program and because of its concomitant dedication of more resources and initiatives to deal with this serious economic problem. Because the data reported stem from greater FBI emphasis and resources directed at the problem, the increase in the total number of ongoing cases does not necessarily indicate a trend that will prove to increase each year nor can it be assumed that each case will prove conclusively to be a valid instance of economic espionage or industrial collection. The surge in investigations suggests a great number of suspicious incidents. Because the FBI designated additional resources to investigate these types of cases, the increase in cases may indicate a longstanding problem only now being accurately defined. (In a related development, DIS reported an expectation of improved incident data concerning suspected activities as a result of better security education and standardized reporting.)

The increased number of current FBI investigations of suspected economic espionage encompasses 23 foreign countries-traditional adversaries and allies-and 12 of the countries are the same as those assessed by the NACIC as most actively targeting US economic and industrial interests. Significantly, 11 of these 12 countries are the basis for over 90 percent of the FBI's current investigations into economic espionage activities; these countries are the highest priority targets of its new Economic Counterintelligence Program.

Overall, CI community inputs and NACIC analysis of all relevant available information revealed considerable consistency in both raw data and conclusions. These aggregated data were consistent also with the 1995 *Annual Report*. Most significant, contributors uniformly reaffirmed the threat assessment presented in the previous *Annual Report*.

Assuming reasonably accurate and deconflicted input, coupled with conservative CI analytic judgments, the number of foreign countries assessed to be most actively targeting US information appears not to have changed significantly. The number of such countries has increased slightly, from 10 to 12, since the last *Annual Report* in 1995. These 12 countries do not necessarily reflect the full picture of targeting against US economic interests. Since economic collection and industrial espionage are complex issues, some types of collection do not constitute illegal behavior. In some instances, however, suspicious incidents could be precursors to illicit collection activities or indicate the intelligence interests of foreign powers. Furthermore, note should be made of the current large number of incidents for which investigations and eventual analysis of the outcome remain to be accomplished.

FBI, CIA, and DIS each provided updates that essentially reaffirmed the 1995 *Annual Report* findings in terms of countries involved in targeting US proprietary economic information and critical technologies. New inputs from the military CI components were also consistent with those from non-Defense agencies. It was evaluation of these data, in toto, that resulted in a total number increase from 10 to 12 countries.

ASIS findings on the nature and scope of reported losses from economic collection or industrial espionage generally parallel the assessed threat as presented by the US CI community. In its March 1996 report, *Trends in Intellectual Property Loss*, ASIS named eight of the same 12 countries identified by the US CI community as either participants or localities in instances where attempts were made to collect US

proprietary economic information. Interestingly, of all the foreign localities or nationalities for incidents reported by ASIS, there was a 75-percent correlation with reported investigative activities by the FBI and a 68-percent correlation with incident referrals identified by DIS. While not an exact overlay, these data generally corroborate the data and findings combined from official US Intelligence Community and law enforcement agencies.

One unique aspect of the private-sector survey, seldom available in CI community assessments, was the magnitude of the estimated dollar loss from economic spying-potentially $2 billion a month for all US businesses. A summary of findings of the ASIS special report particularly relevant to this update is provided in Annex A.Report on the threat to US industry of foreign industrial espionage and any trends in that threat, including the industrial sectors and types of information and technology targeted by such espionage.

Targeted Information and Technology

Report on the threat to US industry of foreign industrial espionage and any trends in that threat, including the number and identity of the foreign governments conducting foreign industrial espionage.

Foreign collection continues to focus on economic and S&T information and products. Both foreign government and foreign commercially sponsored collection activities consistently target dual-use technologies. Although traditional foreign threat countries continue their collection activities, reporting indicates the expansion of nontraditional foreign threat collection within US industry.

According to the FBI and DIS, high-technology and defense-related industries remain the primary targets of foreign economic intelligence collection operations. This finding continues a trend reported in the 1995 *Annual Report*. The most likely industry targets of economic espionage and other collection activities during the past year include the following areas, most of which are included on the 1996 Military Critical Technology List (MCTL):

- Advanced materials and coatings.
- Advanced transportation and engine technology.
- Aeronautics systems.
- Aerospace.
- Armaments and energetic materials.
- Biotechnology.
- Chemical and biological systems.
- Computer software and hardware.
- Defense and armaments technology.
- Directed and kinetic energy systems.
- Electronics.
- Energy research.
- Guidance, navigation, and vehicle control.
- Information systems.
- Information warfare.
- Manufacturing and fabrication.
- Manufacturing processes.
- Marine systems.
- Materials.
- Nuclear systems.
- Semiconductors.
- Sensors and lasers.
- Signature control.
- Space systems.
- Telecommunications.
- Weapons effects and countermeasures.

According to a DIS summary of suspicious contacts reported in FY 1995, entities associated with 26 foreign countries displayed an interest in 16 of the 18 technology categories listed in the newest MCTL. The United States considers all the above industries to be strategically important because they produce classified products for the government, produce dual-use technology used in both the public and private sectors, or are responsible for the leading-edge technologies required to maintain US economic security.

FBI Director Freeh provided the following five examples of foreign targeting activities in his 28 February 1996 statement before the Senate Judiciary and Intelligence Committees:

- One foreign-government-controlled corporation targeted US proprietary business documents and information from US telecommunications competitors.
- Another foreign competitor acquired the technical specifications from a US automotive manufacturer.
- In violation of US export laws, a foreign company attempted to acquire a US company's restricted radar technology.
- Several US companies reported the targeting and acquisition of proprietary biotechnology information.
- One US company reported the foreign theft of its manufacturing technology regarding its microprocessors.

In addition to revealing collection efforts against technological information, both FBI and DIS reporting continue to reflect an increasing trend of foreign collection activity against US Government economic policy information. These collection efforts seek to obtain advance knowledge about US policy guidelines, negotiations, and proposals in order to give the foreign country an added advantage in bilateral or international negotiations. Types of US Government economic information- especially prepublication or unpublished "insider" data-of special interest to foreign governments and intelligence services include:

- Bid proposals.
- Economic, trade, and financial agreements.
- Energy policies.
- Marketing plans.
- Price structuring.
- Proposed legislation affecting the profitability of foreign firms operating in the United States.
- Tax and other monetary policies.
- Technology transfer and munitions control regulations.
- Trade developments.

Collection Methods

Report on the threat to US industry of foreign industrial espionage and any trends in that threat, including the number and identity of the foreign governments conducting foreign industrial espionage.

The collection methods utilized by foreign governments to gather information on economic matters remain largely unchanged from last year's report. Traditional espionage methods-once primarily reserved for collecting US national defense information-continue to be applied to the collection of economic and proprietary information.

Practitioners of economic espionage seldom use one method of collection; rather, their concerted collection programs combine both legal and illegal, traditional, and more innovative methods. FBI investigations continue to identify the various methods utilized by those engaged in economic espionage. In addition, the FBI continues to assess the scope of coordinated intelligence efforts against the United States.

DIS reported that foreign economic collection methodology continues to present various security countermeasures concerns to the defense industry. Foreign intelligence services still use clandestine means, but foreign governments also rely significantly on overt and perfectly legal collection methods.

Foreign collectors are known to use accessible databases and information systems, including the Internet, to identify and target information. This methodology is not limited to foreign commercially sponsored activity, but also includes foreign intelligence service operations.

Worldwide connectivity of information systems and global marketing ventures create a complex and varied target environment for collectors.

Because of the growing popularity and expansion of the Internet, the US defense industry reports significant increases in security countermeasures incidents associated with computer-based collection attempts. Large amounts of DOD technical information are transferred over the Internet on a daily basis and could be targeted by hostile entities. Corporate America has an even greater presence on publicly

accessible networks. The Internet and E-mail networks provide direct methods of exploitation for foreign collection efforts. This is of particular concern in situations where programs to monitor the content of such online communications are lacking, and access can be gained through public gateways or hacking techniques. Access to a company's bulletin board and home page on the Internet, internal E-mail, and employees may provide foreign collectors with many avenues to broaden their collection efforts.

Annex A

ASIS Special Report: Trends in Intellectual Property Loss

The American Society for Industrial Security (ASIS) issued a special report in March 1996 titled *Trends in Intellectual Property Loss.*

Because the US Government does not keep statistics on private-industry losses, the ASIS survey provides valuable insight into corporate America's self-assessment of the trends and risks associated with intellectual property protection. ASIS reported incidents by a variety of categories ranging from frequency and types of industry to localities of incidents and reported nationality of those involved. For example, ASIS reported incidents associated with 16 nationalities or countries; eight of the named countries were among the 12 countries assessed by the US counterintelligence community to be most actively involved in targeting US interests.

The ASIS report presents data that indicate some foreign companies and governments pose a significant and continuing threat to intellectual property-which the report's authors defined as patents, copyrights, trademarks, and trade secrets-and that such activity will have mounting negative effects on US industry.

Findings particularly relevant to National Counterintelligence Center's 1996 updated *Annual Report*, as presented in the ASIS report, are presented below:

- Reported incidents increased 323 percent since 1992. Losses of corporate information increased from a reported 9.9 incidents per month in 1992 to an average of 32 incidents per month in 1995.
- About three-fourths of reported losses occurred in the United States, and the majority of those incidents involved "trusted relationships" (employees, vendors, contractors, retirees, and so forth).
- Other incidents were attributable to a variety of sources: domestic competitors, computer hackers, foreign competitors, foreign intelligence services, and foreign business partners.
- Of incidents outside the United States, approximately half took place in countries traditionally considered allies of the United States.
- Foreign nationals were identified in 21 percent of the incidents where the perpetrator's nationality was known.

The prepublication copy of the ASIS report reviewed by the NACIC totaled 35 pages of text and charts, and presented numerous other findings that summarized contributors' views on incidents and losses affecting American-based companies. In the report, the responding companies surveyed are broken out into three categories-"Services," "High-Tech," and "Manufacturing"-and most of the survey data is grouped and discussed from these categories. Included are general and specific discussion areas that cover incidents and losses by category; incidents by locality and nationality; methods of acquisition/collection; impact of losses by category; and the essential content and implementation of formal industry programs for safeguarding proprietary information. The report's authors comment in their conclusions:

. . . we must act decisively. Corporate management has a fiduciary responsibility to stockholders to take reasonable and prudent steps to safeguard intellectual property assets.

Annual Report to Congress on Foreign Economic Collection and Industrial Espionage

July 1995

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III. Options for Considerations
IV. Foreign Economic Threat

Introduction

Section 809 of the Intelligence Authorization Act for Fiscal Year 1995 required that the President report to the Congress on foreign industrial espionage targeted against US industry. The Act defined foreign industrial espionage as "industrial espionage conducted by a foreign government or by a foreign company with direct assistance of a foreign government against a private United States company and aimed at obtaining commercial secrets." The Act required that the report address four issues:

a. The respective policy functions and operational roles of the agencies of the Executive Branch of the Federal Government in identifying and countering threats to US industry of foreign industrial espionage, including the manner in which such functions and roles are coordinated.

b. The means by which the Federal Government communicates information on such threats, and on methods to protect against such threats, to US industry in general and to US companies known to be targets of foreign espionage.

c. The specific measures that are being or could be undertaken in order to improve the activities referred to in the above paragraphs, including proposals for any modifications of law necessary to facilitate the undertaking of such activities.

d. The threat to US industry of foreign industrial espionage and any trends in that threat, including:

1. The number and identity of the foreign governments conducting foreign industrial espionage.

2. The industrial sectors and types of information and technology targeted by such espionage.

3. The methods used to conduct such espionage.

The National Counterintelligence Policy Board (NACIPB) on behalf of the National Security Council, tasked the National Counterintelligence Center (NACIC) to draft a community-based response to this Congressional requirement. The NACIC solicited input from the relevant Executive Branch agencies, including the Federal Bureau of Investigation (FBI), National Security Division; the Central Intelligence Agency (CIA), Counterintelligence Center; the Department of State, Bureaus of Intelligence and Research and Diplomatic Security; the Director of Counterintelligence and Security Programs in the Office of the Assistant Secretary of Defense for Command, Control, Communication, and Intelligence; the Defense Intelligence Agency (DIA); the US Army Intelligence and Security- Command; the Naval Criminal Investigative Service (NCIS); the Air Force Office of Special Investigations (OSI); the Defense Investigative Service (DIS); the Personnel Security Research Institute; the National Security Agency (NSA); the Department of Energy (DOE), Counterintelligence Division; the Department of Commerce, Office of Export Enforcement; the

Department of Treasury, Office of Intelligence Support; and the US Customs Service, Office of Intelligence. Input from each of these agencies has been incorporated into this report.

This study describes the "defensive" measures that the US Government applies to counter foreign collection of US economic-related intelligence and information. It also lists the US targets of foreign economic collection and the methods foreign governments and corporations use to obtain US economic and technological information. including at times US Government information that directly affects US industry. This study does not address the concept of the US Government "offensively" collecting foreign proprietary information and providing it to US firms, which is against US policy.

To provide a full scope of foreign economic collection efforts targeted at US firms, this report examines "foreign industrial espionage" as specifically requested by Congress as well as other types of collection efforts that potentially could be damaging to US national and corporate interests. This report includes collection efforts by foreign intelligence services, other government agencies, and private firms, in two broad classes of economic collection activities-espionage and illicit acquisition of proprietary information, and other economic collection efforts. In distinguishing between different types of collection activity, this report is not designed to establish legal parameters for the activities described, nor to characterize the actions and decisions of US law enforcement and intelligence agencies with regard to counterintelligence (CI) operations and investigations

Espionage and Illicit Acquisition of Proprietary Information.

Espionage and illicit collection activities represent attempts by foreign governments and/or industry to acquire classified or non-public information from US firms. Government-sponsored activities are conducted by entities such as intelligence services, other government agencies-such as foreign trade offices and S&T attaches-and private corporations.

Other Economic Collection Efforts.

Foreign governments and industry also collect economic information from US firms through standard business practices-such as mergers and acquisitions, strategic alliances, and licensing agreements-as well as gathering publicly available information. Although these activities are an accepted element of the business world and are largely peripheral to the scope of this report, a large body of reporting indicates that these activities generate a considerable portion of the technology and economic information obtained by our competitors. They clearly do not constitute illegal behavior. however. Open-source collection activities include, but are not limited to, review of trade journals or corporate annual reports, market surveys, and attending conferences and symposia. On some instances, however, these types of collection efforts could be precursors to illicit collection activities or indicate the intelligence interest of foreign powers. For example, attempts by a foreign government's intelligence service to persuade an employee of a US firm to gather information from the firm's library could be the first step in setting up a source that would eventually collect proprietary document. Similarly, joint ventures and licensing agreements provide ideal opportunities to gather non-public information from US firms.

This report is divided into four sections, corresponding with the four parts of the Congressional requirement. A classified version of this report accompanies this document.

I. Policy Functions and Operational Roles

Report the respective policy functions and operational roles of the agencies of the Executive Branch of the Federal Government in identifying and countering threats to US industry of foreign industrial espionage, including the manner in which such functions and roles are coordinated

The US Government's primary methods for identifying and countering foreign economic espionage and illicit acquisition of proprietary information are CI operations and law enforcement investigations. CI and law enforcement agencies monitor foreign intelligence collection, ascertain how and against whom it is directed, and determine the optimum remedy to counter the threat, either through CI methods or criminal prosecution.

Cl efforts are directed at monitoring, penetrating, and neutralizing foreign intelligence activities targeted against US national interests, including economic and industrial interests. Law enforcement agencies take advantage of CI information as well as develop their own information through investigations. At times, these two communities have proceeded separately without effectively coordinating their efforts. Section 111 of this study contains several Executive Branch options to ensure better coordination and cooperation.

The FBI is the central US Government agency for collecting, analyzing, and investigating foreign threats to US industry. Because of its mission as both the US Government's primary CI agency with regard to foreign intelligence

activities within the United States and in its role as the lead criminal investigative agency, the FBI is able to use both types of remedies against economic and industrial espionage. The FBI recently created two new investigative classifications-one for cases in which there is alleged or confirmed foreign power involvement and one for purely criminal cases-to better counter the problem. Current internal FBI administrative reform is designed to optimize the use of CI and law enforcement remedies.

The US Customs Service is the US Government's primary border enforcement agency with responsibility for enforcing several categories of laws that relate to illegal economic activities. For example, Customs is responsible for enforcing the Arms Export Control Act and the Export of War Materials Act, which involve munitions control and trafficking activities. It is also responsible for the enforcement of export controls of high-technology material and information under the Export Administrations Act. Economic and industrial espionage are often connected to trade sanctions and embargoes against designated countries, strategic trade issues, and protection of intellectual property rights, and thus fall under Customs responsibilities.

Each Department of Defense (DOD) military service has CI and criminal investigative components that conduct Cl operations and investigate foreign economic and industrial intelligence activities as they relate to DOD programs and systems. Military services work closely with the FBI when the activity involves violations of Federal laws or intelligence activity targeted against US persons. The information developed through this support is disseminated and coordinated throughout the Cl and security programs communities.

CI and law enforcement investigative agencies rely on several sources within the US Government for CI information and criminal leads that they further develop through investigations and operations, including the following:

- The FBI's Development of Espionage, Counterintelligence, and Counter terrorism Awareness (DECA) Program provides an interface with the US corporate community through which the FBI not only conveys information but also obtains investigative leads from corporations concerning foreign government and corporate attempts to illicitly collect US economic and technological information.

- The CIA informs the FBI and other appropriate US Government agencies when it learns, in the course of its broader foreign CI and economic intelligence gathering activities, about a to reign government or company targeting US industry.

For example, the CIA informs the FBI and/or the Department of Justice of economic espionage information acquired from foreign government sources. In addition, the CIA informs the State Department and other appropriate government agencies of instances of economic espionage or state-supported unfair trading practices, such as bribery of contracting officials. The CIA also prepares analysis on countries engaging in economic espionage and questionable trading practices for dissemination to US Government policy makers and throughout the Intelligence Community.

- DOE's Counterintelligence Division manages a defensive CI program to identify and counter threats of foreign economic and industrial intelligence collection activities against DOE personnel and facilities. DOE collects information through reports on foreigners visiting DOE facilities and through debriefings of DOE employees and contractors who may have been targeted by foreign governments or corporations. It furnishes this information as CI leads to the FBI when there is evidence of foreign intelligence targeting.

- DIS systematically collects Cl information developed through personnel security interviews and industrial security inspections. The Counterintelligence Office analyses this information and, when appropriate, provides it as Cl and criminal investigative leads to agencies such as the FBI, US Customs Service, and the military services.

II. US Government Support to Private Industry

Report the means by which the Federal Government communicates information on [industrial espionage] threats, and on methods to protect against such threats, to US industry in general and to US companies known to be targets of foreign espionage.

US Government agencies identify and counter foreign economic espionage and illicit efforts to acquire proprietary information from two distinct but integrated approaches: Cl and law enforcement. As a subset of those approaches, and taking advantage of the information that the respective communities develop, the US Government also counters those activities through awareness training.

Awareness programs are designed to provide government and private audiences with the foreign threat information they need to better protect classified and proprietary economic information from illicit collection. US Government contractors receive the vast majority of threat information that flows from government to industry. Recipients include

contractors for the National Aeronautics and Space Administration (NASA), CIA, and the Departments of Defense, Energy, and State.

The primary US Government programs that pass threat information to non-government affiliated corporations are the FBI's DECA Program; the State Department's Overseas Security Advisory Council (OSAC); and, on occasion, the CIA's National Resources Division. NACIC, which recently completed a survey of the Cl needs of US industry, also has implemented initiatives to work with these various programs to provide more timely or relevant threat information to the private sector.

After obtaining information indicating that a specific US company is being targeted by a foreign intelligence service or government, the US Intelligence Community (USIC) shares it with the FBI which may inform the US company about the threat.

The FBI may brief appropriate personnel in the company about the threat and work with them to counteract that threat. Information of a more general nature also is shared with the State Department's OSAC representatives for passage to the private sector. The NACIC will join forces with OSAC to share threat information, particularly on the US technology targeted and collection techniques used by foreign governments.

The following tabulation lists the awareness and briefing programs within each US Government agency that provides threat information to private sector companies:

Federal Bureau of Investigation

The DECA Program is the FBI's public voice and educational medium for communicating foreign threat information, especially the economic espionage threat, to the private sector. The DECA Program has been in place for over 20 years and has been an integral part of the FBI's foreign CI program. DECA coordinators in each of the FBI's 56 field offices have regular liaison with companies located in the field offices' territories. The DECA coordinators furnish briefings, videotapes, pamphlets, and other materials to help the private sector understand and recognize foreign economic espionage threats directed at them. The content of briefings and material provided is tailored to the specific needs and concerns of each company. The DECA coordinators also discuss the various methods employed by foreign governments to accomplish their intelligence collection goals. During fiscal years 1993 and 1994, the FBI briefed almost 20,000 companies totaling nearly a quarter of a million personnel, in addition to briefings at academic institutions, laboratories, and state and local governments.

The DECA Program is a national effort with management, direction, and analytical support from FBI Headquarters. As needed, FBIHQ provides field offices with information, materials, and speaker support to facilitate a specific request or need. It relies on dynamic and direct communication between the DECA coordinator and executives, security directors, and personnel in US corporations. In addition, the program periodically publishes a foreign intelligence threat information journal titled DECA Notes. Both classified and unclassified versions of DECA Notes and DECA briefings have been given to US corporations throughout the United States.

Department of State

State Department's OSAC is a joint venture by the Department and US businesses to interact on overseas security problems of mutual concern, including foreign economic threats. OSAC is administered under the State Department's Bureau of Diplomatic Security (DS). Over 1,400 private-sector organizations participate in its activities and receive information and guidance. As part of the growing emphasis on the threat to US business, OSAC established a Committee for Protection of Information and Technology that seeks to improve the government-industry partnership.

OSAC also oversees "Country Councils" in selected foreign cities that consist of US embassy security officers and other post officials working with security managers of US private-sector enterprises to exchange unclassified security information in a timely fashion. There are Country Councils in 25 foreign cities, with five more planned for 1995. Country Councils enable OSAC to pass threat information to industry and to gather information from US corporations concerning threats to US economic security.

Government and business representatives have joined with OSAC to produce a series of publications providing guidance, suggestions, and planning techniques on a variety of security-related issues, including a booklet titled Guidelines for Protecting US Business Information Overseas, the latest version of which was published in November 1994.

To exchange threat information as expeditiously as possible, the State Department created the OSAC Electronic Bulletin Board (EBB). The EBB is an unclassified on-line system available to OSAC member companies that serves as the focal point for the exchange of information between the Department of State and the US private sector. More specifically, DS's Office of Intelligence and Threat Analysis (ITA) uses the EBB to provide US corporations doing

business abroad with timely, unclassified security related information. US firms supplement ITA's information by voluntarily submitting accounts of security or crime incidents affecting their own or other US overseas operations. The EBB currently contains over 42,000 individual reports of various types of threats overseas.

Central Intelligence Agency

The CIA provides information to the FBI for use, as appropriate and in accordance with memoranda of understanding and executive orders, in the DECA Program. On occasion, the CIA briefs US corporate officials directly concerning the foreign intelligence threats facing US companies. The CIA has presented these briefings, which describe the ways various countries conduct economic intelligence collection against the United States, to individual corporations and at industry-wide conferences, often with FBI participation. The briefings cover foreign economic activities worldwide, focusing on intelligence-gathering techniques used by specific countries. The CIA plans to offer another briefing on commercially available technical gear used by foreign services to conduct economic espionage against US companies.

As appropriate, CIA coordinates with other US Government agencies, specifically the FBI, before notifying a US company that it is the specific target. CIA also is participating extensively in planning and implementing an array of activities under the auspices of the NACIC's new interagency Awareness Working Group (see below). These programs are designed to inform and assist US companies that are actual or potential targets.

Department of Defense

The Defense Intelligence Agency, under its Defense Information Counter Espionage (DICE) program, conducts briefings at conferences attended by government-affiliated contractors and provides current threat information for training courses for DOD contractor personnel. The subjects of these briefings include economic intelligence collection activities by friendly countries and threats of illicit technology transfer. DIA also prepares CI risk assessments on foreign ownership of DOD-affiliated US corporations and studies on the foreign intelligence threat to DOD programs and operations, including contractor programs.

The Defense Investigative Service shares information with industry about targeting of specific technologies or specific contractors based on its analysis of information from data bases such as the Foreign Ownership, Control, or Influence (FOCI) data base and various elements of the Foreign Disclosure and Technical Information System. The focus of the DIS program is to safeguard classified information, but its efforts also help to protect proprietary information. As DIS becomes aware of the targeting of specific technologies or specific contractors, that information is shared with industry and other US Government agencies as appropriate.

Foreign threat information also is developed by DIS Special Agents during personal security interviews (PSIs) by Industrial Security representatives under the auspices of the National Industrial Security Program, and through liaison with other US agencies. Reports are disseminated throughout DOD, throughout the USIC, and to cleared defense contractors during industrial security actions.

DIS is developing a program to identify cleared facilities that are involved in critical technologies and have interface with foreign interests. They will spearhead a briefing/debriefing program for contractor personnel who host foreign national visitors, conduct foreign travel/visits. interface with on-site foreign national visitor groups, and are assigned overseas. The focus of this program will be to identify attempts by foreign nationals to circumvent or undermine disclosure decisions.

DOD Service Cl Components each have comprehensive programs to brief the defense industry and the acquisition community on the political, military, and economic threat to sensitive technologies and programs and the multi disciplinary threat posed by foreign countries, visitors, and economic entities. Military CI components provide a full range of CI support to the military research, development, test, and evaluations community; acquisition program offices; and contractors they serve. Their overall goal is to detect, deter, neutralize, and exploit attempts by foreign entities to acquire restricted DOD systems and technologies.

The DOD Acquisition Systems Protection Program (ASPP) attempts to unify the acquisition, Cl, and security communities to prevent losses of information. Under ASPP, the acquisition community identifies the most essential elements of DOD acquisition programs, known as EPITS (essential program information, technology, and systems), as well as other pertinent information about DOD technologies. The Cl community identifies threats to the technologies in general and to specific EPITS by location as far as possible. The security community then tailors countermeasures to offset the threat and vulnerabilities of the program.

The Department of Defense Security Institute (DODSI) develops and presents courses of instruction in DOD Security Countermeasures programs, including industrial, personnel, information, and security awareness and management programs. Discussions of the threat are inherent in these programs. DODSI also publishes unclassified security awareness information. The most well-known DODSI publication is the Security Awareness Bulletin, which is

distributed to over 25,000 customers in government and industry and provides an easy vehicle for disseminating CI information. Articles often highlight foreign economic and industrial intelligence activities and ways to protect against them. DODSI is in the process of producing a series of security awareness videos titled Countering Espionage.

National Reconnaissance Office

NRO's Counterintelligence Staff runs a Cl threat and awareness program to brief its contractor-based personnel on the intelligence threat targeting their systems and programs.

National Security Agency

The NSA conducts briefings and develops and organizes courses, seminars, and conferences to sensitize its contractors cleared for special compartmented information to the foreign intelligence threat domestically and overseas. NSA provides general and country-specific threat information in all indoctrination and orientation briefings, debriefings, and special briefings (for example, defensive travel briefings, courier briefings, special access briefings, and so forth).

NSA products are not provided directly to the private sector, and there are currently no plans to do so. On rare occasions when specific threat information of import to a US company is developed by NSA, the information may be provided to the FBI. Subject to NSA approval. a "sanitized" FBI threat notification may be made to the firm.

National Counterintelligence Center

The NACIC was established in 1994 in accordance with Presidential Decision Directive/NSC-24, titled "US Counterintelligence Effectiveness." It is the NACIPB's primary mechanism to guide all national level Cl activities, including countering foreign economic and industrial intelligence collection activities.

The NACIC Threat Assessment Office has begun to compile intelligence and open-source reporting on the clandestine targeting of US industry and technologies by foreign powers or their intelligence services. It fulfills this in cooperation with other US Government agencies in three ways:

1. By providing analyses on threats to emerging or existing technologies and on threats to critical facilities in the United States or overseas.

2. By identifying and broadly disseminating information on human and technical collection methods used by foreign powers against the United States, including threats encountered by US businessmen at home or overseas.

3. By assessing the CI aspects of foreign disclosures, foreign ownership, technology transfers, and joint ventures.

In cooperation with other US Government agencies, the NACIC has begun to provide certain reports, as appropriate based upon classification and dissemination caveats, to US private firms with and without classified government contracts. The NACIC has responded to limited tasking from US corporations for threat information and will seek to make this service more available to private-sector customers.

The NACIC Program Integration Office. through the NACIC Awareness Working Group, also serves as a community coordinating body for CI training and awareness programs. As such, it facilitates the development and monitors the effectiveness of US Government awareness programs for both the public and private sectors. Cl information describing the threat to US industry is incorporated into these awareness presentations .

The NACIC is currently participating in two surveys of private industry. The first was conducted in coordination with OSAC, under the direction of the National Security Council. It was distributed in December 1994 and January 1995 to OSAC member companies. This survey was designed to identify ways to enhance the relationship between the CI community and US private industry. It sought the opinion of industry on how the US Government could better provide private corporations with information on the threat from foreign intelligence and security services overseas and in the United States. Results of this survey are now being tabulated and will be used to help formulate US Government policy on how to best fill the CI needs of US industry. The NACIC is also participating in a spring 1995 survey, in conjunction with the American Society of Information Security (ASIS) and Michigan State University, to gauge the severity of the of proprietary information in the private sector. This survey is designed to update and validate a 1992 ASIS survey on the same subject. The survey will be distributed to approximately 6,000 US corporations, and results are planned to be published by summer 1995.

Department of Energy

DOE's CI Program mission is to deter and neutralize foreign intelligence activities in the United States directed at or involving DOE programs, facilities, technology, personnel, and sensitive unclassified and classified information. The

DOE Counterintelligence Division communicates the foreign threat through its awareness training program, analysis program, foreign travel briefing and debriefing programs, and the dissemination of to reign intelligence threat information to employees, scientists, managers, and security personnel. The Counterintelligence Division regularly publishes classified and unclassified analytical studies. bulletins, newsletters. and other information about foreign intelligence threats to DOE facilities and personnel. This threat information is also shared with other US Government agencies and US corporations who have entered into cooperative research and development agreements (CRADAs) with DOE.

Department of Commerce

Although the Department of Commerce does not have a formal program to provide CI support to US business, it provides informal assistance through security awareness briefings to contractors and consultants with access to classified information. Its Office of Export Enforcement conducts an industry outreach program that provides information to numerous industry officials each year on CI as it relates to illegal technology transfer. Various Department of Commerce components also publish newsletters and magazines that contain highlights of security incidents and illicit export practices.

US Customs Service

In support of its multifaceted mission, Customs has for years operated several education and outreach programs designed to familiarize private industry with the export laws and regulations and with the Customs Service roles in enforcing them. These programs have included threat information when it applies to export issues.

National Aeronautics and Space Administration

NASA provides specific threat information to NASA employees and contractors involved in Special Access Programs through approximately 1,500 security awareness briefings annually. Although there are no NASA resources solely dedicated to conducting awareness briefings, security specialists are usually assigned the tasks

III. Options for Consideration

Report the specific measures that are being or could be undertaken in order to improve the activities referred to in the above paragraphs, including proposals Or any modifications of law necessary to facilitate the undertaking of such activities.

Cl efforts are governed by presidential directives, executive orders, and statutes, many of which were established during the Cold War and were designed to counter a corresponding threat: that is, foreign intelligence activities directed against US military and political information. Over the past three years, some of these guidelines have been adapted to better confront the post-Cold War reality that economic and technological information are as much a target of foreign intelligence collection as military and political information.

Law enforcement efforts are similarly limited because economic and technological information is often not specifically protected by Federal laws, making it difficult to prosecute thefts of proprietary technology or intellectual property. Law enforcement efforts instead must rely on less specific criminal laws-such as espionage. fraud and stolen property, and export statutes-to build prosecutable cases against foreign economic and industrial intelligence collectors and to deter such activity. The Administration is considering legislative options to strengthen current Federal statutes, and possibly to establish new laws that would specifically forbid theft of intellectual property and proprietary information.

While other options are under various stages of consideration, the following are included as examples:

Executive Branch Policy Options*Increase resources available to US CI and law enforcement organizations to investigate and, where appropriate, prosecute entities involved in industrial and economic intelligence collection activities targeting US information*.

As attested by the Aldrich Ames espionage case, the end of the Cold War has not stopped traditionally hostile foreign intelligence services from collecting information via espionage. US CI agencies continue to allocate resources against traditional intelligence threats. However, while such threats have continued, an increasing portion of US CI and law enforcement resources is also being drawn to thwart economic and industrial intelligence collection activities. Some of these more recently identified activities are conducted by traditional threat countries and can be investigated with existing resources directed against those countries.

Countries that heretofore have not been considered intelligence threats account for much of the economic collection currently being investigated by the US CI and law enforcement communities. Since the CI community does not have

the benefit of years of accumulated experience investigating such efforts, these investigations are often labor intensive. Resources in these areas will likely have to be increased, especially if the theft of proprietary information is made a Federal violation, since the result would be an increased number of cases requiring more trained investigators and analysts.

Institutionalize the concept that economic security is an integral part of national security.

The goal of US Cl is to identify, penetrate, and neutralize foreign intelligence activities that threaten US national security. Cl has traditionally been directed at military, ideological, or subversive threats to national security. Until the past several years, countering activities that threaten economic security had not usually been included.

In today's world in which a country's power and stature are often measured by its economic/industrial capability, foreign government ministries-such as those dealing with finance and trade-and major industrial sectors are increasingly looked upon to play a more prominent role in their respective country's collection efforts. While a military rival steals documents for a state-of-the-art weapon or defense system, an economic competitor steals a US company's proprietary business information or government trade strategies. Just as a foreign country's defense establishment is the main recipient of US defense-related information, foreign companies and commercially oriented government ministries are the main beneficiaries of US economic information. The aggregate losses that can mount as a result of such efforts can reach billions of dollars per year, constituting a serious national security concern.

The March 1990 and February 1995 national security strategies published by the White House focus on economic security as an integral part not only of US national interest but also of national security.

In February 1995, President William J. Clinton published *A National Security Strategy of Engagement and Enlargement* in accordance with the Goldwater-Nichols Defense Department Reorganization Act of l986. It identified the US central goals as:

- To sustain our security with military forces that are ready to fight.
- To bolster America's economic revitalization.
- To promote democracy abroad

.

The report identifies US intelligence capabilities as critical instruments of national power and notes:

The collection and analysis of intelligence related to economic development will play an increasingly important role in helping policy matters understand economic trends. That collection and analysis can help level the economic playing field by identifying threats to US companies from foreign intelligence services and unfair trading practices. (p17)

The report describes the US Government partnership with business and labor, noting:

Our economic strategy views the private sector as the engine of economic growth It sees government's role as a partner to the private sector-acting as an advocate of US business interests; leveling the playing field in international markets; helping to boost American exports; and finding ways to remove domestic and foreign barriers to the creativity, initiative and productivity of American business (p 19)

Guidance issued from 1990 to the present directs the Intelligence Community and Cl community specifically to detect and deter foreign intelligence targeting of US economic and technological interests, including efforts to obtain US proprietary information from companies and research institutions that form our strategic industrial base.

Consistent with US national security policy since 1990. then, the Cl community should emphasize economic security in operations, reports, and briefings designed to fulfill the guidance outlined above.

Develop a coordinated CI and law enforcement approach and appropriate collection and analytic requirements to address foreign economic and industrial intelligence collection activities.

Previous reports sponsored by the Executive and Legislative Branches have found that efforts across the government to investigate and counter economic and industrial intelligence collection activities were often fragmented and uncoordinated. The Cl and law enforcement communities have usually not effectively harmonized their efforts. Numerous interagency working groups and committees had been formed to discuss the problem, while at the same time a number of individual agencies were exerting their own efforts. This lack of coordination resulted in many partially informed decisions and diverging collection and analytical efforts. The Executive Branch is developing a coordinated Cl and law enforcement approach and appropriate collection and analytic requirements.

Since its inception, the NACIC has made efforts to determine the CI needs of various traditional and nontraditional intelligence consumers. In the process of surveying agency customers, the NACIC discovered that many needs have not fully been met in the past, either because no mechanism was in place to fulfill the needs or because the existing mechanism was malfunctioning. As part of the NAClC's program of determining Cl needs, it will assist in forming appropriate and manageable requirements to ensure that 1) necessary information is being collected and 2) once the information is collected, it reaches those that need it.

Systematically collect and analyze information about the efforts of foreign countries not traditionally considered intelligence threats, along with corporations from those countries, to collect protected US Government and corporate information.

Over the past several months, the NACIC has interviewed over 170 officials from 62 US Government agencies-both those that are customarily involved in Cl and those who have not usually been included in such efforts-to determine the Cl needs of the US Government. Several policy makers interviewed cited a lack of information on the activities of countries that have not traditionally been considered intelligence threats but that may be mounting aggressive intelligence targeting efforts against our leading-edge technologies, economic infrastructure, and personnel. They desire better information about whether information and technology shared with allies through legitimate projects are being siphoned off and provided to foreign competitors, and how much information is being acquired by foreign students studying at US universities and research centers. They are also interested in what intelligence capabilities the US Government is providing to friendly foreign countries through liaison relationships that could be used to collect US information. More proactive and aggressive collection against intelligence serv ices and corporate information collection personnel from countries traditionally allied with the United States needed to fill these intelligence gaps.

IV. Foreign Economic Threat

Report on the threat to US industry of foreign industrial espionage and any trends in that threat, including:

1. The number and identity of the foreign governments conducting any but foreign industrial espionage.

A. Country Case Studies

A number of foreign countries pose various levels and types of threats to US economic and technological information. Some have been considered ideological and military adversaries for decades. Their targeting of US economic and technological information is not new but has continued as an extension of a concerted intelligence assault on the United States conducted throughout the Cold War. Others are either longtime allies of the United States or have traditionally been neutral. These countries target US economic and technological information despite their friendly relations with the United States. In some cases, they take advantage of their considerable legitimate access to US information and collect sensitive information more easily than our military adversaries. In addition, some of the countries traditionally considered allies have infrastructures that allow them to easily internalize high-tech information and utilize it in competition against US firms.

The evidence indicating which countries and corporations conduct economic and industrial espionage against the United States is derived from numerous classified and open sources. Because of the ramifications to US foreign policy as well as the sensitivity of source information, the specific identities of countries are included in the classified report only.

2. The industrial sectors and types of information and technology targeted by such espionage.

B. Targeted Information and Technology

The industries that have been the targets in most cases of economic espionage and other collection activities include biotechnology; aerospace; telecommunications, including the technology to build the "information superhighway"; computer software/ hardware; advanced transportation and engine technology; advanced materials and coatings, including ' stealth" technologies; energy research; defense and armaments technology; manufacturing processes; and semiconductors. Proprietary business information-that is, bid, contract, customer, and strategy in these sectors is aggressively targeted. Foreign collectors have also shown great interest in government and corporate financial and trade data.

These industries are of strategic interest to the United States because they produce classified products for the government, produce dual use technology used in both the public and private sectors, and are responsible for leading-edge technologies critical to maintaining US economic security. Many other US high-tech industrial sectors have been targeted. Any company competing for a sale or a piece of market share, regardless of the market, could resort to intelligence activities as a "force multiplier" to improve its chances of success.

Currently, there is no formal mechanism for determining the full qualitative and quantitative scope and impact of the loss of this targeted information. Industry victims have reported the loss of hundreds of millions of dollars, lost jobs, and lost market share. However, these reports have been ad hoc and often only after public exposure of the loss. Understandably, US industry is reluctant to publicize occurrences of foreign economic and industrial espionage. Such publicity can adversely affect stock values, customers' confidence, and ultimately competitiveness and market share.

3. The methods used to conduct such espionage.

C. Collection methods

Practitioners seldom use one method in isolation but combine them into concerted collection programs. Although countries or corporations have been known to turn legitimate transactions or business relationships into clandestine collection opportunities, some of the methods listed are most often used tor legitimate purposes. While their inclusion here is not intended to imply illegal activity, they are listed as potential elements of a broader, coordinated intelligence effort.

Traditional Methods:
Traditional espionage methods primarily reserved for collecting national defense information are now being applied to collect economic and proprietary information. Traditional awareness training is most suitable for fufullling these collection methods.

Classic Agent Recruitment. An intelligence collector's best source is a trusted person inside a company or organization whom the collector can task to provide proprietary or classified information. A foreign collector's interest in employees is not necessarily commensurate with their rank in ~he company. Researchers, key business managers. and corporate executives can all be targets. but so can support employees such as secretaries, computer operators, technicians, and maintenance people. The latter frequently have good, if not the best, access to competitive information. In addition, their lower pay and rank may provide fertile ground tor manipulation by an intelligence agency.

US Volunteers. The individuals most likely to improperly acquire a company's information are the company's own employees. Employees ~ho resort to stealing information exhibit the same motivations and human frailties as the average thief or spy: illegal or excessive use of drugs or alcohol. money problems, personal stress, and just plain greed.

Surveillance and Surrephtious Entry. Economic and industrial espionage may involve simply breaking into an office containing desired information. Companies have reported break-ins in which laptop computers or disks were stolen, even when there were easily obtainable, more valuable items in the same vicinity. These instances are not always reported, or reported as merely break-ins, without considering the possibility that the target was information rather than equipment.

Some countries convince hotel operators to provide intelligence collectors with access to visitors' luggage or rooms. During these surreptitious break-ins, known colloquially as "bag ops," unattended luggage is searched for sensitive information, and any useful documents are copied or simply stolen.

Specialized Technical Operations. This includes computer intrusions, telecommunications targeting and intercept, and private-sector encryption weaknesses. These activities account for the largest portion of economic and industrial information lost by US corporations.

Because they are so easily accessed and intercepted, corporate telecommunications-particularly international telecommunications-provide a highly vulnerable and lucrative source for anyone interested in obtaining trade secrets or competitive information. Because of the increased usage of these links for bulk computer data transmission and electronic mail, intelligence collectors find telecommunications intercepts cost-effective. For example. foreign intelligence collectors intercept facsimile transmissions through government-owned telephone companies, and the stakes are large -- approximately half of all overseas telecommunications are facsimile transmissions. Innovative "hackers" connected to computers containing competitive information evade the controls and access companies' information. In addition, many American companies have begun using electronic data interchange, a system of transferring corporate bidding, invoice, and pricing data electronically overseas. Many foreign government and corporate intelligence collectors find this information invaluable.

Economic Disinformation. Some governments also use disinformation campaigns to scare their domestic companies and potential clients away from dealing with US companies. Press and government agencies frequently discuss foreign economic and industrial intelligence activities, often in vague, nonspecific terms. The issue has been used to paint foreign competitors or countries as aggressive and untrustworthy, even if the accuser has no tangible evidence of any collection activity. Some countries have widely publicized their efforts to set up information security mechanisms to protect against their competitors' penetration attempts, and frequently the United States is mentioned as the primary threat.

Other Economic Collection Methods:

Tasking Foreign Students Studying in the United States. Some foreign governments task foreign students specifically to acquire information on a variety of economic and technical subjects. In some instances, countries recruit students before they come to the United States to study and task them to send any technological information they acquire back to their home country. Others are approached after arriving and are recruited or pressured based upon a sense of loyalty or fear tor their home country's government or intelligence service.

In some instances. at a intelligence collector's behest. foreign graduate students serve as assistants at no cost to professors doing research in a targeted field. The student then has access to the professor's research and learns the applications of the technology.

As an alternative to compulsory military service, one foreign government has an organized program to send interns abroad, often with the specific task of collecting foreign business and technological information.

Tasking Foreign Employees of US Firms and Agencies. Foreign companies and governments sometimes recruit or task compatriot employees within a US firm to steal proprietary information. Although similar to clandestine recruitment used traditionally b~ intelligence services, often no intelligence service is involved, only a competing company or non-intelligence government agency. The collector then passes the information directly to a foreign firm or the government for use in its R&D activities.

Debriefing of Foreign Visitors to the United States. Some countries actively debrief their citizens after foreign travel, asking for any information acquired during their trips abroad. Sometimes these debriefing sessions are heavy-handed, with some foreign scientists describing them as offensive. In other countries, they are simply an accepted part of traveling abroad.

Recruitment of Emigres, Ethnic Targeting. Frequently, intelligence collectors find it effective to target persons of their own ethnic group. They particularly seek; individuals working in US military and R&D facilities who have access to proprietary and classified US technology. Several countries have found repatriation of emigre and foreign ethnic scientists to be the most beneficial technology transfer methodology. One country, in particular, claims to have repatriated thousands of ethnic scientists back to their home country from the United States. Ethnic targeting includes attempts to recruit and task naturalized US citizens and permanent resident aliens to assist in acquiring US S&T information. Frequently, foreign intelligence collectors appeal to a person's patriotism and ethnic loyalty. Some countries collectors resort to threatening family members that continue to reside in their home country.

Elicitation During International Conferences and Trade Fairs. Events-such as international conferences on high-tech topics, trade fairs, and air shows-attract many foreign scientists and engineers, providing foreign intelligence collectors with a concentrated group of specialists on a certain topic. Collectors target these individuals while they are abroad to gather any information the scientists or engineers may possess. Sometimes, depending on the foreign country and the specific circumstances, these elicitation efforts are heavy-handed and threatening, while other times they are subtle.

Foreign intelligence collectors sometimes attempt to recruit scientists by inviting them on expense-paid trips abroad for conferences or sabbaticals. The individuals are treated royally, and their advice is sought on areas of interest. When they return to the United States, collectors recontact them and ask them to provide information on their areas of research.

Commercial Data Bases, Trade and Scientific Journals, Computer Bulletin Boards, Openly Available US Government Data, Corporate Publications. Many collectors take advantage of the vast amount of competitive information that is legally and openly available in the United States. Open-source information can provide personality profile data, data on new R&D and planned products, new manufacturing techniques, and competitors' strengths and weaknesses. Most collectors use this information for its own worth in their business competition. However, some use openly available information as leads to refine and focus their clandestine collection and to identity individuals and organizations that possess desired information.

Clandestine Collection of Open-Source Materials. Because they believe that they are closely monitored by US Cl, some traditional intelligence services resort to clandestine methods to collect even open source materials. They have been known to use false names when accessing open-source data bases and at time ask that a legal and open relationship be kept confidential .

Foreign Government Use of Private-Sector Organizations, Front Companies, and Joint Ventures. Some foreign governments exploit existing non-government affiliated organizations or create new ones-such as friendship societies, international exchange organizations, import-export companies, and other entities that have frequent contact with foreigners-to gather intelligence and to station intelligence collectors. They conceal government involvement in these organizations and present them as purely private entities in order to cover their intelligence operations. These

organizations spot and assess potential foreign intelligence recruits with whom they have contact. Such organizations also lobby US Government officials to change policies the foreign government considers unfavorable.

Corporate Mergers and Acquisitions. Several countries use corporate mergers and acquisitions to acquire technology. The vast majority of these transactions are made for completely legitimate purposes. However, sometimes they are made specifically to allow a foreign company to acquire US-origin technologies without spending their own resources on R&D.

According to a 1994 US Government report, entitled Report on US Critical Technology Companies 984 foreign mergers and acquisitions of US critical technology companies occurred between 1 January 1985 and 1 October 1993. All but a handful of these mergers and acquisitions were friendly, and four countries accounted for 60 percent of them. Of the total, 60 percent involved US firms in advanced materials, computers-including software and peripherals-and bio-technology, areas of relative US technical strength. The remaining deals involved US firms in electronics and semiconductors, professional and scientific instrumentation, communications equipment, advanced manufacturing, and aircraft and spare parts.

Headhunting, Hiring Competitors' Employees. Foreign companies typically hire knowledgeable employees of competing US firms to do corresponding work for the foreign firm. At times, they do this specifically to gain inside technical information from the employee and use it against the competing US firm.

Corporate Technology Agreements. Some foreign companies use potential technology sharing agreements as conduits for receiving proprietary information. In such instances, foreign companies demand that, in order to negotiate an agreement. the US company must divulge large amounts of information about its processes and products, sometimes much more than is justified by the project being negotiated. Often, the information requested is highly sensitive. In some of these cases, the foreign company either terminates the deal after receipt of the information or refuses to negotiate further if denied the information.

Sponsorship of Research Activities in the United States. Numerous foreign countries exploit a favorable research climate in the United States to sponsor research activities at US universities and research centers. Generally, both the US and the foreign country benefit from the finished research. At times, however, foreign governments or companies use the opportunity as a one-sided attempt only to collect research results and proprietary information at the US facility. Foreign intelligence services also use these efforts as platforms to insert intelligence officers who act solely as information collectors.

Hiring Information Brokers, Consultants. Information brokers scour the world for valuable proprietary data. What they cannot obtain legally or by guile, some information brokers purchase. The broker then verifies the data, puts it into a usable and easily accessible format, and delivers it to interested clients. The following advertisement published in the Asian Wall Street Journal in 1991 illustrates this activity:

Do you have advanced/privileged information of any type of project/contract that is going to be carried out in your country? We hold commission/agency agreements with many large European companies and could introduce them to your project/contract. Any commission received would be shared with yourselves.

The ad was followed by a phone number in Western Europe.

Some countries frequently hire well-connected consultants to write reports on topics of interest and to lobby US Government officials on the country's behalf. Often, the consultants are former high-ranking US Government officials who maintain contacts with their former colleagues. They exploit these connections and contract relationships to acquire protected information and to gain access to other high-level officials who are currently holding positions of authority through whom they attempt to further acquire protected information.

Fulfillment of Classified US Government Contracts and Exploitation of DOD-Sponsored Technology Sharing Agreements. At times, classified US Government contracts are awarded to companies that are partially or substantially controlled by a foreign government. Although US Government security agencies closely monitor these contracts, they can still provide foreign governments unauthorized access to information. Traditional allies of the United States are most likely to use this method, since non-allies seldom are included in such contracts.

Tasking Liaison Officers at Government-to government Projects. During joint R&D activities. foreign governments routinely request to have an onsite liaison officer to monitor progress and provide guidance. Several allied countries have taken advantage of these positions as cover tor intelligence officers assigned with collecting as much information about the facility as possible. Using their close access to their US counterparts conducting joint R&D, particularly in the defense arena, liaison officers have been caught removing documents that are clearly marked as restricted or classified.

A F F I D A V I T

INTRODUCTION

I, Randall Thomas, being duly sworn, hereby depose and say:

1. I am a Special Agent (SA) of the Federal Bureau of Investigation (FBI) and have been so employed for five years. I am presently assigned to the FBI's Los Angeles Division. I am currently assigned to a foreign counterintelligence investigation, in the course of which I have received training and briefings on foreign counterintelligence matters. While attending the FBI Academy in Quantico, Virginia, I received a block of instruction in conducting foreign counterintelligence investigations and the special legal provisions, policies, and techniques pertinent thereto.

2. This affidavit is made in support of a complaint and arrest warrant for **JAMES J. SMITH** for a violation of Title 18, United States Code, Section 793(f) (Gross Negligence in Handling Documents Relating to the National Defense). This affidavit is further made in support of an application for a search warrant to search **SMITH's RESIDENCE**, located at 4422 Guildhall Court, Westlake Village, California, 91361 (described in Attachment A) for items constituting the fruits, evidence, and instrumentalities of violations of Title 18, United States Code, Section 793(f) (Gross Negligence in Handling Documents Relating to the National Defense) and Title 18, United States Code, Section 1343/1346 (Deprivation of Right to Honest Services/Wire Fraud).

3. On several occasions in July 2002, I personally viewed the **SMITH RESIDENCE**. On March 7, 2003, I confirmed with FBI personnel conducting surveillance of the **SMITH RESIDENCE** that day that the following description remained accurate: The **SMITH RESIDENCE** is a single-family, two-story dwelling located at 4422 Guildhall Court, Westlake Village, California. The address is on the east side of the street, at the corner where Guildhall Court turns to the west and forms a cul-de-sac. Immediately south of the residence is the entry to a public walkway admitting to a common park area running behind the cul-de-sac portion of Guildhall Court. There is an attached garage on the north side of the house. Immediately south of the garage, between the garage door and a white metal gate admitting to the covered front entry, there is a chimney sheathed in flagstone. The garage and house are white. Just south of the driveway, directly in front of the residence, the numbers "4422" are painted on the curb against a white background. The investigation has revealed that other than a post office box, **SMITH** has no office, storage locker, or other place to store items.

4. Because this affidavit is being filed for the limited purpose of supporting warrants to (1) search **SMITH's RESIDENCE**, and (2) arrest **SMITH,** I have not related herein all of the facts known to me as part of this investigation.

PROBABLE CAUSE

Overview

5. In the course of conducting an FBI counterintelligence investigation over the last year, and as further detailed below, I have learned that Katrina Leung (a.k.a. CHAN Man Ying, CHEN Wen Ying, LUO Zhongshan, Parlor Maid) was operated from the early 1980's until 2002 as an FBI "asset" providing information about the People's Republic of China (PRC) to the FBI. **JAMES J. SMITH** was the FBI Agent who recruited her and was her primary "handler" until he retired from the FBI in November 2000. **SMITH** routinely debriefed Leung at her residence and on occasion took classified documents there and left them unattended. Leung surreptitiously photocopied some of them, and documents she obtained in this manner have been recovered from her residence. Investigation has revealed that from the early 1980's until December 2002, **SMITH** and Leung had a sexual relationship. Investigation has also revealed that in 1991, **SMITH** learned Leung was providing classified information to PRC intelligence services without authorization by **SMITH** or the FBI, after which **SMITH** continued to allow Leung access to classified information.

Background Re: Counterintelligence Investigations

6. Beginning in early April 2002 and continuing through the present, I have been assigned to a counterintelligence investigation regarding **SMITH** and Leung. In the course of this investigation, I have conferred with FBI agents experienced in foreign counterintelligence matters, received training, and reviewed training materials prepared by FBI personnel with expertise in the area of foreign counterintelligence, and learned the following:

a. The Ministry of State Security (MSS) is an intelligence service of the PRC. Among other functions, MSS conducts intelligence operations for the PRC focusing upon the United States intelligence community, including the FBI, the Central Intelligence Agency (CIA), the National Security Agency (NSA), the Defense Intelligence Agency, the military, the National Reconnaissance Office, and the National Imaging and Mapping Agency.

b. Persons operating to obtain intelligence for foreign intelligence officers (IOs) are called "agents" or "assets." The IO who operates the agent is called the agent's "handler." To preserve an agent's ability to covertly obtain intelligence, IOs go to great lengths to maintain the secrecy of the agent's identity, even within the IO's own intelligence organization. To this end, agents are commonly assigned code names, and those code names, not the agent's true name, are used in the intelligence organization's communications regarding the agent. These and other measures are designed to protect the identity of the agent from compromise. A "Double Agent" is an agent who is cooperating with an intelligence service of one government on behalf of and under the control of an intelligence or security service of another government, and is manipulated by one to the detriment of another.

c. Agents also travel domestically to thwart detection or to foreign countries beyond the reach of U.S. law enforcement in order to meet with intelligence officers for the purposes of conducting debriefings, receiving tasking and payment, and passing classified and national defense information. d. The information sought by PRC intelligence services includes the identities of FBI employees and the nature of FBI investigations.

i. The identity of FBI employees and information regarding those employees' personal, familial, and professional relationships are of use to hostile intelligence services (including those of the PRC) in their attempts to identify individuals who may have access to classified information and national defense information desired by the PRC, and to identify such individuals' potential vulnerabilities to approach or recruitment by the hostile intelligence service. Because success at such efforts would compromise the United States' counterintelligence capability, intelligence regarding FBI personnel involved in counterintelligence investigations concerns the national defense.

ii. The nature of FBI investigations are of value to hostile intelligence services both because the subject matter of the investigations may reveal foreign intelligence of value to the hostile intelligence service, and because details regarding sensitive or classified methodologies, techniques, and technology employed in FBI investigations enable foreign governments to adopt and/or develop countermeasures to defeat them.

e. Classified information is defined by Executive Order 12958 and its predecessor orders (including E.O. 12356) as follows: information in any form that (1) is owned by, produced by or for, or under the control of the United States Government; (2) falls within one or more of the categories set forth in Section 1.5 of the Order (including intelligence sources or methods, cryptology, military plans, and vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security), and (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security. Where such unauthorized release could reasonably result in "serious" damage, the information may be classified as SECRET. Where such damage is "exceptionally grave," the information may be classified TOP SECRET. Access to classified information at any level may be further restricted through compartmentation in SENSITIVE COMPARTMENTED INFORMATION (SCI) categories. Dissemination of classified information at any level may also be restricted through caveats such as: NOFORN (Not Releasable to Foreign Nationals), NOCONTRACT (Not Releasable to Contractors or Contractor/Consultants), WNINTEL (Warning Notice: Intelligence Sources and Methods Involved), and ORCON (Dissemination and Extraction of Information Controlled by Originator).

SMITH's Position And Access To National Defense Information

7. On March 7, 2003, I reviewed portions of **SMITH's** FBI personnel file and security file. I have also spoken with other FBI Special Agents who knew and worked with **SMITH,** including SAs Thomas E. Powers and Edgar Del Rosario. From my review of his personnel files and those conversations I have learned the following:

a. **SMITH** was an FBI Agent in the FBI's Los Angeles office. **SMITH** began his career with the FBI in October 1970 and retired in November 2000. **SMITH** transferred from his first FBI office in Salt Lake City, Utah, to the Los Angeles Office in 1971. In approximately July 1978, **SMITH** was assigned to work on a Foreign Counterintelligence (FCI) squad focusing upon the PRC. From that time until his retirement, **SMITH** worked on FCI PRC matters.

b. **SMITH** was the Acting Supervisor of the Los Angeles FCI China squad from March 1983 through October 1983, and was the Relief Supervisor for the squad in the 1990's. During 1991, **SMITH** was the squad's Acting Supervisor, and became the Supervisory Special Agent (SSA) of the squad in 1996. **SMITH** remained the Los Angeles FBI FCI China squad SSA until his retirement.

8. As an FBI Agent, I know that squad supervisors have an obligation to review the cases being investigated by agents whom they supervise on a regular basis, and that such review entails personal meetings with each agent on the supervisor's squad regarding that agent's cases, as well as review of the FBI file regarding each case. I therefore know that **SMITH** would have had access to and a duty to review cases being worked by the FCI PRC squad, both while he was Acting SSA and SSA, and, in the absence of the squad SSA, while he was the Relief Supervisor. This access and review would have included any SECRET, TOP SECRET, or COMPARTMENTED investigations being worked by the squad.

SMITH's Relationship With Katrina Leung

9. In early April 2002, Special Agent Steve Conley (now a Supervisory Special Agent at FBI Headquarters) told me that Katrina Leung (a.k.a. CHAN Man Wing, CHEN Wen Ying, LUO Zhongshan, Parlor Maid) was a long-time FBI asset providing information regarding the PRC. SA Conley told me that he was Leung's current FBI handler, but that retired SSA **JAMES SMITH** had recruited Leung as an asset for the FBI in the early 1980's and had been her handler until his retirement in November 2000. My review of portions of Leung's FBI file in the ensuing months confirmed this.

10. Since approximately April 2002, **SMITH** was the subject of surveillance under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. Section 1801, et seq. This surveillance, authorized by the Foreign Intelligence Surveillance

Court ("FISC") in Washington, D.C. (established under the authority of Title 50 U.S.C. Section 1803), included covert physical searches, interception of telephone and fax communications, and interception of e-mails. The investigation also included physical surveillance, which did not require a FISC authorization. To the extent this affidavit contains any information which may have at one time been classified, such information has been declassified.

11. On December 20, 2002, I swore out an affidavit before United States Magistrate Judge Jeffrey W. Johnson in support of an application for warrants to search Leung's residence and business for evidence of violations of: (a) Title 18, United States Code, Section 152 (concealment of assets from bankruptcy trustee; making false oaths and claims in bankruptcy); (b) Title 18, United States Code, Section 157 (bankruptcy fraud); (c) Title 18, United States Code, Section 371 (conspiracy to violate Title 18, United States Code, Sections 152 and 157, and to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of revenue, to wit, income taxes); and (d) Title 18, United States Code, Section 794(a) (Unlawfully Delivering National Defense Information to Aid a Foreign Government). Thereafter, Judge Johnson issued warrants to search both locations in Magis. Case Nos. 02-2680M and 02-2679M, respectively. Judge Johnson also granted my request that the affidavit be sealed.

12. On March 9, 2003, I reviewed an audio/video recording of a consensual interview of Leung conducted on December 11, 2002 by SA Peter Duerst and SSA D. Brent Robbins. During that interview, both Leung and the interviewing agents refer to **SMITH** as "JJ." Leung admitted to first becoming intimate with **SMITH** in the early eighties "(v)ery long ago, but I cannot tell you what year."

SMITH's Access To Classified Materials

13. As related in paragraph 8, above, **SMITH's** position as both a Special Agent and later a Supervisory Special Agent of the Los Angeles FBI Chinese FCI squad afforded him access to classified material relating to Chinese FCI matters.

14. On March 10, 2003, I reviewed a report prepared by SA Stephen Phillips on February 5, 2003. From that review I learned the following:

a. Prior to becoming a Special Agent, Phillips was a support employee in the FBI Los Angeles Office assigned to counterintelligence matters. His duties between June 1997 and June 2000 included logging TOP SECRET files and documents in and out of the Secure Compartmented Information Facility (SCIF).

b. The SCIF is a vault containing safes for the storage of TOP SECRET documents. Security regulations dictate that TOP SECRET materials be stored in a SCIF and be released from the SCIF only under certain conditions and pursuant to controls that assure the TOP SECRET documents are securely maintained.

c. During the period that SA Phillips worked in the SCIF, authorized personnel generally reviewed TOP SECRET documents in the SCIF. Occasionally, supervisory personnel would sign for TOP SECRET documents, take them from the SCIF to review in their offices, and then return the documents to SA Phillips in the SCIF. With the exception of SSA **SMITH**, supervisory personnel always promptly returned TOP SECRET documents to the SCIF after reviewing them.

d. On at least one occasion when **SMITH** checked out a TOP SECRET document from the SCIF, he did not return the document until the next day or perhaps the day after that. SA Phillips believed this happened in 1999. No other FBI personnel ever retained TOP SECRET documents overnight that they had checked out from SA Phillips in the SCIF.

Evidence Showing Leung Obtained National Defense Information From SMITH

15. On December 12, 2002, I spoke with FBI Assistant Section Chief (ASC) Bruce Carlson, who told me that on December 11, 2002, ASC Carlson met Leung at her residence so that she could voluntarily provide the FBI with certain items she had discussed during an interview with ASC Carlson that day. In the presence of ASC Carlson and SA Del Rosario, Leung voluntarily removed a document from a locked safe in the upstairs bedroom suite and provided it to ASC Carlson. Leung told ASC Carlson in this and subsequent interviews that she could not remember, but believed that she must have obtained the document from **SMITH** without **SMITH's** knowledge approximately twelve years earlier.

16. I have reviewed a photocopy of that document and noted that it appears to include excerpts of transcripts and/or summaries of a conversation or conversations between a female named "Luo" and someone named "Mao." There are five pages. (As discussed in paragraph 23f, below, Leung stated during interviews that "Mao" was her MSS handler, and "Luo" was her MSS alias.)

17. On December 20, 2002, I spoke with SA Duerst and ASC Carlson, who told me the following: Both reviewed photocopies of the document provided by Leung from her safe. On December 16, 2002, they went to the FBI Los Angeles SCIF to examine TOP SECRET FBI documents. The documents had been transmitted by secure means to the FBI Los Angeles Division from FBI Headquarters in Washington, DC. The documents contain verbatim transcripts and several summaries of conversations between a "Mao" and a "Luo." They learned in their review that the five-page document provided by Leung consists of identical portions of the TOP SECRET document they examined, although the line spacing and fonts differ.

18. On December 11, 2002, SA Bruce Carlson and SA Edgar Del Rosario engaged in a recorded conversation with **LEUNG**. I have reviewed a transcript of that conversation. During that conversation, **LEUNG** read the five-page document and stated that she recognized the document as her conversation with "Mao."

19. My training, experience, and review of the excerpted five-page document provided by Leung and the TOP SECRET document containing essentially the same information satisfy me that both documents contain national defense information within the meaning of Title 18, United States Code, Section 793(f).

20. On December 12, 2002, I participated in a limited consensual search of Leung's residence in San Marino, California. Also present and assisting in the search was SA Stephen Lawrence. Shortly thereafter, and again on March 7, 2003, SA Lawrence told me that while searching a shelf in a bookcase to the left of a desk on the second floor close to the stairs, he found the following documents: (1) a FBI Los Angeles NSD-2 squad telephone directory dated December 20, 1994; (2) a telephone list relating to an FBI investigation codename "Royal Tourist"; (3) a SECRET FBI memorandum regarding Chinese fugitives dated June 12, 1997; and (4) a FBI Legat Directory dated March 17, 1994.

21. On March 11, 2003, I spoke with FBI SSA Serena Alston, who told me that "Royal Tourist" was the code name of an espionage investigation of Peter Lee. Lee was employed by TRW in California and admitted passing SECRET restricted information to the PRC during travel to the PRC in 1985. In 1997, Lee pled guilty to Title 18, United States Code, Section 793(d) (Willful Transmission of National Defense Information to a Person Not Entitled to Receive It).

22. Based on my training, experience, and review of the SECRET FBI memorandum dated June 12, 1997 found in Leung's residence, I believe that the document contains national defense information within the meaning of Title 18, United States Code, Section 793(e). This is because the 1997 memorandum was classified SECRET and discussed reporting of national defense information by a confidential FBI source.

23. On December 18, 2002, I spoke with ASC Carlson and SA Duerst who told me they had interviewed Leung over the course of several days between December 11 and December 17, 2002. These interviews were all videotaped and I have reviewed portions of those recordings. Based on my conversation with ASC Carlson and SA Duerst, and my review of the recordings, I know the following occurred during Leung's interviews:

a. Leung admitted taking the five-page document described in paragraphs 16 and 17, above, from **SMITH**. Leung specifically stated, "I think I sneaked it," and subsequently stated that although **SMITH** sometimes allowed her to review classified documents, he never permitted her to retain them.

b. During the interview, Leung was shown copies of the documents described in paragraph 20, above. The copies were all stapled together in a packet. When SA Duerst displayed this packet to Leung during the interview, Leung specifically admitted she took the NSD-2 squad telephone directory, and generally admitted surreptitiously taking and copying documents from **SMITH**.

c. Leung also admitted that **SMITH** would leave his briefcase open, and that the file-folder pockets in the briefcase often contained documents, with the text facing out. Leung stated this enabled her to see documents that she wanted, and that she would remove them and copy them without **SMITH's** knowledge when he left his briefcase unattended.

d. Leung admitted that she made copies of documents from **SMITH's** briefcase using either a photocopier or facsimile machine in her house. Generally, she would make handwritten notes from documents she surreptitiously copied, and then discard the copies in the trash.

e. Leung admitted that she also made notes regarding documents she surreptitiously obtained from **SMITH** without copying the documents. Leung also made notes regarding information **SMITH** told her. Over the years, Leung provided intelligence she gained in this manner to the MSS.

f. Leung admitted that she had an MSS handler named "Mao." "Luo" was her MSS alias, provided to her by a high ranking PRC official.

24. Investigation has revealed that **SMITH** continued to provide information about the FBI and FBI Agents to Leung after he retired. On November 11, 2002, I participated in a FISC-authorized covert search of Leung's luggage at Los Angeles International Airport (LAX) prior to Leung's departure for the PRC. In Leung's luggage there was a facsimile cover sheet from **SMITH** to Leung. A second page, bearing the same facsimile telephone number across the top, bore six photographs from a meeting of the Society of Former Special Agents of the FBI, held in October 2002. Two of the photographs were of active-duty Special Agents who conduct community affairs for the Los Angeles FBI and attended the meeting. On November 25, 2002, I participated in a similar covert search of Leung's luggage at LAX when Leung returned from the PRC. That search was also authorized by the FISC. The photographs of FBI Agents observed in Leung's luggage for her outbound flight on November 11, 2002 were not present in her luggage when she returned.

25. On December 9 and 10, 2002, I monitored via closed circuit television as **SMITH** was interviewed by FBI Agents regarding his relationship with Leung and operation of her as an asset. During the interviews, **SMITH** made the following statements:

a. At multiple points in the interview, **SMITH** stated that any information Leung had obtained regarding FBI operations, sources, and the like, must have come from **SMITH**.

b. **SMITH** stated at several points in the interview that he had probably told Leung too much in the course of operating her as an asset.

c. When asked whether he was having a sexual relationship with Leung, **SMITH** first refused to answer the question, and then denied having a sexual relationship. On November 5, 2002, I participated in a FISC-authorized electronic surveillance of **SMITH** and Leung at a hotel in the Los Angeles area. The electronic surveillance revealed **SMITH** and Leung having sexual relations.

d. **SMITH** stated he had traveled to Hong Kong in February 2001, and again a year or so later. Each trip was for about a week. **SMITH** initially stated that he had traveled alone each time and had not met anyone there. **SMITH** also reported business travel to London years earlier, but did not reveal that he had been in London with Leung.

e. Later in the interview, **SMITH** again stated he traveled alone to Hong Kong, and that he had not gone with his wife or son. When specifically asked if Leung had accompanied him, **SMITH** stated, "she's, she was there."

f. Later in the interview, **SMITH** denied that he had traveled with Leung to any overseas location other than Hong Kong. When pressed, **SMITH** stated that he had met with Leung in London, and had flown back to the United States with Leung.

Evidence Showing SMITH Knew Leung Had Unauthorized Contact With The MSS

26. As explained in paragraphs 17 through 19, above, and 27d, below, the documents Leung obtained from the safe in her residence and provided to ASC Carlson on December 11, 2002 derived from a TOP SECRET document.

27. On March 26, 2003, I reviewed a memorandum prepared by SA Todd Wight, summarizing interviews conducted by the FBI of a former FBI SSA on December 19, 2002, January 28, February 3 and February 4, 2003. SA Wight's memorandum also summarized the former FBI SSA's career in the FBI. On March 10, 2003, I reviewed portions of transcripts of those interviews. I have also spoken with SA Duerst, who conducted the first three interviews of the former FBI SSA. From my review of Wight's memorandum and the transcripts, and from my discussions with SA Duerst, I learned that the former FBI SSA provided the following information during the interviews:

a. The former FBI SSA was the supervisor of a Chinese counterintelligence squad in the San Francisco FBI office, and knew both **SMITH** and Leung. Leung provided information to the former FBI SSA and met many times with the former FBI SSA both in Los Angeles and San Francisco, often in the company of **SMITH**.

b. During the second interview on January 28, 2003, the former FBI SSA admitted that he had a long-term sexual relationship with Leung while he was a Special Agent. The former FBI SSA stated that the relationship began in 1991 and continued until 1994. During the third interview on February 3, 2003, the former FBI SSA stated his sexual relationship with Leung began in 1989. On February 4, 2003, in a pre-polygraph examination interview, the former FBI SSA stated that his sexual relationship with Leung began in 1988 and continued until his retirement in 1993. The former FBI SSA further stated that the affair continued in 1997 and 1999.

c. The former FBI SSA did not report his sexual relationship with Leung to the FBI. After he retired, he obtained employment with the University of California. That job requires a security clearance, and provides the former FBI SSA access to classified information. The former FBI SSA had not reported his sexual relationship with Leung to the University of California.

d. The San Francisco FBI had access to a TOP SECRET source, and it was that source which provided the information related in the TOP SECRET document and the related five-page document provided by Leung from her safe described in 16 through 19, above. In 1991, the source provided an audio recording of the conversation between "Luo" and "Mao," transcriptions and/or summaries of which formed the substance of the TOP SECRET document and the related five-page document provided by Leung.

e. When the former FBI SSA listened to the audio recording provided by the source, he recognized the voice of "Luo" as Leung. The former FBI SSA immediately notified **SMITH** in Los Angeles. The former FBI SSA was alarmed, because the recording revealed that Leung was communicating with the MSS unbeknownst to **SMITH** or the FBI, and passing information to the MSS without FBI authorization.

f. **SMITH** immediately traveled to San Francisco from Los Angeles to confer with the former FBI SSA about this development. **SMITH** told the former FBI SSA he was not aware of Leung's alias of "Luo" or her communications with "Mao." **SMITH** was visibly upset at the news of Leung's unauthorized communication with the MSS.

g. The former FBI SSA relied on **SMITH** as Leung's handler to appropriately address the problem. Sometime thereafter, prior to meeting with **SMITH** and Leung again, the former FBI SSA asked **SMITH** if the problem with Leung's unauthorized disclosures had been addressed, and **SMITH** affirmed that it had.

Probable Cause That Relevant Items Are In SMITH's House

28. On March 7, 2003 I spoke with SA Thomas E. Powers, who told me the following: SA Powers has known **SMITH** since the early 1980's, when the two car pooled together to the Los Angeles FBI headquarters building. Through the years, **SMITH** always kept a small calendar/date book in his inside jacket pocket. **SMITH** would frequently refer to the date book and make notations about meetings, telephone numbers, and the like in the book.

29. On March 13, 2003, I spoke with SA Kevin Adley, who participated in the interview of **SMITH** on December 9 and 10, 2002, referenced in paragraph 25, above. SA Adley told me the following: On December 9, **SMITH** referred to a small date book or calendar he had with him to locate a telephone number, and then used his cellular telephone to cancel a lunch meeting he had scheduled that day. (It is my experience that agents frequently note telephone numbers, personal contacts, and meetings regarding their work in personal calendars and date books that they keep with them.)

30. When **SMITH** was interviewed on December 9 and 10, 2002, as referenced in paragraph 25, above, he acknowledged that Leung (and not his wife) had picked him up on his last day of work. **SMITH** also acknowledged he had invited Leung to attend his FBI retirement party in November 2000. He also acknowledged that he had permitted Leung to video tape the party, even though FBI Agents and CIA officers were in attendance. When asked where the tape was, **SMITH** stated "at home."

31. During the same interview, **SMITH** acknowledged that he had decided early in his operation of Leung as an asset to appear with her frequently and publicly as an FBI Agent. My review of evidence seized during the execution of the search warrant at Leung's residence (referenced in paragraphs 11 and 12, above) revealed photographs of **SMITH** with Leung. Also recovered was a photograph of **SMITH** seated at Leung's kitchen table posing near large coin sacks, with many coins in his hands. The photograph appeared to be comic in intent, as **SMITH** had an exaggerated expression and pose.

32. On December 10, 2002, I spoke with SA Powers, who told me the following: On December 9, 2002 **SMITH** consented to a limited search of the upstairs study at his residence, and to a search of the computer in his study. SA Powers conducted such a search that evening, with the assistance of an FBI computer specialist. No relevant evidence was found in the study, and an electronic image of the computer was obtained.

33. On March 14, 2003, I spoke with SA Samuel B. Whitman, who told me the following: SA Whitman coordinated the review of electronic evidence obtained by FBI computer specialists from **SMITH's** computer during the consensual search at **SMITH's** residence on December 9, 2002. That review has been completed, and the electronic image of **SMITH's** computer yielded no relevant information.

OTHER RELEVANT INFORMATION

34. In February 2003, **SMITH** voluntarily produced forty-seven journals containing extensive notes regarding his debriefings of Leung between approximately 1988 and 2000, fourteen video tapes, and miscellaneous documents, all pursuant to a grant of act-of-production immunity.

35. On March 26, 2003, I reviewed a surveillance report and learned the following: On February 13, 2003, FBI Surveillance monitored **SMITH** leaving his residence in his vehicle in the morning. He stopped at a liquor store, a bank, and a gas station, and then at a diner where he ate breakfast alone. He then drove to the building where his attorney has an office. Using a luggage carrier, he carted three large boxes and a briefcase into the building. When he departed several hours later, he had only one box and the briefcase.

36. On February 13, 2003, I spoke with SA Duerst, who told me that on that date he went to the office of **SMITH's** attorney, where the attorney provided SA Duerst with one box containing twenty-five of the forty-seven journals described in paragraph 34, above.

37. The information set forth in paragraphs 34 through 36, above, is not offered as probable cause in support of this warrant.

ITEMS TO BE SEIZED

38. Based on the foregoing, I believe probable cause exists that **JAMES J. SMITH** has violated Title 18, United States Code, Section 793(f) (Gross Negligence in Handling National Defense Information) and that evidence of that violation, and violation of Title 18, United States Code, Section 1343/1346 (Deprivation of Right to Honest Services/Wire Fraud), as more specifically enumerated below, will be found at **SMITH's RESIDENCE**. I therefore request the Court issue a search warrant authorizing a search of **SMITH's RESIDENCE** for the following:

a. any visual recording of **SMITH's** retirement party in November 2000 on printed or magnetic media, specifically including video tape;

b. **SMITH's** calendars and date books for the period 1982 through the present;

c. evidence tending to establish the nature of **SMITH's** relationship with or communication with Leung between 1982 and the present, including letters, cards, facsimiles, diaries, notebooks and other printed materials, audio tapes, photographs, and video tapes; and

d. evidence tending to show travel by **SMITH** and Leung jointly between 1982 and December 2002, including:

i. credit card statements, accommodation receipts, air travel receipts, and itineraries;

ii. photographs, video tapes, letters, notebooks, post cards, and printed images of such travel.

ARREST WARRANT

39. Based on the foregoing, I also believe probable cause exists that **JAMES J. SMITH** has committed a violation of Title 18, United States Code, Section 793(f) (Gross Negligence in Handling National Defense Information), and request that the Court issue a warrant for his arrest.

REQUEST FOR SEALING

40. The criminal investigation described herein is continuing. Based on my training and experience, I believe that disclosure of the contents of this affidavit would seriously impede the investigation by disclosing details of the government's investigation and evidence gathered in connection herewith. The targets of the ongoing investigation would be able to learn the present extent of the government's knowledge. In addition, I believe disclosure of the information contained in this affidavit to Katrina Leung would significantly increase her apprehension of arrest and prosecution and therefore would increase the risk that she would destroy evidence and/or flee. For similar reasons, my request for sealing of the affidavit in support of a warrant to search Leung's residence (referenced in paragraph 11, above) was granted by the Court. Accordingly, I request that the court issue an order sealing this affidavit and the sealing order, until the government notifies the court that it is appropriate to unseal these documents.

RANDALL THOMAS

Special Agent

Federal Bureau of Investigation

Sworn and subscribed to before me

this _____ day of _____, 2003

_____

UNITED STATES MAGISTRATE JUDGE

A F F I D A V I T

INTRODUCTION

I, Randall Thomas, being duly sworn, hereby depose and say:

1. I am a Special Agent (SA) of the Federal Bureau of Investigation (FBI) and have been so employed for five years. I am presently assigned to the FBI's Los Angeles Division. I am currently assigned to a foreign counterintelligence investigation, in the course of which I have received training and briefings on foreign counterintelligence matters. While attending the FBI Academy in Quantico, Virginia, I received a block of instruction in conducting foreign counterintelligence investigations and the special legal provisions, policies, and techniques pertinent thereto.

2. This affidavit is made in support of a complaint and arrest warrant for **KATRINA LEUNG** (a.k.a. CHAN Man Ying, CHEN Wen Ying, LUO Zhongshan, Parlor Maid) for a violation of Title 18, United States Code, Section 793(b) (Unauthorized Copying of National Defense Information with Intent to Injure the United States or Benefit a Foreign Nation).

3. Because this affidavit is being filed for the limited purpose of supporting a warrant to arrest **LEUNG**, I have not related herein all of the facts known to me as part of this investigation.

PROBABLE CAUSE

Overview

4. In the course of conducting an FBI counterintelligence investigation over the last year, and as further detailed below, I have learned that **LEUNG** was operated from the early 1980's until 2002 as an FBI "asset" providing information about the People's Republic of China (PRC) to the FBI. James J. Smith was the FBI Agent who recruited her and was her primary "handler" until he retired from the FBI in November 2000. Smith routinely debriefed **LEUNG** at her residence and on occasion took classified documents there and left them unattended. **LEUNG** surreptitiously photocopied some of them, and documents she obtained in this manner have been recovered from her residence. Investigation has revealed that from the early 1980's until December 2002, Smith and **LEUNG** had a sexual relationship. Investigation has also revealed that in 1991, Smith learned **LEUNG** was providing classified information to PRC intelligence services without authorization by Smith or the FBI, after which Smith continued to allow **LEUNG** access to classified information.

Background Re: Counterintelligence Investigations

5. Beginning in early April 2002 and continuing through the present, I have been assigned to a counterintelligence investigation regarding Smith and **LEUNG**. In the course of this investigation, I have conferred with FBI agents experienced in foreign counterintelligence matters, received training, and reviewed training materials prepared by FBI personnel with expertise in the area of foreign counterintelligence, and learned the following:

a. The Ministry of State Security (MSS) is an intelligence service of the PRC. Among other functions, MSS conducts intelligence operations for the PRC focusing on the United States intelligence community, including the FBI, the Central Intelligence Agency (CIA), the National Security Agency (NSA), the Defense Intelligence Agency, the military, the National Reconnaissance Office, and the National Imaging and Mapping Agency.

b. Persons operating to obtain intelligence for foreign intelligence officers (IOs) are called "agents" or "assets." The IO who operates the agent is called the agent's "handler." To preserve an agent's ability to covertly obtain intelligence, IOs go to great lengths to maintain the secrecy of the agent's identity, even within the IO's own intelligence organization. To this end, agents are commonly assigned code names, and those code names, not the agent's true name, are used in the intelligence organization's communications regarding the agent. These and other measures are designed to protect the identity of the agent from compromise. A "Double Agent" is an agent who is cooperating with an intelligence service of one government on behalf of and under the control of an intelligence or security service of another government, and is manipulated by one to the detriment of another.

c. Agents also travel domestically to thwart detection or to foreign countries beyond the reach of U.S. law enforcement in order to meet with intelligence officers for the purposes of conducting debriefings, receiving tasking and payment, and passing classified and national defense information. d. The information sought by PRC intelligence services includes the identities of FBI employees and the nature of FBI investigations.

i. The identity of FBI employees and information regarding those employees' personal, familial, and professional relationships are of use to hostile intelligence services (including those of the PRC) in their attempts to identify individuals who may have access to classified information and national defense information desired by the PRC, and to identify such individuals' potential vulnerabilities to approach or recruitment by the hostile intelligence service. Because success at such efforts would compromise the United States' counterintelligence capability, intelligence regarding FBI personnel involved in counterintelligence investigations concerns the national defense.

ii. The nature of FBI investigations are of value to hostile intelligence services both because the subject matter of the investigations may reveal foreign intelligence of value to the hostile intelligence service, and because details regarding sensitive or classified methodologies, techniques, and technology employed in FBI investigations enable foreign governments to adopt and/or develop countermeasures to defeat them.

e. Classified information is defined by Executive Order 12958 and its predecessor orders (including E.O. 12356) as follows: information in any form that (1) is owned by, produced by or for, or under the control of the United States Government; (2) falls within one or more of the categories set forth in Section 1.5 of the Order (including intelligence sources or methods, cryptology, military plans, and vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security), and (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security. Where such unauthorized release could reasonably result in "serious" damage, the information may be classified as SECRET. Where such damage is "exceptionally grave," the information may be classified TOP SECRET. Access to classified information at any level may be further restricted through compartmentation in SENSITIVE COMPARTMENTED INFORMATION (SCI) categories. Dissemination of classified information at any level may also be restricted through caveats such as: NOFORN (Not Releasable to Foreign Nationals), NOCONTRACT (Not Releasable to Contractors or Contractor/Consultants), WNINTEL (Warning Notice: Intelligence Sources and Methods Involved), and ORCON (Dissemination and Extraction of Information Controlled by Originator).

Smith's Position And Access To National Defense Information

6. On March 7, 2003, I reviewed portions of Smith's FBI personnel file and security file. I have also spoken with other FBI Special Agents who knew and worked with Smith, including SAs Thomas E. Powers and Edgar Del Rosario. From my review of his personnel files and those conversations I have learned the following:

a. Smith was an FBI Agent in the FBI's Los Angeles office. Smith began his career with the FBI in October 1970 and retired in November 2000. Smith transferred from his first FBI office in Salt Lake City, Utah, to the Los Angeles Office in 1971. In approximately July 1978, Smith was assigned to work on a Foreign Counterintelligence (FCI) squad focusing the PRC. From that time until his retirement Smith worked on FCI PRC matters.

b. Smith was the Acting Supervisor of the Los Angeles FCI China squad from March 1983 through October 1983, and was the Relief Supervisor for the squad in the 1990's. During 1991, Smith was the squad's Acting Supervisor, and became the Supervisory Special Agent (SSA) of the squad in 1996. Smith remained the Los Angeles FBI FCI China squad SSA until his retirement.

7. As an FBI Agent, I know that squad supervisors have an obligation to review the cases being investigated by agents whom they supervise on a regular basis, and that such review entails personal meetings with each agent on the supervisor's squad regarding that agent's cases, as well as review of the FBI file regarding each case. I therefore know that Smith would have had access to and a duty to review cases being worked by the FCI PRC squad, both while he was Acting SSA and SSA, and, in the absence of the squad SSA, while he was the Relief Supervisor. This access and review would have included any SECRET, TOP SECRET, or COMPARTMENTED investigations being worked by the squad.

Smith's Relationship With Katrina LEUNG

8. In early April 2002, Special Agent Steve Conley (now a Supervisory Special Agent at FBI Headquarters) told me that Katrina **LEUNG** (a.k.a. CHAN Man Ying, CHEN Wen Ying, LUO Zhongshan, Parlor Maid) was a long-time FBI asset providing information regarding the PRC. SA Conley told me that he was **LEUNG's** current FBI handler, but that retired SSA James Smith had recruited **LEUNG** as an asset for the FBI in the early 1980's and had been her handler until his retirement in November 2000. My review of portions of **LEUNG's** FBI file in the ensuing months confirmed this.

9. Since approximately December 2001, **LEUNG** has been the subject of surveillance under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. Section 1801, et seq. This surveillance, authorized by the Foreign Intelligence Surveillance Court ("FISC") in Washington, D.C. (established under the authority of Title 50 U.S.C. Section 1803), included covert physical searches, interception of telephone and fax communications, and interception of e-mails. The investigation also included physical surveillance, which did not require a FISC authorization. To the extent this affidavit contains any information which may have at one time been classified, such information has been declassified.

10. On December 20, 2002, I swore out an affidavit before United States Magistrate Judge Jeffrey W. Johnson in support of an application for warrants to search **LEUNG's** residence and business for evidence of violations of: (a) Title 18, United States Code, Section 152 (concealment of assets from bankruptcy trustee; making false oaths and claims in bankruptcy); (b) Title 18, United States Code, Section 157 (bankruptcy fraud); (c) Title 18, United States Code, Section 371 (conspiracy to violate Title 18, United States Code, Sections 152 and 157, and to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of revenue, to wit, income taxes); and (d) Title 18, United States Code, Section 794(a) (Unlawfully Delivering National Defense Information to Aid a Foreign Government). Thereafter, Judge Johnson issued warrants to search both locations in Magis. Case Nos. 02-2680M and 02-2679M, respectively. Judge Johnson also granted my request that the affidavit be sealed.

11. On March 9, 2003, I reviewed an audio/video recording of a consensual interview of **LEUNG** conducted on December 11, 2002 by SA Peter Duerst and SSA D. Brent Robbins. During that interview, both **LEUNG** and the

interviewing agents refer to Smith as "JJ." **LEUNG** admitted to first becoming intimate with Smith in the early eighties " (v)ery long ago, but I cannot tell you what year."

Smith's Access To Classified Materials

12. As related in paragraph 7, above, Smith's position as both a Special Agent and later a Supervisory Special Agent of the Los Angeles FBI Chinese FCI squad afforded him access to classified material relating to Chinese FCI matters.

13. On March 10, 2003, I reviewed a report prepared by SA Stephen Phillips on February 5, 2003. From that review I learned the following:

a. Prior to becoming a Special Agent, Phillips was a support employee in the FBI Los Angeles Office assigned to counterintelligence matters. His duties between June 1997 and June 2000 included logging TOP SECRET files and documents in and out of the Secure Compartmented Information Facility (SCIF).

b. The SCIF is a vault containing safes for the storage of TOP SECRET documents. Security regulations dictate that TOP SECRET materials be stored in a SCIF and be released from the SCIF only under certain conditions and pursuant to controls that assure the TOP SECRET documents are securely maintained.

c. During the period that SA Phillips worked in the SCIF, authorized personnel generally reviewed TOP SECRET documents in the SCIF. Occasionally, supervisory personnel would sign for TOP SECRET documents, take them from the SCIF to review in their offices, and then return the documents to SA Phillips in the SCIF. With the exception of SSA Smith, supervisory personnel always promptly returned TOP SECRET documents to the SCIF after reviewing them.

d. On at least one occasion when Smith checked out a TOP SECRET document from the SCIF, he did not return the document until the next day or perhaps the day after that. SA Phillips believed this happened in 1999. No other FBI personnel ever retained TOP SECRET documents overnight that they had checked out from SA Phillips in the SCIF.

Evidence Showing LEUNG Obtained National Defense Information From Smith

14. On December 12, 2002, I spoke with FBI Assistant Section Chief (ASC) Bruce Carlson, who told me that on December 11, 2002, ASC Carlson met **LEUNG** at her residence so that she could voluntarily provide the FBI with certain items she had discussed during an interview with ASC Carlson that day. In the presence of ASC Carlson and SA Del Rosario, **LEUNG** voluntarily removed a document from a locked safe in the upstairs bedroom suite and provided it to ASC Carlson. As referenced in paragraph 22a, below, **LEUNG** admitted that she surreptitiously took this document from Smith.

15. I have reviewed a photocopy of that document and noted that it appears to include excerpts of transcripts and/or summaries of a conversation or conversations between a female named "Luo" and someone named "Mao." There are five pages. (As discussed in paragraph 22f, below, **LEUNG** stated during interviews that "Mao" was her MSS handler, and "Luo" was her MSS alias.)

16. On December 20, 2002, I spoke with SA Duerst and ASC Carlson, who told me the following: Both reviewed photocopies of the document provided by **LEUNG** from her safe. On December 16, 2002, they went to the FBI Los Angeles SCIF to examine TOP SECRET FBI documents. The documents had been transmitted by secure means to the FBI Los Angeles Division from FBI Headquarters in Washington, DC. The documents contain verbatim transcripts and several summaries of conversations between a "Mao" and a "Luo." They learned in their review that the five-page document provided by **LEUNG** consists of identical portions of the TOP SECRET document they examined, although the line spacing and fonts differ.

17. On December 11, 2002, SA Bruce Carlson and SA Edgar Del Rosario engaged in a recorded conversation with **LEUNG**. I have reviewed a transcript of that conversation. During that conversation, **LEUNG** read the five-page document and stated that she recognized the document as her conversation with "Mao."

18. My training, experience, and review of the excerpted five-page document provided by **LEUNG** and the TOP SECRET document containing essentially the same information satisfy me that both documents contain national defense information within the meaning of Title 18, United States Code, Section 793(b).

19. On December 12, 2002, I participated in a limited consensual search of **LEUNG's** residence in San Marino, California. Also present and assisting in the search was SA Stephen Lawrence. Shortly thereafter, and again on March 7, 2003, SA Lawrence told me that while searching a shelf in a bookcase to the left of a desk on the second floor close to the stairs, he found the following documents: (1) a FBI Los Angeles NSD-2 squad telephone directory dated December 20, 1994; (2) a telephone list relating to an FBI investigation codename "Royal Tourist"; (3) a SECRET FBI memorandum regarding Chinese fugitives dated June 12, 1997; and (4) a FBI Legat Directory dated March 17, 1994.

20. On March 11, 2003, I spoke with FBI SSA Serena Alston, who told me that "Royal Tourist" was the code name of an espionage investigation of Peter Lee. Lee was employed by TRW in California and admitted passing SECRET restricted information to the PRC during travel to the PRC in 1985. In 1997, Lee pled guilty to Title 18, United States Code, Section 793(d) (Willful Transmission of National Defense Information to a Person Not Entitled to Receive It).

21. Based on my training, experience, and review of the SECRET FBI memorandum dated June 12, 1997 found in **LEUNG's** residence, I believe that the document contains national defense information within the meaning of Title 18, United States Code, Section 793(b). This is because the 1997 memorandum was classified SECRET and discussed reporting of national defense information by a confidential FBI source.

22. On December 18, 2002, I spoke with ASC Carlson and SA Duerst who told me they had interviewed **LEUNG** over the course of several days between December 11 and December 21, 2002, and on January 6, 2003. These interviews were all videotaped and I have reviewed portions of those recordings. Based on my conversation with ASC Carlson and SA Duerst, and my review of the recordings, I know the following occurred (among other things) during **LEUNG's** interviews:

a. With respect to the five-page document described in paragraphs 14 and 15, above, **LEUNG** at one point said that she did not remember how she obtained the document, but later stated "I think I sneaked it." **LEUNG** also stated that although Smith sometimes allowed her to review classified documents, he never permitted her to retain them.

b. During the interview, **LEUNG** was shown copies of the documents described in paragraph 19, above. The copies were all stapled together in a packet. When SA Duerst displayed this packet to **LEUNG** during the interview, **LEUNG** specifically admitted she took the NSD-2 squad telephone directory, and generally admitted surreptitiously taking and copying documents from Smith.(1)

c. **LEUNG** also admitted that Smith would leave his briefcase open, and that the file-folder pockets in the briefcase often contained documents, with the text facing out. **LEUNG** stated this enabled her to see documents that she wanted, and that she would remove them and copy them without Smith's knowledge when he left his briefcase unattended.

d. **LEUNG** admitted that she made copies of documents from Smith's briefcase using either a photocopier or facsimile machine in her house. Generally, she stated that she would make handwritten notes from documents she surreptitiously copied, and then discard the copies in the trash.

e. **LEUNG** admitted that she also made notes regarding documents she surreptitiously obtained from Smith without copying the documents. **LEUNG** also made notes regarding information Smith told her. Over the years, **LEUNG** admitted that she provided intelligence she gained in this manner to the MSS.

f. **LEUNG** admitted that she had an MSS handler codenamed "Mao." "Luo" was her MSS alias, provided to her by a high ranking PRC official.

23. Investigation has revealed that Smith continued to provide information about the FBI and FBI Agents to **LEUNG** after he retired. On November 11, 2002, I participated in a FISC-authorized covert search of **LEUNG's** luggage at Los Angeles International Airport (LAX) prior to **LEUNG's** departure for the PRC. In **LEUNG's** luggage there was a facsimile cover sheet from Smith to **LEUNG**. A second page, bearing the same facsimile telephone number across the top, bore six photographs from a meeting of the Society of Former Special Agents of the FBI, held in October 2002. Two of the photographs were of active-duty Special Agents who conduct community affairs for the Los Angeles FBI and attended the meeting. On November 25, 2002, I participated in a similar covert search of **LEUNG's** luggage at LAX when **LEUNG** returned from the PRC. That search was also authorized by the FISC. The photographs of FBI Agents observed in **LEUNG's** luggage for her outbound flight on November 11, 2002 were not present in her luggage when she returned.

24. On December 9 and 10, 2002, I monitored via closed circuit television as Smith was interviewed by FBI agents regarding his relationship with **LEUNG** and operation of her as an asset. During the interviews, Smith made the following statements:

a. At multiple points in the interview, Smith stated that any information **LEUNG** had obtained regarding FBI operations, sources, and the like, must have come from Smith.

b. Smith stated at several points in the interview that he had probably told **LEUNG** too much in the course of operating her as an asset.

c. When asked whether he was having a sexual relationship with **LEUNG**, Smith first refused to answer the question, and then denied having a sexual relationship. On November 5, 2002, I participated in a FISC-authorized electronic surveillance of Smith and **LEUNG** at a hotel in the Los Angeles area. The electronic surveillance revealed Smith and **LEUNG** having sexual relations.

d. Smith stated he had traveled to Hong Kong in February 2001, and again a year or so later. Each trip was for about a week. Smith initially stated that he had traveled alone each time and had not met anyone there. Smith also reported business travel to London years earlier, but did not reveal that he had been in London with **LEUNG**.

e. Later in the interview, Smith again stated he traveled alone to Hong Kong, and that he had not gone with his wife or son. When specifically asked if **LEUNG** had accompanied him, Smith stated, "she's, she was there."

f. Later in the interview, Smith denied that he had traveled with **LEUNG** to any overseas location other than Hong Kong. When pressed, Smith stated that he had met with **LEUNG** in London, and had flown back to the United States with **LEUNG**.

Evidence Showing Smith Knew LEUNG Had Unauthorized Contact With The MSS

25. As explained in paragraphs 14 through 18, above, and 26d, below, the documents **LEUNG** obtained from the safe in her residence and provided to ASC Carlson on December 11, 2002 derived from a TOP SECRET document.

26. On March 26, 2003, I reviewed a memorandum prepared by SA Todd Wight, summarizing interviews conducted by the FBI of a former FBI SSA on December 19, 2002, January 28, February 3 and February 4, 2003. SA Wight's memorandum also summarized the former FBI SSA's career in the FBI. On March 10, 2003, I reviewed portions of transcripts of those interviews. I have also spoken with SA Duerst, who conducted the first three interviews of the former FBI SSA. From my review of Wight's memorandum and the transcripts, and from my discussions with SA Duerst, I learned that the former FBI SSA provided the following information during the interviews:

a. The former FBI SSA was the supervisor of a Chinese counterintelligence squad in the San Francisco FBI office, and knew both Smith and **LEUNG**. **LEUNG** provided information to the former FBI SSA and met many times with the former FBI SSA both in Los Angeles and San Francisco, often in the company of Smith.

b. During the second interview on January 28, 2003, the former FBI SSA admitted that he had a long-term sexual relationship with **LEUNG** while he was a Special Agent. The former FBI SSA stated that the relationship began in 1991 and continued until 1994. During the third interview on February 3, 2003, the former FBI SSA stated his sexual relationship with **LEUNG** began in 1989. On February 4, 2003, in a pre-polygraph examination interview, the former FBI SSA stated that his sexual relationship with **LEUNG** began in 1988 and continued until his retirement in 1993. The former FBI SSA further stated that the affair continued in 1997 and 1999.

c. The former FBI SSA did not report his sexual relationship with **LEUNG** to the FBI. After he retired, he obtained employment with the University of California. That job requires a security clearance, and provides the former FBI SSA access to classified information. The former FBI SSA had not reported his sexual relationship with **LEUNG** to the University of California.

d. The San Francisco FBI had access to a TOP SECRET source, and it was that source which provided the information related in the TOP SECRET document and the related five-page document provided by **LEUNG** from her safe described in paragraphs 14 through 18, above. In 1991, the source provided an audio recording of the conversation between "Luo" and "Mao," transcriptions and/or summaries of which formed the substance of the TOP SECRET document and the related five-page document provided by **LEUNG**.

e. When the former FBI SSA listened to the audio recording provided by the source, he recognized the voice of "Luo" as **LEUNG**. The former FBI SSA immediately notified Smith in Los Angeles. The former FBI SSA was alarmed, because the recording revealed that **LEUNG** was communicating with the MSS unbeknownst to Smith or the FBI, and passing information to the MSS without FBI authorization.

f. Smith immediately traveled to San Francisco from Los Angeles to confer with the former FBI SSA about this development. Smith told the former FBI SSA he was not aware of **LEUNG's** alias of "Luo" or her communications with "Mao." Smith was visibly upset at the news of **LEUNG's** unauthorized communication with the MSS.

g. The former FBI SSA relied on Smith as **LEUNG's** handler to appropriately address the problem. Sometime thereafter, prior to meeting with Smith and **LEUNG** again, the former FBI SSA asked Smith if the problem with **LEUNG's** unauthorized disclosures had been addressed, and Smith affirmed that it had.

The LEUNGs' False Tax Returns and Mortgage Deductions

27. As further detailed in paragraphs 28 through 33 below, the **LEUNGs** claimed mortgage interest deductions for the mortgage on their residence the residence was not in truth mortgaged. The **LEUNGs** were actually making mortgage payments to a foreign bank account they themselves controlled, even though the account was held in the name of their purported mortgage holder. They also did not report significant income from a foreign corporation and from the FBI.

28. On April 1, 2003, I conferred with SA Stephen Lawrence, who informed me that he is a licensed Certified Public Accountant (CPA), and that he had reviewed financial records pertaining to the **LEUNGs** as more specifically set forth below. On April 3, 2003, I conferred with FBI Financial Analyst (FA) [deleted], who related to me the results of his investigation of **LEUNG's** finances. From those discussion, I learned the following:

a. The **LEUNGs'** personal tax returns for the years 1987 through 2001 were obtained from their paid tax preparer pursuant to a federal grand jury subpoena.

b. On January 8, 2003, Northern Telecom (Asia) Limited (Northern Telecom) was served with a subpoena for documents related to any contacts between Northern Telecom and **LEUNG**. On January 21, 2003, Northern Telecom provided documents responsive to that subpoena, which SA Stephen Lawrence reviewed. His review revealed the following:

i. On or about October 1, 1990, a "Representative Agreement" was signed between Northern Telecom, a corporation incorporated under the laws of Hong Kong, and Merry Glory Ltd., a corporation organized and existing under the laws of Hong Kong. Under the terms of the Representative Agreement, Northern Telecom appointed Merry Glory Ltd. as its representative with respect to the establishment of a joint venture in the PRC for the purposes of manufacturing and selling Northern Telecom's DMS-100 family of digital switching systems. Also under the terms of the Representative Agreement, Merry Glory Ltd., which was to cause its services to be performed on its behalf by **LEUNG**, was to be paid a fee equivalent to three percent (3%) of the initial registered capital of the joint venture.

ii. On or about July 7, 1995, a check drawn on Northern Telecom's account was made payable to the order of Merry Glory, Ltd. in the amount of $872,895.

iii. On or about November 19, 1996, a check drawn on Northern Telecom's account was made payable to the order of Merry Glory, Ltd. in the amount of $321,416. As referenced in paragraph 33, below, **LEUNG** admitted that she controlled Merry Glory, Ltd.

c. SA Stephen Lawrence reviewed the **LEUNGs'** personal tax returns for 1987 through 2001, referenced above. His review indicated that the payments received from Northern Telecom were not reported on the **LEUNGs**' personal tax returns.

d. A review of public records available through the Choice Point Online database revealed that the **LEUNG** residence (located at 2260 Robles Avenue, San Marino, California) was refinanced by a company named Right Fortune, Ltd., (RFL), on March 17, 1998. A trust deed was issued by RFL to Brindle Trust on the same date. A review of public records available through the Lexis/Nexis database in conjunction with a review of records seized pursuant to the search warrant for **LEUNG's** residence, referenced in paragraph 10, above, revealed that the **LEUNGs** are the trustees of Brindle Trust.

e. The tax returns referenced above show that the **LEUNG's** claimed mortgage interest deductions in the amounts of $46,420, $46,420, $39,572, and $37,485 for mortgage payments made to RFL for the tax years 1998, 1999, 2000, and 2001, respectively. The tax returns also reflect that 2260 Robles Avenue is the **LEUNGs'** home address.

f. [deleted]'s financial investigation revealed that an account in the name of RFL is located at Hang Seng Bank Limited (HSBL) in Hong Kong. Financial analysis of the RFL account and the **LEUNGs'** joint account at Wells Fargo Bank revealed that in 1999, 2000, and 2001, **LEUNG** paid twelve monthly checks each year totaling, over the three-year period, $216,072 to RFL. Each monthly check purported to represent a mortgage payment in the amount of $6,002, and was made payable to RFL. All the checks were signed by **LEUNG**.

g. [deleted]'s investigation also determined that fifty-five cancelled checks were drawn between approximately April 22, 1998 and approximately August 31, 2002 on the **LEUNGs'** Wells Fargo account. They were made payable to RFL and deposited in RFL's account at HSBL. Of the fifty-five checks, thirteen appeared to be endorsed by **LEUNG's** husband (from May 28, 1998 through approximately June 21, 1999), and forty appeared to be endorsed by Kit Keung Leung ("Keung") (believed to be the uncle of **LEUNG's** husband in Hong Kong) (from March 24, 1999 through August 31, 2002). One of the checks' endorsements was unintelligible and one check, although indicated in bank statements, could not be located by the bank. On October 9, 2002, a FBI language specialist verified that **LEUNG's** husband's signature appeared in Chinese on the back of the thirteen checks described above.

29. As discussed above, **LEUNG** was the subject of FISC-authorized surveillance, including interception of facsimile and e-mail communications. On April 7, 2003, I reviewed some of the e-mails and facsimiles that were intercepted. Some of these communications were in the English language, while others were in Chinese (sometimes the Mandarin dialect, sometimes the Cantonese dialect). The Chinese communications had been translated by one of several FBI language specialists who are fluent in both Chinese (Mandarin and Cantonese dialects) and English. My review of the e-mails and facsimiles revealed the following:

a. On or about June 8, 2002, **LEUNG's** husband sent a reply e-mail to Keung (the individual who endorsed the forty checks referenced in paragraph 28g, above) acknowledging his receipt of Keung's prior e-mail. (The prior e-mail was attached to **LEUNG's** husband's reply to Keung). The prior e-mail listed account balances for, among other accounts, an HSBL bank account in the name of RFL.

b. On or about July 3, 2002, a facsimile was sent from the **LEUNGs'** residence to Keung which contained two messages. The first message reflected, among other things, that Kenneth Mankin Chan ("Chan," believed to be **LEUNG's** brother) needed $250,000 and that $70,000 had already been remitted. Aside from the $90,000 from the Bank of China (BOC), Keung was asked to "please remit another $90,000 from Right Fortune." (BOC was formerly Hua Chiao Commercial Bank, and most of the records concerning BOC transactions pertinent to this investigation reference that former name.) The second message instructed "Please remit the other $90,000 from Hang Seng Bank." It also requested that a receipt be returned via facsimile after each remittance.

c. On July 4, 2002, Keung sent a facsimile cover sheet and a BOC customer advice form to **LEUNG's** husband at their residence and to Chan. The cover sheet reflected that a remittance in the amount of $90,000 had been carried out earlier that day from Keung's BOC account to Chan's account at East West Bank. It also reflected account balances for Keung's BOC account, the RFL account at HSBL, and a HSBL account held jointly by **LEUNG's** husband and Keung.

d. On July 9, 2002, Keung sent another facsimile cover sheet and a BOC customer advice form to **LEUNG's** husband at the **LEUNG** residence. The cover sheet reflected that Keung had just wired $90,000 from his BOC account to Chan's account at East West Bank. It also reflected updated account balances for Keung's BOC account, the RFL account at HSBL, and a HSBL account held jointly by **LEUNG's** husband and Keung.

e. On July 23, 2002, Keung sent an e-mail to **LEUNG's** husband acknowledging that RFL's checks were received on that day.

30. On April 1, 2003, SA Stephen Lawrence informed me that he had also reviewed portions of **LEUNG's** FBI file regarding payments made to her by the FBI. His review indicated that between 1983 and 2002, the FBI paid **LEUNG** approximately $1,197,449 for expense reimbursement and approximately $521,440 for services provided as an FBI asset. Between 1987 and 2001 (the years for which the FBI was able to obtain corresponding tax returns, as referenced

in paragraph 28a, above) the FBI paid **LEUNG** approximately $1,097,585 for expense reimbursement and approximately $435,575 for services provided as an FBI asset. SA Lawrence also found records in **LEUNG**'s FBI file showing that, on September 25, 1985, Smith informed **LEUNG** that any payments she received from the FBI had to be considered income.

31. On April 4, 2003, I reviewed additional records from **LEUNG**'s FBI file which indicated that on May 23, 1996, Smith advised **LEUNG** that "all payments are to be reported to the Internal Revenue Service (IRS) as income."

32. SA Lawrence's review of the **LEUNGs'** personal tax returns for 1987 through 2001 revealed that the payments **LEUNG** received for services provided as an FBI asset were not reported on the **LEUNGs'** personal tax returns as required by the Internal Revenue Code.

33. My review of interviews of **LEUNG** referenced in paragraph 22, above, revealed that **LEUNG** admitted controlling overseas accounts in Hong Kong in the name of Merry Glory and Right Fortune. **LEUNG** further stated she used such accounts to create the appearance of a separate creditor to which she made mortgage payments, when in fact she was paying herself. **LEUNG** further stated that she bought her residence about twelve years ago for about $1.4 million. She made a down payment of half that amount and financed the balance. When she received money from Northern Telecom, she deposited the funds into her Right Fortune account, and used the funds to pay the balance of her mortgage. This created the appearance she had refinanced with another company, and enabled her to falsely claim mortgage interest deductions for her residence after she had in fact paid her mortgage in full.

CONCLUSION

34. Based on the foregoing, I believe probable cause exists that **KATRINA LEUNG** has committed a violation of Title 18, United States Code, Section 793(b) (Unauthorized Access and Willful Retention of Documents Relating to the National Defense), and request that a warrant issue for her arrest.

REQUEST FOR SEALING

35. The criminal investigation described herein is continuing. Based on my training and experience, I believe that disclosure of the contents of this affidavit would seriously impede the investigation by disclosing details of the government's investigation and evidence gathered in connection herewith. The targets of the ongoing investigation would be able to learn the present extent of the government's knowledge. In addition, I believe disclosure of the information contained in this affidavit to Smith would significantly increase his apprehension of arrest and prosecution and therefore would increase the risk that he would destroy evidence and/or flee. For similar reasons, my request for sealing of the affidavit in support of a warrant to search **LEUNG**'s residence (referenced in paragraph 10, above) was granted by the Court. Accordingly, I

request that the court issue an order sealing this affidavit and the sealing order, until the government notifies the court that it is appropriate to unseal these documents.

_____

RANDALL THOMAS

Special Agent

Federal Bureau of Investigation

Sworn and subscribed to before me

this _____ day of _____, 2003

_____

UNITED STATES MAGISTRATE JUDGE

1. On March 6, 2003, I reviewed portions of video/audio recordings of the consensual interviews of **LEUNG** conducted by SA Duerst and ASC Carlson on December 13, and 17, 2002. That review leads me to believe it is possible **LEUNG** did not explicitly admit stealing the 1997 memorandum, as indicated in my affidavit of December 20, 2002, referenced in paragraph 10, above. My review does indicate that **LEUNG** generally admitted surreptitiously taking and copying such documents from Smith.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[October 23, 2001]

UNITED STATES OF AMERICA	)	CRIMINAL NO.
	)	
v.	)	Count 1: Attempted Espionage
	)	18 U.S.C. § 794(a)
BRIAN PATRICK REGAN,	)	
	)	
Defendant	)	

INDICTMENT

October 2001 Term - At Alexandria

THE GRAND JURY CHARGES THAT:

GENERAL ALLEGATIONS

At all times material to this indictment:

1. The defendant BRIAN PATRICK REGAN was born October 23, 1962, in Queens, New York. He enlisted in the United States Air Force (USAF) in August 1980, and served continuously until August 31, 2000, when he retired at the rank of E-7 (MSGT). His primary specialty in the USAF was signals intelligence analysis.

2. From 1991 to 1994, REGAN was assigned to the Air Force Intelligence Support Group at the Pentagon, first as a Communications Denial Analyst specializing in targeting the communications systems of military adversaries of the United States, and then as an Air Defense Analyst. His 1992 performance evaluation noted he was a "recognized expert on air defense systems in the Middle East and former Soviet Union." From mid-1994 to mid-1995, he was assigned to the Joint Military Intelligence College, as a student.

3. From in or about July 1995 until on or about August 31, 2000, REGAN was detailed to the headquarters of the National Reconnaissance Office (NRO), in the Eastern District of Virginia. The NRO is an agency of the United States Department of Defense responsible for building and operating the nation's reconnaissance satellites, and is part of the United States Intelligence Community. At the NRO, Regan was assigned to an office named the Signals Intelligence Applications Integration Office, which is responsible for focusing signals intelligence support for tactically deployed military units.

4. In or about October 2000, REGAN became employed by TRW Incorporated (TRW), in the Eastern District of Virginia, to serve as a contractor employee to the NRO, in generally the same capacity as he had served while detailed from the USAF to the NRO.

5. On or about July 30, 2001, REGAN began his TRW assignment at the NRO, at a facility in the Eastern District of Virginia.

Oath of Office and Security Acknowledgments

6. Upon enlisting in the USAF, REGAN signed an oath of office in which he swore that: "I . . . do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and

domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

7. Executive Order 12958 and its predecessor orders establish that information in any form that (1) is owned by, produced by or for, or under the control of the United States Government, and (2) falls within any of the categories set forth in Section 1.5 of the order (including intelligence sources or methods; cryptology; military plans; and vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security), may be classified by an original classification authority who determines that the unauthorized disclosure of such information reasonably could be expected to result in damage to the national security. Where such damage would be "serious", the information may be classified as SECRET. Where such damage would be "exceptionally grave", the information may be classified as TOP SECRET. Access to classified information at any level may be further restricted through compartmentation in SENSITIVE COMPARTMENTED INFORMATION (SCI) categories. Dissemination of classified information at any level may also be restricted through caveats such as NOFORN (Not Releasable to Foreign Nationals).

8. REGAN held TOP SECRET clearances continuously from the time he joined the USAF in 1980 until on or about August 23, 2001, and was indoctrinated for access to a variety of SCI programs. Specifically:

a. on or about November 25, 1991, REGAN signed aClassified Information Nondisclosure Agreement in which heacknowledged that:

> ...2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.
>
> 3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) I have been given prior written notice of authorization from the United States Government Department or Agency . . . responsible for the classification of the information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply withlaws and regulations that prohibit the unauthorized disclosure of classified information.
>
> 4. 1 have been advised that . . . any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and 952, Title 18, United States Code,...
>
> 7. I understand that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of, or under the control of, the United States Government, unless and until otherwise determined by an authorized official or final-ruling of a court of law. . . .

b. During the course of his USAF service, REGAN was granted access to SCI information, and in that connection signed nondisclosure forms acknowledging his responsibilities regarding such information. For example, on or about July 31, 1995, he signed an SCI Nondisclosure Agreement, in which he acknowledged that he had received security indoctrinations and understood, among other things, that he had been advised that the direct or indirect unauthorized disclosure by him of SCI information "could cause irreparable injury to the United States, and be used to advantage by a foreign nation," and pledged that "I will never divulge such information, in any form or any manner, to anyone who is not authorized to receive it, without prior written authorization from an appropriate official of the United States Government." He also acknowledged that he had been advised that such unauthorized disclosure could constitute violations of criminal laws including Title 18, United States Code, Section 794.

c. On or about August 30, 2000, in connection with his retirement from the USAF, REGAN signed a Security Debriefing Acknowledgment in which he stated that he had been reminded of his continuing obligation to comply with the terms of the Agreement he had signed on or about, July 31, 1995.

d. Also on or about August 30, 2000, REGAN signed a Security Termination Statement in which he acknowledged that he understood that "any unauthorized disclosure of information affecting the national defense is prohibited and punishable by law" and agreed that: "I shall not knowingly or wilfully divulge, reveal, or transmit classified information orally or in writing or by any other means, to any unauthorized person or agency."

e. On or about July 30, 2001, REGAN signed another SCI Nondisclosure Agreement, in order for his access to SCI to be reinstated.

Regan's 1999-2000 Intelink searches

9. Intelink is the United States Intelligence Community's classified version of the Internet, and can be accessed only by persons holding appropriate security clearances.

10. During at least mid-1999 until his retirement from the USAF, REGAN, from his NRO office, used Intelink to access classified United States intelligence information related to the military preparedness of Iran, Iraq, Libya, and the People's Republic of China, which information was unrelated to his official duties.

Regan's June-July 2001 activities

11. On or about the evening of Wednesday, June 13, 2001, REGAN accessed the Internet using a public-access computer at the Crofton Public Library in Crofton, Maryland, which is located near his residence. He conducted a series of Internet searches and viewed files including those bearing the following names:

"Embassies of the Arab World"

"Embassies: Laos thru Luxembourg Embassy Resource"

"Foreign Embassies in Paris"

"Foreign Embassies in Switzerland"

"Libyian Embassies and Consulates of Libya @ Embassy World"

"People's Bureau of the Socialist People's Libyan Arab Jamahiriya"

In addition, he accessed a web site containing the addresses and telephone numbers of Embassies of Arab countries located in Washington, D.C., as well as web sites using the following links, among others:

"Iraq"

"Aljamahiriya Arabe Libyenne Populaire Socialiste"

"Libyan Arab Jamahiriya"

"Saudi Arabia"

"Sweden/Suede"

12. On or about Sunday, June 24, 2001, REGAN accessed the Internet using a public-access computer at the Crofton Public Library, and conducted a series of Internet searches using the following terms:

"iraqi embassy"

"iraqi embassy swiss"

"embassies in Switzerland"

"Foreign Embassies in france"

"Foreign Embassies in germany"

"Foreign Embassies in germany of iraq"

"Foreign Embassies in germany of libya"

"swiss hostels".

He printed out a number of the pages he viewed, and took handwritten notes of information he viewed.

13. On or about Tuesday, June 26, 2001, REGAN boarded a Lufthansa Airlines plane at Dulles International Airport, in the Eastern District of Virginia, and flew to Berlin, Germany. According to the Lufthansa Airlines itinerary, he was due to then fly on to Munich, Germany. On or about Tuesday, July 3, 2001, he flew back from Berlin to Dulles International Airport. This travel was not in connection with any official duties.

14. A suitcase that REGAN checked at Dulles International Airport, for his June 26, 2001, flight to Germany, contained glue and packing tape.

15. On or about Monday, July 30, 2001, REGAN began his TRW assignment at NRO, working at an NRO facility in the Eastern District of Virginia. His initial duties were limited to taking several months of NRO computer-based training necessary for recertification to the position he was to occupy. This training did not require REGAN to access Intelink.

Regan's August 2001 activities

16. At approximately 8:00 am on or about Wednesday, August 1, 2001, REGAN received access to the NRO computer system for purposes of his TRW training and assignment. Beginning at approximately 8:40 am, REGAN, in his NRO office, accessed Intelink through the NRO computer system, and opened and viewed several Intelink files containing classified information relating to a particular Libyan missile test range.

17. On or about Thursday, August 2, 2001, REGAN volunteered for a temporary duty assignment to Europe from mid- to late-August 2001, but was rejected.

18. On every weekday from Monday, August 6, 2001, through Thursday, August 23, 2001 -- except for five weekdays when he was in training -- REGAN accessed Intelink and viewed classified information relating to military facilities in Iraq, Iran, Libya, and the People's Republic of China, as well as classified documents relating to current United States intelligence collection capabilities against those countries. The classified documents and information were not related to REGAN's official duties or training.

19. On or about Saturday, August 11, 2001, REGAN purchased an airline ticket for travel from Dulles International Airport,in the Eastern District of Virginia, on Thursday, August 23, 2001, to Zurich, Switzerland, via Frankfurt, Germany, returning by the same route on August 30, 2001. This travel was unrelated to the official duties of Regan.

20. On or about Wednesday, August 15, 2001, REGAN, in his NRO office, accessed Intelink and viewed two classified images. One was a recent view of a Surface-to-Air Missile launch facility in Country A. The other was a recent view of a Surface-to-Surface Missile facility in Country B. Each classified image bore the geocoordinates for the facility depicted. A torn piece of paper, which was recovered from the burn bag in REGAN's NRO office on or about Friday, August 17, 2001, bore handwritten notations of those geocoordinates and other words and numbers that appeared on the classified images.

21. On or about Thursday, August 23, 2001, at approximately 8:03 am, REGAN, in his NRO office, accessed Intelink and viewed a file containing classified text and a related classified image, dated "21 August 01", pertaining to current launch preparations of a particular Intermediate Range Ballistic Missile in Country B. While he was viewing the classified image, REGAN made handwritten notations in a small spiral notebook that he had removed from his front trousers pocket. At the time he made these notations, the notebook was turned sideways.

22. On Thursday, August 23, 2001, beginning at approximately 10:49 am, REGAN left his NRO office and traveled to Dulles International Airport, in the Eastern District of Virginia, where he checked a suitcase onto his flight to Europe. He then returned to his NRO office. At approximately 3:55 pm, REGAN again left his NRO office, and returned to Dulles International Airport, where he passed through security and

boarded a shuttle vehicle bound for the international departure area terminal from which his flight to Europe was to depart. At approximately 5:05 pm, while on the shuttle, he was approached by special agents of the FBI, and subsequently placed under arrest.

23. At the time of his arrest, REGAN carried in his front right trousers pocket a small 3-by-5-inch spiral-bound notebook containing various handwritten notations. Only one page of the notebook contains notations written sideways. These notations consist of the term "21 Month" followed by a series of apparently unrelated innocuous words that in fact constitute a personal system of code representing the geocoordinates of the classified image viewed by REGAN that morning, as described in paragraph 21 above.

24. At the time of his arrest, REGAN carried in his wallet a piece of paper bearing handwritten notations of a series of apparently unrelated innocuous words that in fact are a personal system of code representing the geocoordinates, and other identifying information, of the two classified images REGAN had viewed in his office on August 15, 2001, as described in paragraph 20 above. Also carried by REGAN in his wallet was a piece of paper bearing the street addresses and international telephone numbers for the Embassy of the People's Republic of China in Bern, Switzerland, the Embassy of the People's Republic of China in Vienna, Austria, the Embassy of Iraq in Vienna, Austria, and the Iraqi Interests Section in Paris, France.

25. At the time of his arrest, REGAN carried an accordion folder containing:

a. Four rubber finger-tip protectors.

b. One inner folder containing:

i. three copies of four pages bearing a series of handwritten three-digit number groups, each page bearing the handwritten title of "LETTER" followed by an alphanumeric;

ii. two copies of a page bearing a series of typed alphanumeric groupings;

iii. two copies of a typed page bearing fifteen lines of numbers grouped in series of three;

iv. four blank business-sized envelopes;

v. white adhesive labels; and

vi. Lufthansa/United Airlines tickets issued to Brian Regan; and

c. A second inner folder containing a sheet of paper bearing unclassified descriptions of classified technical training courses and materials which were part of REGAN's NRO training curriculum. The descriptions demonstrated the classification level and type of classified United States information to which REGAN had access.

26. At the time of his arrest, REGAN was carrying a blue canvas bag containing a pocket-sized battery-operated Garmin GPS III Plus global positioning system (GPS) receiver, and six batteries.

27. Also in the blue canvas bag that REGAN was carrying at the time of his arrest were three latex gloves, a roll of Scotch tape, a roll of Scotch mailing tape, and a current United States tourist passport issued to Brian Patrick Regan.

28. At the time of his arrest, REGAN carried a folded piece of paper concealed in his right shoe, between the innersole and a removable sole. On the piece of paper were handwritten the street addresses of the Embassies of the People's Republic of China in Bern, Switzerland, and Paris, France, the PRC Consulate in Paris, France, the Embassy of Iraq in The Hague, Netherlands, and the Iraqi Interests Section in Paris, France.

29. The bag checked by REGAN at Dulles international Airport on or about August 23, 2001, contained, among other things, a plastic box, with lid, measuring approximately 14 inches long by 12 inches wide by 6 inches deep, as well as six unused white plastic garbage bags, a roll of Scotch packing tape, and a bottle of Elmer's glue.

30. On or about Thursday, August 23, 2001, a computer diskette located in REGAN's residence contained a letter, dated August 31, 2000, addressed to an individual in the Canary Islands, Spain, and stating "I am interested in offshore IBC and bank accounts/credit cards" and requesting information.

COUNT ONE

(18 U.S.C. § 794(a))
(Attempted Espionage)

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges and incorporates by reference the GENERAL ALLEGATIONS of this Indictment.

2. Between on or about June 1, 2001, until on or about August 23, 2001, in the Eastern District of Virginia and elsewhere, BRIAN PATRICK REGAN, with the intent and reason to believe that they were to be used to the injury of the United States and to the advantage of a foreign government, did knowingly and unlawfully attempt to communicate, deliver, and transmit, to a foreign government, and to representatives, officers, agents, and employees thereof, directly and indirectly, documents and information relating to the national defense of the United States, which documents and information were classified SECRET.

(In violation of Title 18, United States Code, § 794(a).)

A TRUE BILL:

F 0 R E P E R S 0 N

PAUL J. MCNULTY
United States Attorney

by: Justin W. Williams
Assistant United States Attorney
Chief, Criminal Division

Patricia M. Haynes
Assistant United States Attorney

John T. Morton
Assistant United States Attorney

Ronald R. Roos
Internal Security Section
Criminal Division
United States Department of Justice

United States District Court
Eastern District of Virginia

CRIMINAL COMPLAINT

UNITED STATES OF AMERICA

v.

Brian P. Regan

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. From in or about fall 2000 through August 23, 2001, in Chantilly, Virginia, and elsewhere, in the Eastern District of Virginia defendant(s) did,

> unlawfully and knowingly conspire to commit espionage, that is, with intent and reason to believe that they were to be used to the injury of the United States and to the advantage of a foreign nation, communicate, deliver, and transmit to a foreign government and to a representative and agent thereof, directly and indirectly, documents and information relating to the national defense,

in violation of Title 18 United States Code, Section(s) 794(c).

I further state that I am a(n) Special Agent and that this complaint is based on the following facts:

> See Attached Affidavit

Continued on the attached sheet and made a part hereof: Yes

Signature of Complainant:

> Steven A. Carr
> Special Agent
> Federal Bureau of investigation

at Alexandria, Virginia

AUSA Robert A. Spencer
Sworn to before me and subscribed in my presence,

Date_____

Name & Title of Judicial Officer_____

Signature of Judicial Officer_____

AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT AND SEARCH WARRANT

I, Steven A. Carr, being duly sworn, hereby state:

1. I am a Special Agent of the Federal Bureau of Investigation (FBI) and have been so employed for six years. I am currently assigned to the Washington Field Office to a squad responsible for foreign counterintelligence matters; I have worked in this field for six years. As a result of my involvement in counterintelligence investigations, and foreign counterintelligence training I have received, I am familiar with the tactics, methods, and techniques of foreign intelligence services and their agents.

2. As more fully described below, I respectfully submit that Brian P. Regan violated 18 U.S.C. § 794(c) in that he conspired to commit espionage by transmitting classified U.S. national defense information to a person he believed was an agent of a foreign government. Regan, with reason to believe that they were to be used to the injury of the United States and the advantage of a foreign nation, knowingly and unlawfully conspired to communicate, transmit, and deliver to a foreign government documents and information

relating to the national defense of the United States, and did commit an overt act in furtherance thereof in the Eastern District of Virginia.

3. Information in this affidavit is based on my personal knowledge and on information provided to me by other counterintelligence investigators and law enforcement officers during this investigation. This affidavit relies on information provided by agencies of the United States Intelligence Community, which have cooperated with this investigation. This affidavit is not intended to be an exhaustive summary of the investigation against Regan, but is for the purpose of setting out probable cause in support of:

a. A complaint charging Brian P. Regan with a violation of Title 18, United States Code, Section 794(c)(conspiracy to commit espionage); and

b. A search warrant for a bag checked by Brian P. Regan onto a Lufthansa flight at Washington Dulles International Airport on August 23, 2001, which bag is more fully described in Attachment C to this affidavit.

4. Pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, Acting Attorney General Theodore B. Olson has approved use in this application, for law enforcement purposes, of information obtained and derived from searches and surveillance conducted under the authority of the act.

BACKGROUND

5. Brian P. Regan is 38 years old, and he lives at [address deleted] Bowie, Maxyland. Regan is married and has two daughters and two sons. He served in the U.S. Air Force from August 1980 until retiring in August 2000. His training in the Air Force included cryptanalysis. His responsibilities included the administration of an Intelink website. Intelink is a classified U.S. government computer system accessible only by certain members of the U.S. Intelligence Community. Regan's last assignment with the Air Force was at the headquarters of the National Reconnaissance Office ("NRO"a) located in Chantilly, in the Eastern District of Virginia. During Regan's Air Force assignment at NRO, he had authorized access to classified U.S. national defense information up to the TOP SECRET level, and also had authorized access to sensitive compartmented information ("SCI"). Regan's access to Sensitive Compartmented Information was terminated when he retired from the Air Force on August 30, 2000.

6. The NRO is the national program to meet the U.S. government's intelligence needs through spaceborne reconnaissance. The NRO is an agency of the U.S. Department of Defense and receives its budget through that portion of the National Foreign Intelligence Program known as the National Reconnaissance Program, which is approved by both the Secretary of Defense and the Director of Central Intelligence.

7. Since October 2000, Regan has been employed by TRW in Fairfax, Virginia. On July 25, 2001, Regan's access to SCI was reinstated for his work for NRO as a TRW contractor. On July 30, 2001, Regan, as a TRW contractor, has been assigned to an NRO facility in Chantilly, Virginia.

8. Pursuant to Executive Order 12958 and its predecessor Executive Orders, information must be classified as TOP SECRET and properly safeguarded if the release of that information could reasonably be expected to cause "exceptionally grave damage to the national security." Pursuant to Executive Order 12958, and its predecessor, Executive Order 12356, information, the unauthorized disclosure of which reasonably could be expected tocause "serious damage to the national security," must be classified as "Secret." Pursuant to these same executive orders, "Confidential" information is information the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

THE INVESTIGATION

9. In the Fall of 2000, reliable source information indicated that a number of U.S. government documents were provided to the government of Country A. The large majority of these documents are classified and relate to the U.S. national defense, and are not authorized for release to Country A. The remaining documents are portions of classified documents, which portions are unclassified, but which documents in their entirety are also not authorized for release to Country A. Most of the classified documents provided to country A consisted of electronic images, classified "Secret," taken from overhead platforms. Another document consisted of classified portions of a Centra1 Intelligence Agency intelligence report, classified "Secret," issued on a specific date. The particular copy of this report provided to Country A had been printed out eight days after the date the report was issued. Another of the documents consisted of two classified pages from a CIA newsletter, which newsletter overall is classified "Secret." Another of the documents was a document, classified "Secret," relating to a foreign country's satellite capability. Another of these documents was the unclassified cover page of a defense intelligence reference document classified

"Top Secret." Another such document was one page from a document containing "Top Secret" information. Another such document was the unclassified table of contents for a particular intelligence manual classified "Top Secret." The documents also include two photographs, one classified "Secret" and the other classified "Confidential."

10. Also in the Fall of 2000, reliable source information revealed that an agent had provided the government of Country A separate information intended to accompany the documents described in paragraph 9, above. This accompanying information consisted of an introductory message, in English, and separate encrypted messages. The initial, unencrypted message appears to be an introductory letter containing instructions to prevent detection of the messages by the U.S. government.

11. The encrypted messages, which were decrypted by the U.S. government, set forth contact instructions, establish bona fides, and offered to provide additional classified information. In particular, the encrypted message gives instructions to respond to a specified email address on a free email provider. This email address was ostensibly established by one "Steven Jacobs," of a specific address in Alexandria, Virginia. Records of the provider indicate that this email address was established on August 3, 2000, and was accessed nine times between August 2000 and January 2001. Eight of the nine times this email address was accessed were from public libraries located in Anne Arundel and Prince George's Counties, Maryland. Regan's residence is located one half mile from a Prince George's County library with public internet access. One of the Anne Arundel County libraries used to access this account is in Crofton, approximately five miles from Regan's residence. Physical surveillance of Regan during May through August 2001 indicated that Regan regularly utilized the public internet access located in the Crofton library. The ninth library is the Tysons-Pimmit Library, in Falls Church, Virginia, which is located along the route Regan used to commute between his residence and his office.

12. The office formerly occupied by Brian P. Regan at the NRO, Chantilly, Virginia, was searched in April 2001. A copy of the intelligence manual referred to in paragraph 9, above, bearing Regan's name, was found on a shelf behind his former desk.

13. The computer formerly assigned to Brian P. Regan at the NRO, Chantilly, Virginia, was searched in April 2001. FBI special agents analyzed the hard drive of this computer and found that someone using Regan's password had surfed a large number of Intelink Uniform Resource Link ("URL") addresses pertaining to countries A, B and C. One of these URL addresses is for one of the overhead images discussed in paragraph 9, above. Also on the hard drive of Regan's computer were four URLs that correspond to the URL addresses for other documents described in paragraph 9, above. Other such URL addresses contain direct links to some of the other documents discussed in paragraph 9, above. In addition, NRO server records indicate that Regan's computer was used to gain access to three other documents described in paragraph 9, above.

14. Intelink audit records indicate that the URL for the CIA intelligence report described in paragraph 9, was accessed from the computer in Regan's former office at 8:52 p.m. on the date the particular copy of the report described in paragraph 9 had been printed out. NRO records indicate that Regan's electronic entry badge was used to enter his office suite at 1:55 p.m. on that date. Separate NRO security records indicate that Regan's passcode was used to set the alarm on the suite at 1:15 a.m. the following morning. Later that same day, Regan flew on a "space available" U.S. Air Force flight from Norfolk, Virginia, to Iceland, and thereafter traveled to additional locations in other countries in Europe.

15. The document noted in paragraph 9, above, which related to a foreign country's satellite capability, was composed expressly for and distributed at a course given at Colorado Springs, Colorado, that Regan attended July 28 through August 8, 1997. The course was given for members of the U.S. Intelligence Community with appropriate clearances. Regan was one of two NRO members who attended the course. Regan was the designated recipient for NRO for all classified materials distributed at the course.

16. Agents also have established that there are common spelling errors in the messages described in paragraphs 10, 11 and 12 above, and in documents typed on Regan's former NRO computer.

17. The FBI has had Regan under surveillance since June 2001. On several occasions while under surveillance, FBI personnel have observed Regan conducting what appear to be surveillance detection runs, that is, conducting multiple U-turns, pulling over to the side of the road, and appearing to be checking to see whether he is under surveillance.

18. On June 21, 2001, Regan sent an email from an account registered in his own name to an email account in the name of his wife. The email attached one page of alphanumeric encryption key that appears to be

similar to the encryption technique described in paragraphs 10, 11 and 12, above.

19. On June 26, 2001, Regan traveled from Washington Dulles International Airport to Munich, Germany, on Lufthansa. Earlier, in June 2001, FBI surveillance observed Regan log onto the internet at a public library. When Regan departed, he failed to sign off the internet, so FBI personnel were able to observe which internet sites Regan had visited. One of the sites that Regan had visited provided the address for a diplomatic office of Country C in Switzerland. Regan also looked up a hotel in Zurich. Before Regan's flight departed on June 26, 2001, the FBI searched his checked suitcase, pursuant to a court order. Regan's suitcase contained glue and packing tape. Regan returned to Washington Dulles International Airport on July 3, 2001.

20. On August 23, 2001, the FBI conducted surveillance of Regan's office at NRO in Chantilly, Virginia, by closed circuit television, pursuant to a court order. Regan was observed looking at a "Secret" document on his computer terminal while taking notes in a small notebook which he took from, and returned to, his front pants pocket. A court-authorized search of Regan's computer confirmed that he had been logged onto Intelink accessing classified material.

21. Regan had reservations to Zurich, Switzerland, through Frankfurt, Germany, on Lufthanea, departing from Washington Dulles International Airport on August 23, 2001. Regan confirmed these reservations on August 11, 2001. Regan had reservations to return August 30, 2001. On August 23, 2001, Regan told a co-worker that he was driving to Orlando, Florida, to take his family to Disney World, leaving on August 27 and returning August 30, 2001. In addition, Regan wrote "Orlando, Florida" on a dry-erase board in his office suite, to indicate to his colleagues where he would be for this time period. Regan did not report to his employer, as required in light of his security clearances, that he would be traveling outside the country.

22. On August 23, 2001, at approximately 9:00 a.m., while Regan was occupied in a meeting at NRO, the FBI conducted a court-authorized search of Regan's Dodge Caravan. In that search, the FBI found a carry-on bag which contained four pages of what appears to be handwritten encrypted messages, one page of what appears to be a typewritten encrypted message, and what appears to be one page of a decryption key. The carry-on bag also contained handwritten addresses and phone numbers for diplomatic offices of Country D in Bern, Switzerland, and Vienna, Austria, and for a diplomatic office of Country C in Vienna. Also on the same day, the FBI searched, pursuant to a court order, the brown suitcase that is described in Attachment B. In that suitcase was a bottle of Elmer's glue and a roll of tape.

23. On August 23, 2001, Regan drove to Dulles Airport, arriving at approximately 1:00 p.m. Regan checked a brown suitcase at the Lufthansa counter. This suitcase was secured by the FBI and is in the custody of the FBI at Tyson's Corner, Virginia. Regan was bumped to a later flight. Regan then departed Dulles Airport and returned to his office at NRO. Regan drove back to Dulles Airport at approximately 5:3O p.m. and was stopped by the FBI in the airport terminal. Regan had with him, in his same carry-on bag, the same documents that were found in the search of his van earlier in the day. Also in Regan's carry-on bag when he was stopped by the FBI was an NRO document, marked "For Official Use Only," that listed classes available to members of the U.S. Intelligence Community. This document indicates the security clearance required to attend each class. This document consists of two pages, front and back, and FBI personnel had earlier observed Regan (via court-authorized closed circuit television) create this document by cutting and taping together documents, and then photocopying the taped-up document. When he was stopped, Regan was also carrying: approximately five blank, business-sized envelopes; three rubber gloves; and four finger sleeves.

24. Also in Regan's carry-on bag when he was stopped by the FBI at Dulles Airport on August 23, 2001, was a hand-held global positioning system ("GPS"). Based on my training and experience in intelligence matters, I know that a GPS unit can be used to locate a specific site for drop or signal sites.

25. On Regan's person when he was stopped by the FBI at Dulles Airport on August 23, 2001, was a spiral notebook, which appears to be the notebook in which Regan was taking notes while looking at classified information on his computar terminal earlier in the day on August 23, 2001. In addition, hidden in Regan's shoe, Regan had a piece of paper on which was written names and addresses in a country in Europe.

26. Regan was confronted by FBI special agents at the airport at approximately 5:35 p.m. In response to a question from this affiant, Regan denied knowledge of cryptology, coding and decoding. However, when shown photographs of the alphanumeric tables, which appear to be related to cryptology, which tables had been in his carry-on bag, he stated "This is my stuff." Regan was arrested shortly thereafter.

27. Financial checks indicated that in February 2001, Regan had consumer debts amounting to $53,000.

28. Based on the foregoing, I respectfully submit that there is probable cause to believe that Brian P. Regan knowingly and unlawfully conspired to commit espionage, that is, with intent and reason to believe that it would be used to the injury of the United States and to the advantage of a foreign nation, communicate, deliver, and transmit to a foreign government and to a representative and agent thereof, directly and indirectly, documents and information relating to the national defense, in violation of 18 U.S.C. § 794(c). I also respectfully submit that probable cause exists that fruits, evidence, and instrumentalities of a crime, namely, conspiracy to commit espionage, may be found in the suitcase that Regan checked at Dulles Airport on August 23, 2001, which suitcase is more fully described in Attachment B. Accordingly, I request a warrant to search the suitcase described in Attachment B for the items listed in Attachment A.

Steven A. Carr
Special Agent
Federal Bureau of investigation

Sworn to and subscribed before me this ____ of August 2001,

_____
UNITED STATES MAGISTRATE JUDGE
Alexandria, Virginia

ATTACHMENT A
ITEMS TO BE SEIZED

1. Espionage paraphernalia, including devices designed to conceal and transmit national defense and classified intelligence information and material, and implements used by espionage agents to communicate with their handlers and with a foreign government, including, coded pads, signaling devices or implements, microdots, secret writing papers, any notes, letters, or written correspondence between Brian P. Regan and any agents of a foreign country, any computers (including laptops), computer disks, cameras, film, codes, telephone numbers, maps, photographs, and other materials relating to communication procedures or correspondence.

2. Records, notes, calendars, hournals, maps, instructions, and classified documents and other papers relating to the transmittal of national defense and classified intelligence information.

3. United States and foreign currency, financial instruments, precious metals, jewelry, and other items of value, which are the proceeds of or assets derived from illegal espionage activities; any financial records of foreign or domestic bank accounts, including cancelled checks, statements, deposit slips, withdrawal slips, wire transfer requests and confirmations, account numbers, addresses, credit cards and credit card statements, financial and investment account records, reflecting proceeds or wealth from espionage activities, including financial records or documents in aliases.

4. Passports, visas, calendars, date books, address books, credit card and hotel receipts, airline records, reflecting travel in furtherance of espionage activities.

5. Identity documents (including those in aliases), including passports, licenses, visas, U.S. and foreign currency, instructions, maps, photographs, bank account numbers, and other materials related to emergency contact procedures and escape routes.

6. Materials used to alter documents, including glue and tape.

7. Safety deposit box records, including signature cards, bills, and payment records; any documents relating to storage sites where the defendant may be storing classified information or other items relating to espionage activities.

8. Federal, state, and local tax returns, work sheets, W-2 forms, 1099 forms, and related schedules.

9. Telephone bills and records, including calling cards and pager records.

10. Photographs, including photographs of co-conspirators.

11. Computer hardware, software, and storage media, including any computer, laptop computer, modem, server, records, information and files contained within such computer hardware, software, or storage media.

12. Classified or official documents or information.

ATTACHMENT B
DESCRIPTION OF SUITCASE TO BE SEARCHED

The suitcase is a two-tone brown, cloth and leather-like, suitcase, approximately 24 by 18 inches, with two straps, with buckles, encircling the suitcase. The suitcase opens with zippers, and bears the words "Ricardo Beverly Hills." The suitcase has a Delta tag on it that reads: "K. Q. Feeley, [address deleted] Skaneatles, NY [deleted]" The suitcase has a Lufthansa tag on it that reads: "Brian Regan, [address deleted], Bowie, MD [deleted]"

The suitcase is in the custody of the FBI in Tysons Corner, Virginia.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[date stamped:] May 16, 2001

UNITED STATES OF AMERICA	)	CRIMINAL NO. 01-188-A
	)	
v.	)	Count 1: Conspiracy to Commit Espionage
	)	18 U.S.C. § 794(c)
ROBERT PHILIP HANSSEN,	)	
	)	
	)	Count 2-20: Espionage
	)	18 U.S.C. § 794(a)
	)	
	)	Count 21: Attempted Espionage
	)	18 U.S.C. § 794(a)
	)	
	)	Forfeiture
	)	18 U.S.C. § 794

MAY 2001 TERM -- AT ALEXANDRIA

INDICTMENT

THE GRAND JURY CHARGES THAT:

GENERAL ALLEGATIONS

At all times material to this indictment:

1. The defendant ROBERT PHILIP HANSSEN was a Special Agent of the Federal Bureau of Investigation (FBI), who entered on duty with the FBI on January 12, 1976, and served continuously until February 18, 2001. For most of his FBI career, defendant HANSSEN worked in the FBI's Intelligence Division, renamed the National Security Division. In that capacity, defendant HANSSEN worked with, and had access to, classified information relating to the foreign intelligence and counterintelligence activities of the FBI and other United States Intelligence Community agencies, including the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Defense Intelligence Agency (DIA).

2. From in or about January 1981 to in or about September 1985, defendant HANSSEN was assigned to FBI Headquarters in Washington, D.C. From in or about September 1985 to in or about August 1987, defendant HANSSEN was assigned to the FBI Field Office in New York, New York. In or about August 1987, he returned to Washington, D.C., where he served in a variety of FBI assignments until February 18, 2001.

3. Upon entering on duty with the FBI on January 12, 1976, defendant HANSSEN signed an Oath of Office in which he swore that: "I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." That same day, he signed the FBI Pledge for Law Enforcement Officers, in which he pledged, in part: "I accept the obligation in connection with my assignments to . . . consider the information, coming into my knowledge by virtue of my position as a sacred trust, to be used solely for official purposes. . . . In the performance of my duties and assignments, I shall not engage in unlawful and unethical practices."

4. Executive Order 12958 and its predecessor orders establish that information in any form that (1) is owned by, produced by or for, or under the control of the United States Government, and (2) falls within any of the categories set forth in Section 1.5 of the Order (including: intelligence sources or methods; cryptology; military plans; and vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security), may be classified by an original classification authority who determines that the unauthorized disclosure of such information reasonably could be expected to result in damage to

the national security. Where such damage would be "serious", the information may be classified as SECRET. Where such damage would be "exceptionally grave", the information may be classified as TOP SECRET. Access to classified information at any level may be further restricted through compartmentation in SENSITIVE COMPARTMENTED INFORMATION (SCI) categories. Dissemination of classified information at any level may also be restricted through caveats such as NOFORN (Not Releasable to Foreign Nationals) or ORCON (Dissemination and Extraction of Information Controlled by Originator), and was formerly likewise restricted through the caveats NOCONTRACT (Not Releasable to Contractors or Contractor/Consultants) and WNINTEL (Warning Notice: Intelligence Sources and Methods Involved).

5. Defendant HANSSEN held TOP SECRET clearances continuously from the time he joined the FBI in 1976, and was indoctrinated for access to a variety of SCI programs. Specifically:

a. Upon entering on duty with the FBI, on January 12, 1976, defendant HANSSEN signed an Employment Agreement in which he acknowledged that:

> I understand that Federal Law such as Title 18, United States Code, Sections 793, 794, and 798; . . . (Executive Order 11652); and regulations issued by the Attorney General . . . prohibit loss, misuse, or unauthorized disclosure or production of national security information, other classified information and other nonclassified information in the files of the FBI; . . . I understand that unauthorized disclosure of information in the files of the FBI or information I may acquire as an employee of the FBI could result in impairment of national security, place human life in jeopardy, . . . or prevent the FBI from effectively discharging its responsibilities. . . . I agree that I will never divulge, publish, or reveal either by word or conduct, or by any other means disclose to any unauthorized recipient without official written authorization . . . any information from the investigatory files of the FBI or any information relating to material contained in the files, or disclose any information or produce any material acquired as part of the performance of my official duties or because of my official status . . .

b. On various occasions throughout his FBI employment, defendant HANSSEN signed various iterations of the Nondisclosure Agreement for Sensitive Compartmented Information, in which he acknowledged that he had received security indoctrinations and understood, among other things, that he had been advised that the direct or indirect unauthorized disclosure by him of SCI information "could cause irreparable injury to the United States, and be used to advantage by a foreign nation," and pledged that "I will never divulge such information, in any form or any manner, to anyone who is not authorized to receive it, without prior written authorization from an appropriate official of the United States Government." He also acknowledged that he had been advised that such unauthorized disclosure could constitute violations of criminal laws including Title 18, United States Code, Section 794.

6. The *Komitet Gosudarstvennoy Bezopasnosty*, known as the KGB, was the intelligence service of the Union of Soviet Socialist Republics (USSR). In or about December 1991, the *Sluzhba Vneshney Razvedki Rossi*, known as the SVR, assumed the foreign intelligence functions of the former KGB for the principal successor state of the USSR, the Russian Federation. In this indictment, term "KGB/SVR" refers to activities of either the KGB or the SVR.

7. As used by those who engage in espionage activities:

a. The term "dead drop" site refers to a prearranged hidden location used for the clandestine exchange of packages, messages, and payments, which avoids the necessity of an intelligence officer and an agent being present at the same time.

b. A "signal site" is a prearranged fixed location, usually in a public place, on which an agent or an intelligence officer can place a predetermined mark in order to alert the other to operational activity.

c. An "accommodation address" is a "safe" address, not overtly associated with intelligence activity, used by an agent to communicate with the intelligence service for which he is working.

COUNT ONE

(18 U.S.C. § 794(a) and (c))
(Conspiracy to Commit Espionage)

THE GRAND JURY FURTHER CHARGES THAT:

A. THE CONSPIRACY

1. The Grand Jury realleges and incorporates by reference the GENERAL ALLEGATIONS of this Indictment.

2. From on or about October 1, 1985, through on or about February 18, 2001, in the Eastern District of Virginia and elsewhere, the defendant ROBERT PHILIP HANSSEN did knowingly and unlawfully combine, confederate, and agree with other persons, both known and unknown to the Grand Jury, including officers of the KGB/SVR, to knowingly and unlawfully communicate, deliver, and transmit to foreign governments, specifically the Union of Soviet Socialist Republics (USSR) and its successor, the Russian Federation, and to those foreign governments' representatives, officers, and agents, directly and indirectly, documents and information relating to the national defense of the United States, with intent and reason to believe that the same would be used to the injury of the United States and to the advantage of the USSR and its successor, the Russian Federation, such communication, delivery and transmission resulting in the identification by a foreign power (as defined in Section 101 (a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual, and directly concerning satellites, early warning systems, means of defense or retaliation against large-scale attack, communications intelligence, and major element of defense strategy, in violation of Title 18, United States Code, Section 794 (a).

B. WAYS, MANNER, AND MEANS OF THE CONSPIRACY

1. It was a part of the conspiracy that defendant HANSSEN would and did use his position as a Special Agent of the FBI, and his official access to classified information relating to the national defense, to acquire, accumulate, and transmit such information, including information classified SECRET and TOP SECRET, some of which was designated as SCI, to the KGB/SVR.

2. It was a further part of the conspiracy that defendant HANSSEN would and did secretly remove classified information relating to the national defense from United States Government facilities in order to provide such information to the KGB/SVR.

3. It was a further part of the conspiracy that defendant HANSSEN would and did write letters to the KGB/SVR conveying information of interest to the KGB/SVR, including classified information relating to the national defense, that he had learned or otherwise obtained in the course of his official FBI duties.

4. It was a further part of the conspiracy that defendant HANSSEN would and did write letters to the KGB/SVR proposing communications plans, locations for signal sites and dead drop exchange sites, and schedules for operational activity.

5. It was a further part of the conspiracy that defendant HANSSEN would and did select signal sites and dead drop exchange sites in public areas, including parks near his home in the Eastern District of Virginia, and along routes he would drive in the ordinary course of his daily business.

6. It was a further part of the conspiracy that in their communications to each other defendant HANSSEN and the KGB/SVR would and did use a code for dates and times of operational activity.

7. It was a further part of the conspiracy that defendant HANSSEN would and did mail letters and packages to the KGB/SVR through "accommodation addresses" in the Eastern District of Virginia and elsewhere.

8. It was a further part of the conspiracy that defendant HANSSEN would and did exchange packages with the KGB/SVR at "dead drop" sites in the Eastern District of Virginia, and thereby avoided personal meetings, in order to continue to conceal his true identity from the KGB/SVR and help ensure his continued safety.

9. It was a further part of the conspiracy that defendant HANSSEN would and did wrap his materials for the KGB/SVR in plastic garbage bags, secured with clear tape.

10. It was a further part of the conspiracy that, in their communications regarding operational activity, defendant HANSSEN and the KGB/SVR would and did use code names including "PARK", "LEWIS", "ELLIS" and "V" to refer to established dead drop and signal sites.

11. It was a further part of the conspiracy that defendant HANSSEN and the KGB/SVR would and did use, and in their communications would and did refer to, standard ADC maps of Northern Virginia and other areas, to identify with specificity locations for operational activity.

12. It was a further part of the conspiracy that defendant HANSSEN would and did maintain and use apparently innocuous materials, such as adhesive tape, thumbtacks, colored chalk, and plastic garbage bags in conducting his operational activity with the KGB/SVR.

13. It was a further part of the conspiracy that defendant HANSSEN would and did use a code in the return address of items he mailed to the KGB/SVR, in order to indicate that a dead drop operation should occur on a particular day.

14. It was a further part of the conspiracy that defendant HANSSEN and the KGB/SVR would and did communicate by telephone, and would and did use a classified advertisement in order to make specific telephone call arrangements.

15. It was a further part of the conspiracy that defendant HANSSEN would and did provide correspondence and other information, including classified information relating to the national defense, to the KGB/SVR in the form of computer disks.

16. It was a further part of the conspiracy that defendant HANSSEN would and did arrange with the KGB/SVR to use special computer programs, called keys, to encrypt and decrypt the correspondence and other information they exchanged in the form of computer diskettes.

17. It was a further part of the conspiracy that the KGB/SVR would and did pay substantial amounts of money to defendant HANSSEN in the form of cash payments for his espionage-related activities.

18. It was a further part of the conspiracy that the KGB/SVR would and did place additional sums of money in escrow for defendant HANSSEN, representing additional payments for defendant HANSSEN's espionage-related activities.

19. It was a further part of the conspiracy that defendant HANSSEN would and did ask the KGB/SVR for additional payment in the form of diamonds, and that the KGB/SVR would and did pay him in diamonds on several occasions.

20. It was a further part of the conspiracy that defendant HANSSEN would and did propose to the KGB/SVR that a Swiss bank account be used for the receipt of payments from the KGB/SVR.

21. It was a further part of the conspiracy that defendant HANSSEN would and did respond to specific requests for classified information which the KGB/SVR asked him to obtain or otherwise provide.

22. It was a further part of the conspiracy that defendant HANSSEN's espionage relationship with the USSR was converted into an espionage relationship with the Russian Federation after the USSR dissolved and the Russian Federation came into existence.

23. It was a further part of the conspiracy that the KGB/SVR would and did use codenames to refer to defendant HANSSEN in its internal files, and limited access to those files by KGB/SVR personnel, in order to protect the operation involving defendant HANSSEN.

24. It was a further part of the conspiracy that defendant HANSSEN would and did sign his letters to the KGB/SVR, if at all, with a name other than his true name.

25. It was a further part of the conspiracy that defendant HANSSEN and the KGB/SVR would and did take steps to conceal and maintain the secrecy of his espionage activities in order to protect himself from prosecution and to permit him to engage in additional espionage activity.

C. OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, defendant HANSSEN and unindicted co-conspirators did commit overt acts in the Eastern District of Virginia and elsewhere, including but not limited to the following:

1. On or about October 1, 1985, defendant HANSSEN mailed a letter to the KGB, addressed to the residence of a Soviet Embassy official in the Eastern District of Virginia, which letter contained classified information relating to the national defense, the transmission of a portion of which resulted in the identification by a foreign power (as defined in Section 101 (a) of the Foreign Intelligence Surveillance Act of 1978) of two individuals acting as agents of the United States and consequently in the deaths of these individuals, and the transmission of another portion of which concerned communications intelligence.

2. On or about October 15, 1985, defendant HANSSEN mailed a package to the KGB, addressed to the residence of a Soviet Embassy official in the Eastern District of Virginia, which package contained classified documents.

3. On or about October 24, 1985, defendant HANSSEN mailed a message to the KGB, addressed to the residence of a Soviet Embassy official in the Eastern District of Virginia.

4. Between on or about November 2 and November 8, 1985, defendant HANSSEN retrieved from a dead drop site in Nottoway Park in the Eastern District of Virginia a package from the KGB containing $50,000 cash and a message.

5. On or about November 8, 1985, defendant HANSSEN mailed a letter to the KGB, addressed to the residence of a Soviet Embassy official in the Eastern District of Virginia, which letter contained classified information relating to the national defense the transmission of a portion of which resulted in the identification by a foreign power (as defined in Section 101 (a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual, such individual also being one of the subjects of Overt Act 1.

6. On or about June 30, 1986, defendant HANSSEN mailed a letter to the KGB, addressed to the residence of a Soviet Embassy official in the Eastern District of Virginia, which letter contained classified information relating to the national defense a portion of which directly concerned satellites.

7. On or about June 30, 1986, defendant HANSSEN signed a letter to the KGB in the name of "Ramon."

8. From on or about July 14, 1986, to on or about July 18, 1986, the KGB placed the following advertisement in The Washington Times:

> DODGE - '71, DIPLOMAT, NEEDS ENGINE WORK, $1000. Phone
> (703) 451-9780 (CALL NEXT Mon., Wed., Fri. 1 p.m.)

9. On or about Monday, July 21, 1986, defendant HANSSEN placed a call to the telephone number given in the KGB's Washington Times advertisement, and gave a phone number to a KGB officer with whom he spoke.

10. On or about Monday, July 21, 1986, about an hour after the conversation described in the foregoing paragraph, the KGB officer placed a call to the number defendant HANSSEN had given him, and informed defendant HANSSEN that the Nottoway Park dead drop site was being loaded for him.

11. On or about August 7, 1986, defendant HANSSEN mailed a letter to the KGB, addressed to the residence of a Soviet Embassy official in the Eastern District of Virginia.

12. On or about August 18, 1986, defendant HANSSEN placed a telephone call to the telephone number given in the KGB's Washington Times advertisement, and spoke to a KGB officer.

13. On or about August 19, 1986, defendant HANSSEN retrieved from the Nottoway Park dead drop site in the Eastern District of Virginia a package from the KGB containing $10,000 cash and a letter.

14. On or about August 19, 1986, defendant HANSSEN mailed a note to the KGB, addressed and delivered to the residence of a Soviet Embassy official in the Eastern District of Virginia.

15. On or about September 8, 1987, defendant HANSSEN mailed a letter to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

16. On or about September 14, 1987, defendant HANSSEN mailed a package to the KGB containing classified documents.

17. On or about September 15, 1987, defendant HANSSEN retrieved from the Nottoway Park dead drop site in the Eastern District of Virginia a package from the KGB containing $10,000 cash and a message.

18. On or about September 26, 1987, defendant HANSSEN placed at the Nottoway Park dead drop site in the Eastern District of Virginia a package for the KGB containing a letter and a classified document.

19. On or about September 29, 1987, the KGB deposited $100,000 in a Moscow bank account for defendant HANSSEN.

20. On or about November 7, 1987, defendant HANSSEN mailed a letter to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

21. On or about November 17, 1987, defendant HANSSEN mailed a letter to the KGB.

22. On or about November 23, 1987, defendant HANSSEN placed at the Nottoway Park dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents relating to the national defense.

23. On or about November 23, 1987, defendant HANSSEN retrieved from the Nottoway Park dead drop site in the Eastern District of Virginia a package from the KGB containing $20,000 cash and a letter.

24. On or about November 23, 1987, the KGB informed defendant HANSSEN that $100,000 had been placed in a bank on his behalf.

25. On or about February 3, 1988, defendant HANSSEN mailed a note to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

26. On or about February 8, 1988, defendant HANSSEN placed at the Nottoway Park dead drop site in the Eastern District of Virginia a package for the KGB containing a letter, classified documents, and a computer diskette, including classified information relating to the national defense a portion of which directly concerned communications intelligence.

27. On or about February 8, 1988, defendant HANSSEN retrieved from the Nottoway Park dead drop site in the Eastern District of Virginia a package from the KGB containing $25,000 cash and a letter.

28. On or about March 15, 1988, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

29. On or about March 16, 1988, defendant HANSSEN mailed a note to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

30. On or about March 24, 1988, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

31. On or about March 28, 1988, defendant HANSSEN placed at the Nottoway Park dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents relating to the national defense and a computer diskette.

32. On or about March 28, 1988, defendant HANSSEN retrieved from the Nottoway Park dead drop site in the Eastern District of Virginia a package from the KGB containing $25,000 cash and a letter.

33. On or about March 31, 1988, defendant HANSSEN mailed a note to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

34. On or about April 5, 1988, in the Eastern District of Virginia, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia, which computer diskette contained classified information.

35. On or about April 5, 1988, in the Eastern District of Virginia, defendant HANSSEN asked the KGB for diamonds.

36. On or about May 17, 1988, in the Eastern District of Virginia, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address, which computer diskette contained classified information.

37. On or about July 13, 1988, defendant HANSSEN mailed a letter to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

38. On or about July 18, 1988, defendant HANSSEN placed at the Nottoway Park dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents relating to the national defense, including a document directly concerning early warning systems and other means of defense or retaliation against large-scale attack.

39. On or about July 18, 1988, defendant HANSSEN retrieved from the Nottoway Park dead drop site in the Eastern District of Virginia a package from the KGB containing $25,000 cash and a letter.

40. On or about July 29, 1988, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia, which computer diskette contained classified information.

41. On or about August 22, 1988, the KGB deposited $50,000 in a Moscow bank account for defendant HANSSEN.

42. On or about September 20, 1988, defendant HANSSEN mailed a note and computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia, which computer diskette contained classified information.

43. On or about September 26, 1988, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents.

44. On or about September 26, 1988, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing a diamond and a letter.

45. On or about September 26, 1988, the KGB advised defendant HANSSEN that $50,000 had been deposited in defendant HANSSEN's account.

46. On or about November 30, 1988, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia, which computer diskette contained classified information.

47. On or about December 26, 1988, defendant HANSSEN placed at a dead drop site in the Eastern District o'f Virginia a package for the KGB containing documents and a computer diskette, which computer diskette contained classified information relating to the national defense and directly concerning communications intelligence.

48. On or about December 26, 1988, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $10,000 cash, a diamond, and a message.

49. On or about January 31, 1989, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing a note, a classified document, and a computer diskette which contained classified information.

50. On or about January 31, 1989, defendant HANSSEN placed an emergency call-out signal for the KGB at a pre-designated signal site.

51. On or about March 16, 1989, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

52. On or about March 20, 1989, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia two packages for the KGB containing classified documents relating to the national defense and a computer diskette which contained classified information.

53. On or about March 20, 1989, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $18,000 cash, a diamond, and a letter.

54. On or about May 17, 1989, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

55. On or about May 22, 1989, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents, two of the three diamonds that he had previously received from the KGB and which he was returning for cash, and a computer-diskette which contained classified information relating to the national defense including information directly concerning communications intelligence.

56. On or about May 22, 1989, defendant HANSSEN suggested to the KGB that an account in Switzerland be used for the receipt of payments from the KGB.

57. On or about May 22, 1989, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing a letter and a classified document relating to the national defense that HANSSEN had previously provided to the KGB and had asked the KGB to return to him.

58. On or about August 1, 1989, defendant HANSSEN placed two simultaneous call-out signals for the KGB at pre-designated signal sites.

59. On or about August 7, 1989, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing a computer diskette which contained classified information, and rolls of undeveloped film depicting the contents of a classified document relating to the national defense which directly concerned means of defense or retaliation against large-scale nuclear attack and other elements of defense strategy.

60. On or about August 7. 1989, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $30,000 cash and a letter.

61. On or about August 17, 1989, the KGB deposited $50,000 in a Moscow bank account for defendant HANSSEN.

62. On or about September 22, 1989, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

63. On or about September 25, 1989, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents relating to the national defense which directly concerned communications intelligence, and a computer diskette which contained classified information.

64. On or about September 25, 1989, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $30,000 cash, a letter, and a KGB computer diskette.

65. On or about September 28, 1989, defendant HANSSEN mailed a letter to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

66. On or about October 16, 1989, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

67. On or about October 23, 1989, defendant HANSSEN placed at a dead drop site in Foxstone Park in the Eastern District of Virginia a package for the KGB containing a computer diskette which contained classified information relating to the national defense, including information which directly concerned communications intelligence.

68. Between on or about October 31 and November 3, 1989, defendant HANSSEN retrieved from the Foxstone Park dead drop site in the Eastern District of Virginia a package from the KGB containing $55,000 cash and a KGB computer diskette.

69. Between on or about October 31 and November 3, 1989, the KGB advised defendant HANSSEN that $50,000 had been deposited into his account in Moscow.

70. On or about December 20, 1989, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

71. On or about December 25, 1989, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents relating to the national defense which included information directly concerning communications intelligence, and a computer diskette which contained classified information.

72. On or about December 25, 1989, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $38,000 cash and two KGB computer diskettes.

73. On or about March 1, 1990, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

74. On or about March 5, 1990, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing a document and a computer diskette which contained classified information relating to the national defense.

75. On or about March 5, 1990, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $40,000 cash and a KGB computer diskette.

76. On or about May 3, 1990, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

77. On or about May 7, 1990, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents and a computer diskette which contained classified information.

78. On or about May 7, 1990, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $35,000 cash and a KGB computer diskette.

79. On or about May 17, 1990, defendant HANSSEN mailed a letter and a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia.

80. On or about May 21, 1990, defendant HANSSEN retrieved from the Foxstone Park dead drop site in the Eastern District of Virginia a package from the KGB containing two KGB computer diskettes.

81. On or about August 20, 1990, defendant HANSSEN mailed a computer diskette to the KGB, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia, which computer diskette contained classified information.

82. On or about September 3, 1990, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $40,000 cash and a KGB computer diskette.

83. On or about February 2, 1991, defendant HANSSEN placed an emergency call-out signal for the KGB.

84. On or about February 2, 1991, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing a computer diskette which contained classified information relating to the national defense.

85. On or about February 18, 1991, the KGB placed at a dead drop site in the Eastern District of Virginia a package containing $10,000 cash and a KGB computer diskette.

86. On or about April 10, 1991, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

87. On or about April 15, 1991, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents and a computer diskette.

88. On or about April 15, 1991, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $10,000 cash and a KGB computer diskette.

89. On or about July 9, 1991, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

90. On or about July 15, 1991, defendant HANSSEN placed at the Foxstone Park dead drop site in the Eastern District of Virginia a package for the KGB containing classified documents and a computer diskette.

91. On or about July 15, 1991, defendant HANSSEN retrieved from the Foxstone Park dead 'drop site in the Eastern District of Virginia a package from the KGB containing $12,000 cash and a KGB computer diskette.

92. On or about August 19, 1991, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB containing aclassified document relating to the national defense and a computer diskette containing classified information relating to the national defense, which included information directly concerning communications intelligence.

93. On or about August 19, 1991, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB containing $20,000 cash and a message.

94. On or about October 1, 1991, defendant HANSSEN placed a call-out signal for the KGB at a pre-designated signal site.

95. On or about October 7, 1991, defendant HANSSEN placed at a dead drop site a package for the KGB containing a classified document and a computer diskette which contained classified information.

96. On or about October 7, 1991, defendant HANSSEN retrieved from a dead drop site a package from the KGB containing $12,000 cash and a KGB computer diskette.

97. On or about December 12, 1991, defendant HANSSEN mailed a note to the KGB/SVR, addressed and delivered to a Soviet accommodation address in the Eastern District of Virginia, which note contained classified information relating to the national defense.

98. On or about December 16, 1991, defendant HANSSEN placed at a dead drop site in the Eastern District of Virginia a package for the KGB/SVR containing classified documents relating to the national defense and a computer diskette which contained classified information relating to the national defense, including information directly concerning communications intelligence.

99. On or about December 16, 1991, defendant HANSSEN retrieved from a dead drop site in the Eastern District of Virginia a package from the KGB/SVR containing $12,000 cash and a KGB computer diskette.

100. On or about August 11, 1999, defendant HANSSEN conducted searches of the FBI's collected computerized databases of classified and unclassified investigative files and indices, called the Automated Case Support (ACS) System, for the purpose of determining whether the FBI was aware of operational activity at Foxstone Park.

101. On or about October 6, 1999, defendant HANSSEN maintained, on a computer memory storage device known as a Versa Card, a letter from the KGB/SVR.

102. On or about November 3, 1999, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops in Virginia or of operational activity at Foxstone Park.

103. On or about November 15, 1999, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops in Virginia or of operational activity at Foxstone Park.

104. On or about March 14, 2000, defendant HANSSEN created or last modified a letter to the KGB/SVR.

105. On or about March 31, 2000, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops involving Russia.

106. On or about June 8, 2000, defendant HANSSEN created or last modified a letter to the KGB/SVR.

107. On or about July 31, 2000, defendant HANSSEN maintained, on the Versa Card described above, a letter from the KGB/SVR.

108. On or about October 4, 2000, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops.

109. On or about November 13, 2000, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops.

110. On or about November 17, 2000, defendant HANSSEN created or last modified a letter to the KGB/SVR.

111. On or about December 21, 2000, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops.

112. In or about January 2001, defendant HANSSEN possessed a personal PALM III device which contained on it a record referring to "ELLIS" and the date February 18 and the time 8:00.

113. On or about January 16, 2001, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops.

114. On or about January 19, 2001, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops.

115. On or about January 22, 2001, defendant HANSSEN conducted searches of the FBI's ACS System for the purpose of determining whether the FBI was aware of recent dead drops or of operational activity at Foxstone Park.

116. On or about January 30, 2001, defendant HANSSEN maintained in the glove compartment of his personal automobile a roll of white Johnson & Johnson medical adhesive tape and a box of Crayola colored chalk.

117. On or about January 30, 2001, defendant HANSSEN maintained in the trunk of his personal automobile a roll of Superior Performance Scotch clear mailing tape and a number of dark colored Hefty garbage bags.

118. On or about February 12, 2001, defendant HANSSEN maintained in the glove compartment of his personal automobile a box containing thumbtacks of various colors, including yellow and white.

119. On or about February 18, 2001, defendant HANSSEN possessed classified documents relating to the national defense in the trunk of his personal automobile.

120. On or about February 18, 2001, defendant HANSSEN wrapped classified documents relating to the national defense and a computer diskette in a plastic garbage bag secured with clear tape.

121. On or about February 18, 2001, defendant HANSSEN went to Foxstone Park in the Eastern District of Virginia.

122. On or about February 18, 2001, at Foxstone Park in the Eastern District of Virginia, defendant HANSSEN placed a piece of white adhesive tape on a pole.

123. On or about February 18, 2001, at Foxstone Park in the Eastern District of Virginia, defendant HANSSEN placed a package, wrapped in a plastic garbage bag secured with clear tape, and containing classified documents relating to the national defense and a computer diskette, under afootbridge in a manner which concealed the package from view.

(In violation of Title 18, United States Code, § 794(c).)

COUNTS TWO THROUGH TWENTY

(18 U.S.C. § 794(a))
(Espionage)

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges and incorporates by reference the GENERAL ALLEGATIONS of this Indictment.

2. On or about the following specified dates, in the Eastern District of Virginia and elsewhere, defendant ROBERT PHILIP HANSSEN, with the intent and reason to believe that they were to be used to the injury of the United States and to the advantage of a foreign government, specifically the Union of Soviet Socialist Republics (USSR), did knowingly and unlawfully communicate, deliver, and transmit, and attempt to communicate, deliver, and transmit, to representatives of a foreign government, specifically the USSR, and to representatives, officers, agents, and employees thereof, directly and indirectly, documents and information relating to the national defense of the United States, specifically the following documents and information:

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
2	October 1, 1985	(a) The fact that Valeriy Martynov, a KGB officer, had been recruited by the United States intelligence services, which information was classified SECRET, and the transmission of	Letter mailed to an address in the City of Alexandria, Virginia

which information resulted in the identification by a foreign power (as defined in section 101 (a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual.

(b) The fact that Sergey Motorin, a KGB officer, had been recruited by the United States intelligence services, which information was classified SECRET, and the transmission of which information resulted in the identification by a foreign power (as defined in section 101 (a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual.

(c) The fact that Boris Yuzhin, a KGB officer, had been recruited by the United States intelligence services, which information was classified SECRET.

(d) The existence of an FBI technical penetration of a particular Soviet establishment, as well as the specific location of the penetration device, and the methods and technology utilized, which information was classified TOP SECRET, and directly concerned communications intelligence.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
3	November 8, 1985	(a) The fact that Valeriy Martynov used a particular and described concealment device, which information was classified SECRET, and the transmission of which information resulted in the identification by a foreign power (as defined in section 101 (a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual. (b) The existence of a successful intelligence collection operation against a specific Soviet target, which information was classified TOP SECRET/SCI.	Letter mailed to an address in the City of Alexandria, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
4	June 30, 1986	The fact that the United States knew of a particular technical vulnerability in Soviet satellite transmissions and was actively exploiting the vulnerability, which information was classified TOP SECRET/SCI, and directly concerned satellites.	Letter mailed to an address in the City of Alexandria, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
5	November 23, 1987	A report about a recent FBI/CIA meeting with a Soviet intelligence officer who was an FBI/CIA recruitment target, which report was classified SECRET.	Dead drop in Nottoway Park, in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
6	February 8, 1988	(a) Specific information about a recruited KGB officer who had secretly defected to the United States, which information	Dead drop in Nottoway Park, in

		was classified SECRET. (b) The identity, by KGB codename and recent specific assignment, of a KGB agent who was currently operating as an illegal in a particular United States city and who had been recruited by the FBI to serve as a double agent, which information was classified SECRET. (c) A particular limitation of the National Security Agency's ability to read certain Soviet communications, which information was classified TOP SECRET/SCI, and directly concerned communications intelligence.	Fairfax County, Virqinia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
7	March 28, 1988	A version of a TOP SECRET document entitled "The FBI's Double Agent Program", which contained a detailed evaluation of FBI double agent operations, including joint operations with other United States intelligence agencies, conducted worldwide over a ten-year period.	Dead drop in Nottoway Park, in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
8	July 18, 1988	(a) A TOP SECRET United States intelligence analysis of the effectiveness of Soviet intelligence collection efforts against certain United States nuclear weapons capabilities, which analysis directly concerned early warning systems and other means of defense or retaliation against large-scale attack. (b) A TOP SECRET/SCI document entitled "Compendium of Future Intelligence Requirements: Volume II", dated September 1987, prepared for the Director of Central Intelligence by the Staff of the Intelligence Producers Council, containing a comprehensive listing of specific current intelligence information, including information about military capabilities and preparedness, sought by the United States regarding the Soviet Union and other nations. (c) A TOP SECRET comprehensive historical FBI review of allegations from recruitments and detectors over a period of years that the Soviet intelligence services had penetrated the FBI, which identified Soviet recruitments and detectors with specificity, and described particular information they provided. (d) A SECRET Central Intelligence Agency Counterintelligence Staff Study entitled "The Soviet Counterintelligence Offensive: KGB Recruitment Operations Against CIA", dated March 1988.	Dead drop in Nottoway Park, in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
9	December 26, 1988	The fact that the United States was targeting a particular category of Soviet communications, which information was classified TOP SECRET/SCI, and directly concerned communications intelligence.	Dead drop in Eakin Community Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
10	March 20,	A TOP SECRET/SCI document entitled "DCI Guidance for the National MASINT Intelligence Program (FY1991-FY2000)",	Dead drop in Eakin Community Park in

	1989	prepared by the Measurement and Signature Intelligence (MASINT) Committee and dated November 1988, which represented the United States Intelligence Community's consensus as to specific MASINT objectives and studies leading to needed capabilities, and whose contents were highly specific and technical, and which document defendant HANSSEN requested be returned to him.	Fairfax County, Virginia

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
11	May 22, 1989	(a) The existence, and details of, an ongoing FBI espionage investigation of United States Department of State officer Felix Bloch, which information was classified SECRET, and which transmission led the Soviet Union to warn Bloch of the investigation and thereby prevent the FBI from concluding its investigation. (b) The fact that the United States was targeting a particular category of Soviet communications, which information was classified TOP SECRET/SCI and directly concerned communications intelligence.	Dead drop in Idylwood Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
12	August 7, 1989	A highly-restricted TOP SECRET/SCI analysis, dated May 1987, of the Soviet intelligence threat to a specific and named highly-compartmented United States Government program to ensure the continuity of government in the event of a Soviet nuclear attack, which analysis directly concerned means of defense or retaliation against large-scale nuclear attack and other elements of defense strategy.	Dead drop in Eakin Community Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
13	September 25, 1989	(a) Documentary material containing details of a United States program of technical penetration of a particular Soviet establishment, which information was classified TOP SECRET/SCI and directly concerned communications intelligence. (b) Documentary material concerning a United States technical operation against a specific foreign target, which information was classified TOP SECRET and directly concerned communications intelligence.	Dead drop in Canterbury Woods Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
14	October 23, 1989	The fact that the United States had the capability to read certain Soviet communications, which information was classified TOP SECRET/SCI and directly concerned communications intelligence.	Dead drop in Foxstone Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
15	December 25, 1989	(a) Documentary material containing details of a United States program of technical penetration of a particular Soviet establishment, which information was classified TOP	Dead drop in Idylwood Park in Fairfax County, Virginia.

		SECRET/SCI and directly concerned communications intelligence. (b) A Director of Central Intelligence National Intelligence Estimate (NIE) entitled "The Soviet System in Crisis: Prospects for the Next Two Years", dated November 1989 and classified SECRET.	

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
16	March 5, 1990	(a) Confirmation that a particular Soviet person was a recruited intelligence asset of the FBI, which information was classified SECRET. (b) The fact that a particular named Soviet Embassy employee in the United States was a recruited intelligence asset of the FBI, which information was classified SECRET.	Dead drop in Eakin Community Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
17	February 2, 1991	(a) Confirmation of the true identity of a Soviet person in the United States who was operating as an FBI recruitment-in-place, which information was classified SECRET. (b) The fact that a particular Soviet person in the United States was a recruited reporting asset of the FBI, which information was classified SECRET.	Dead drop in Eakin Community Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
18	August 19, 1991	(a) The fact that the National Security Agency was reading the communications of a specific foreign country, and the specific methods used to do so, which information was classified TOP SECRET/SCI and directly concerned communications intelligence. (b) A document, classified SECRET, disclosing details of a proposed FBI technical surveillance operation against a Soviet person in the United States. (c) The fact that the FBI was initiating a "dangle" operation against the Soviets at a particular named United States military facility, which information was classified SECRET	Dead drop in Lewinsville Park in Fairfax County, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
19	December 12, 1991	The fact that approval had been given for a device the FBI was to implant in a technical surveillance operation against a Soviet person in the United States, about which defendant HANSSEN had first reported to the KGB on August 19, 1991, which information was classified SECRET.	Note mailed to an address in the City of Alexandria, Virginia.

COUNT	DATE	MATERIAL OR INFORMATION TRANSMITTED	MEANS AND PLACE OF TRANSMITTAL
20	December 16, 1991	(a) The fact that the United States Intelligence Community was obtaining especially sensitive material derived from the communications of a specific foreign country, which fact was	Dead drop in Idylwood Park in

	classified TOP SECRET/SCI and directly concerned communications intelligence.	Fairfax County, Virginia
	(b) A SECRET document entitled "The KGB's First Chief Directorate: Structure, Functions, and Methods", produced by the Director of Central Intelligence Counterintelligence Center, dated November 1990.	
	(c) A SECRET document entitled "Director of Central Intelligence FY 1992 Congressional Budget Justification, Volume X: Federal Bureau of Investigation Foreign Counterintelligence Program."	

(In violation of Title 18, United States Code, § 794 (a).)

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges and incorporates by reference the GENERAL ALLEGATIONS of this Indictment.

2. On or about February 18, 2001, in the Eastern District of Virginia, defendant ROBERT PHILIP HANSSEN, with the intent and reason to believe that they were to be used to the injury of the United States and to the advantage of a foreign government, specifically the Russian Federation, did knowingly and unlawfully attempt to communicate, deliver, and transmit, to representatives of a foreign government, that is the Russian Federation, and to representatives, officer, agents, and employees thereof, directly and indirectly, the following documents relating to the national defense of the United States:

seven internal FBI documents classified SECRET, disclosing details of ongoing and proposed FBI counterintelligence operations against Russian persons in the United States.

(In violation of Title 18, United States Code, § 794 (a).)

FORFEITURE

Defendant ROBERT PHILIP HANSSEN, if convicted of any of the violations charged in this Indictment, shall forfeit to the United States any property constituting, or derived from, any proceeds he obtained, directly or indirectly, as the result of such violation; and any of the defendant's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation. This property includes, but is not limited to $1,437,000 received from the Soviets and/or Russians, directly or indirectly, in proceeds of the charged espionage and espionage conspiracy of which he is charged, which $1,437,000 itself includes, but is not limited to:

1. Approximately $800,000, plus applicable interest, maintained on the behalf of the defendant by or through the KGB and SVR and which may have been deposited, at one point, in the Vneshtorg Bank in Moscow;

2. Approximately $600,000 in cash and diamonds obtained by the defendant from the KGB and SVR;

3. $50,000 recovered by the FBI from the "Lewis" drop site in Long Branch Nature Center; and

4. Two Rolex watches, bearing the serial numbers L859772 and R16710A30B9315/E458859.

(Pursuant to Title 18, United States Code, § 794 (incorporating provisions of Title 21, United States Code, § 853).)

A TRUE BILL:

[signed: Robin Welde De Graf]
FOREPERSON

KENNETH E. MELSON

United States Attorney

Randy I. Bellows
Assistant United States Attorney

Justin W. Williams
Assistant United States Attorney

Gordon D. Kromberg
Assistant United States Attorney

Laura A. Ingersoll
Senior Trial Attorney
Internal Security Section
Criminal Division
United States Department of Justice

Transcription and HTML by Steven Aftergood

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[filed March 5, 2001]

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 01-185-M
v.	)	
	)	
ROBERT PHILIP HANSSEN,	)	

PROTECTIVE ORDER

This matter comes before the Court upon the Government's Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and documents which will be reviewed by or made available to, or are otherwise in the possession of, the defendant and/or defense counsel in this case.

Pursuant to the authority granted under Section 3 of the Classified Information Procedures Act, 18 U.S.C. App. III (1994) (CIPA); the Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (reprinted following CIPA Section 9); Rules 16(d) and 57 of the Federal Rules of Criminal Procedure; the general supervisory authority of the Court; and in order to protect the national security,

IT IS ORDERED:

1. The procedures set forth in this Protective Order are intended to govern the time period preceding indictment in this case, as well as throughout all post-indictment proceedings. Accordingly, these procedures shall apply to all pre-indictment, pretrial, trial, and post-trial (including appellate) matters in this case, and may be modified from time to time by further order of the Court acting under its inherent supervisory authority to ensure the proceedings in this case are fair and expeditious.

2. As used herein, the terms "classified national security information and documents," "classified information" and "classified documents" refer to:

a. any classified document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958 or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)", or any information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party, which has been derived from United States government information that was classified, regardless whether such document or information has subsequently been classified by the government pursuant to Executive Order 12958 or its predecessor Orders as "CONFIDENTIAL", "SECRET", or "TOP SECRET" or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. verbal classified information known to the defendant or defense counsel; or

d. any document and information as to which the defendant or defense counsel have been notified orally or in writing that such documents or information contains classified information.

3. The words "documents" or "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to,

a. papers; correspondence; memoranda; notes; letters; reports; summaries; photographs; maps; charts and graphs; inter- office and intra-office communications; notations of any sort concerning

conversations, meetings, or other communications; bulletins; teletypes, telegrams, and telefacsimiles; invoices; worksheets; and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

4. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the originating agency of the document or the information contained therein (hereinafter, the "originating agency").

5. "Access to classified information" means having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information.

6. "Secure area" shall mean a physical facility accredited for the storage, handling, and control of classified information.

7. This case will involves classified national security documents and information. The storage, handling, control, and use of such documents and information will require special security precautions mandated by statute, executive order, and regulation, and access to which requires the appropriate security clearance.

8. In accordance with the provisions of CIPA and the Security Procedures, the Court designates Christine E. Gunning as Court Security Officer for this case, and Michael P. Macisso, Charles L. Alliman, Earl D. Hicks, James P. Londergan, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure any classified documents or information to be made available in connection with this case. Defense counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents and information.

9. The Court has been advised that the following government attorneys working on this case, Helen F. Fahey, Randy I. Bellows, Laura A. Ingersoll, Justin W. Williams, and John J. Dion, have the requisite security clearances to have access to the classified documents and information that relate to this case. All references to government attorneys, or attorneys for the government, as used in this Order, refer only to the attorneys listed in this paragraph.

10. The defendant, and the following attorneys for the defense and their approved employees (collectively referred to herein as "the defense"), shall be given access to classified documents and information as required by the government's discovery obligations and otherwise as necessary to prepare for proceedings in this case: Plato Cacheris, Thomas Preston Burton, John Hundley, and Sydney J. Hoffmann. Any additional person whose assistance the defense reasonably requires may only have access to classified information in this case after obtaining from the Court -- with prior notice to the government -- an approval for access to the appropriate level of classification on a need to know basis, and after satisfying the other requirements described in this Order for access to classified information. The substitution, departure, or removal for any reason from this case of defense counsel or anyone associated with the defense as an employee or witness or otherwise, shall not release that person from the provisions of this Order or the Memorandum of Understanding executed in connection with this Order.

11. Unless already holding an appropriate security clearance, and approved for access to classified information in this case, for the purpose of establishing security clearances necessary for access to classified information that may be involved in this case. Standard Form 86 ("Security Investigation Data for Sensitive Position"), attached releases, and full fingerprints shall be completed and submitted to the Court Security Officer forthwith by defense counsel, all persons whose assistance the defense reasonably requires, and by such Court personnel as the Court requires for its assistance. The Court Security Officer shall take all reasonable steps to process all security clearance applications.

12. Before any person, including the defendant and defense counsel -- but not including government counsel and appropriately cleared Court personnel. Department of Justice employees, and originating

agency personnel -- may have access to classified national security information that may be involved in this case, he or she must also sign and swear to the Memorandum of Understanding ("MOU") appended to this Protective Order. Each person executing the MOU must file an executed original with the Court and in addition must provide an executed original to the Court Security Officer.

13. The Court Security Officer shall arrange for an appropriately approved secure area for the use of the defense. The Court Security Officer shall establish procedures to assure that the secure area is accessible to the defense, and the defendant and authorized witnesses accompanied by defense counsel, during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The secure area shall contain a separate working area for the defense, and will be outfitted with any secure office equipment requested by the defense that is reasonable and necessary to the preparation of the defendant's defense in this case. The Court Security officer, in consultation with defense counsel, shall establish procedures to assure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. No documents containing classified information may be removed from this secure area unless authorized by the Court Security Officer with notice to the Court.

The Court Security Officer shall not reveal to the government the content of any conversations she or he may hear among the defense, nor reveal the nature of documents being reviewed by them, or the work generated by them. In addition, the presence of the Court Security Officer shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney- client privilege.

14. Until further order of this Court, any pleading or other document filed by the defense shall be filed under seal with the Court through the Court Security Officer. The time of physical submission to the Court Security Officer shall be considered the date and time of filing. The Court Security Officer shall promptly examine the pleading or documents and, in consultation with representatives of the appropriate agencies, determine whether the pleading or document contains classified information. If the Court Security Officer determines that the pleading or document contains classified information, she or he shall ensure that that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. Any document filed by the defense that does not contain classified information shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by the defense that contains classified information; the Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

15. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of the filing.

16. Access to Classified Information. Defense counsel and their employees, and the defendant and defense witnesses when accompanied by defense counsel, shall have access to classified information only as follows:

a. All classified information produced by the government to the defense, in discovery or otherwise, and all classified information possessed, created, or maintained by the defense, shall be stored, maintained, and used only in the secure area established by the Court Security Officer.

b. The defense shall have free access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

c. No person, including the defense, shall copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.

d. All documents prepared by the defense (including without limitation, pleadings or other documents intended for filing with the Court) that do or may contain classified information, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information, and in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials (such as notes, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) containing classified information shall be

maintained in the secure area unless and until the Court Security Officer determines that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government.

e. The defense shall discuss classified information only within the secure area or in an other area authorized by the Court Security Officer, and shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system.

f. The defense shall not disclose, without prior approval of the Court, the contents of any classified documents or information to any person not authorized pursuant to this Order, except the Court, Court personnel, and the attorneys for the government, who have been identified by the Court Security Officer as having the appropriate clearances and the need to know that information. Counsel for the government shall be given an opportunity to be heard in response to any defense request for disclosure to a person not named in this Order. Any person approved by the Court for disclosure under this paragraph shall be required to obtain the appropriate security clearance, to sign and submit to the Court the Memorandum of Understanding appended to this Order, and to comply with all terms and conditions of this Order. If preparation of the defense requires that classified information be disclosed to persons not named in this Order, the Court Security Officer shall promptly seek to obtain security clearances for them at the request of defense counsel.

g. If counsel for the government advise defense counsel that certain classified information or documents may not be disclosed to the defendant, then defense counsel, employees of defense counsel, and defense witnesses shall not disclose such information or documents to the defendant without prior concurrence of counsel for the government, or, absent such concurrence, prior approval of the Court. Counsel for the government shall be given an opportunity to be heard in response to any defense request for disclosure to the defendant of such classified information.

17. Classified Information in the Possession of the Defendant Prior to the Institution of this Case. The Court has been advised by the government that as a result of his previous employment by the Federal Bureau of Investigation, the defendant possesses classified information. Furthermore, as set forth in the government's Motion for Protective Order and Incorporated Memorandum of Law, it is clear that the defendant has a continuing contractual obligation to the government not to disclose classified information that he possesses as a result of his government employment to any unauthorized person. The government is entitled to enforce its agreements to maintain the confidentiality of classified information. Consequently, pursuant to federal common law and the ordinary principles of contract law, the defendant is hereby enjoined from breaching the terms of the secrecy agreements to which he has subscribed throughout his. government employment, an exemplar of which is appended hereto and expressly incorporated herein. Specifically, the defendant is prohibited from any future violations of the above-referenced secrecy agreements, and in particular is enjoined from disclosing any classified information to any unauthorized person during the pendency of this Order. Nothing in this Order shall be construed as a limitation on the government in filing additional criminal charges against the defendant in the event of an unauthorized disclosure of classified information, or instituting civil litigation to further enforce these agreements.

18. Procedures for the public disclosure of classified information by the defense shall be those provided in Sections 5 and 6 of CIPA. No classified information may be disclosed by the defense except:

a. to the Court, court personnel, and government attorneys and their agents and employees identified by the Court Security Officer as holding proper approvals for access to classified information;

b. to representatives of the agency or department originating the classified information who have been identified by the Court Security Officer as holding proper security clearances and having the need to know the classified information;

c. in accordance with the procedures of CIPA and the procedures established by the Court Security Officer; and

d. to persons who have been authorized to have access to classified information pursuant to this Order or to CIPA.

To facilitate the defense filing of notices required under Section 5 of CIPA, the Court Security Officer shall make arrangements with the appropriate agencies for a determination of the classification level, if any, of materials or information either within the possession of the defense or about which the defense has knowledge and which the defense intends to use in any way at any pretrial proceeding or at trial. Nothing submitted by the defense to the Court Security Officer pursuant to this paragraph shall be made available to

counsel for the government unless so ordered by the Court, or so designated by the defense. Any and all items which are classified shall be listed in the defendant's Section 5 notice.

19. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. Any breach of this Order will also result in the termination of a person's access to classified information. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause serious damage, and in some cases exceptionally grave damage, to the national security of the United States or may be used to the advantage of a foreign nation against the interests of the United States. This Order is to ensure that those authorized by the Order to receive classified information will never divulge the classified information disclosed to them to anyone who is not now authorized to receive it, without prior written authorization from the originating agency and in conformity with this Order.

20. Unless otherwise ordered by the Court, with due notice to the government, all classified information to which the defendant, defense counsel, defense counsel employees, or any defense witness has access in this case is now and will remain the property of the government. The defendant, defense counsel, defense counsel employees, and defense witnesses shall return all classified information in their possession obtained through discovery from the government in this case, or for which they are responsible because of access to classified information, upon demand of the Court Security Officer. The notes, summaries, and other documents prepared by the defense that do or may contain classified information shall remain at all times in the custody of the Court Security Officer for the duration of this case. At the conclusion of this case, all such notes, summaries, and other documents are to be destroyed by the Court Security Officer in the presence of defense counsel.

21. A copy of this Order shall be issued forthwith to counsel for the defendant, who shall be responsible for advising the defendant, defense counsel employees, and defense witnesses of the contents of this Order. The defendant, defense counsel, defense counsel employees, and defense witnesses to be provided access to classified information shall execute the Memorandum of Understanding appended to this Order, and defense counsel shall file executed originals with the Court and the Court Security Officer and serve executed original of such document upon the government. The execution and filing of the Memorandum of Understanding is a condition precedent for the defendant, defense counsel, defense counsel employees, and defense witnesses to have access to classified information.

ORDERED this 5th day of March, 2001, at Alexandria, Virginia.

[signed]
HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

WE ASK FOR THIS:

HELEN F. FAHEY
UNITED STATES ATTORNEY

Randy I. Bellows, Esquire
Justin W. Williams, Esquire
Assistant United States Attorneys

Laura A. Ingersoll, Esquire
Senior Trial Attorney
Internal Security Section
United States Department of Justice

SEEN AND AGREED TO:

Plato Cacheris, Esquire
Thomas Preston Barton, Esquire
John Hundley, Esquire
Sydney J. Hoffmann, Esquire
Counsel for the Defendant

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[filed March 5, 2001]

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 01-185-M
v.	)	
	)	
ROBERT PHILIP HANSSEN,	)	

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER AND INCORPORATED MEMORANDUM OF LAW

The United States of America, by and through its undersigned attorneys, hereby moves this Court to enter a Protective Order pursuant to Section 3 of the Classified Information Procedures Act, 18 U.S.C. App. III (1994) (CIPA); the Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (reprinted following CIPA Section 9) ; Rules 16(d) and 57 of the Federal Rules of Criminal Procedure; the ordinary principles of contract law; the general supervisory authority of the Court; and in order to protect the national security, which Protective Order will establish procedures necessary for the handling of classified information by the parties in this case so as to prevent unauthorized disclosure of such information. In support thereof, the United States states as follows:

FACTS

1. The Defendant, ROBERT PHILIP HANSSEN, was arrested on February 18, 2001, on a Criminal Complaint charging him with espionage and conspiracy to commit espionage, in violation of 18 U.S.C. Sections 794 (a) and (c). He has remained detained since his arrest, and the government will be seeking his continued detention pending trial.

2. HANSSEN was employed as a Special Agent of the Federal Bureau of Investigation from 1976 until after his arrest in the instant case. During that entire time, and in connection with his assigned duties, HANSSEN held security clearances and was given authorized access to information classified up to and including TOP SECRET SCI levels.[1] In connection with those security clearances, the defendant received periodic briefings and indoctrinations in the proper handling and use of classified information, and he signed agreements in which he acknowledged his understanding of the rules and regulations governing the handling and use of classified information, and agreed to abide by them.

[1] "TOP SECRET" information is certain information the disclosure of which could be reasonably expected to exceptionally grave damage to the national security. Exec. Order No. 12958 §1.3 (a). "SCI" refers to "Sensitive Compartmented Information", which is deemed so sensitive that access to it must be restricted to a limited number of persons among those holding the appropriate clearance level.

3. The Complaint alleges that HANSSEN engaged in a 15-year-long conspiracy in which he made unauthorized communication of classified information to officers of the intelligence services of the Union of Soviet Socialist Republics ("Soviet Union") and its successor state, the Russian Federation ("Russia"). The prosecution of this case will require that the government provide defense counsel with access to certain classified information. The government has agreed to produce a substantial amount of such classified information to the defense in pre-indictment discovery.

4. The unauthorized disclosure of classified information in the possession of HANSSEN before his arrest, and of classified information that the government will make available to defense counsel, can reasonably be expected to cause up to exceptionally grave damage to the national security of the United States, and to adversely affect foreign relations.

MEMORANDUM OF LAW

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, provides procedures designed to protect the rights of the defendant while minimizing the associated harm to national security in cases where classified information may be relevant to the criminal proceedings. See United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

Section 3 of CIPA and Rules 16(d) (1) and 57 of the Federal Rules of Criminal Procedure authorize the Court to issue a protective order to prevent disclosure or dissemination of sensitive information that could compromise national security. See United States v. Rezaq, 156 F.R.D. 514, 523 (D.D.C. 1994); United States v. Musa, 833 F. Supp. 752 (E.D. Mo. 1993). The legislative history of CIPA reflects the type of protection that can be sought in a protective order to ensure that classified information is not improperly revealed and disseminated:

> The court is given authority to issue orders protecting against the disclosure of classified material in connection with the prosecution by the United States. . . . The details of each order are fashioned by the trial judge according to the circumstances of the particular case. The terms of the order may include, but need not be limited to, provisions: (1) prohibiting the disclosure of the information except as authorized by the court; (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (4) requiring the maintaining of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense; (5) requiring the making and handling of notes taken from the material containing classified information; and (6) authorizing the assignment of government security personnel and the provision of Government storage facilities. Punishment for violation of a protective order would be a contempt of court.

S. Rep. No. 96-823, reprinted in 1980 U.S. Code Cong. & Ad. News 4294, 4299 (96th Cong. 2d Sess.).

The purpose of CIPA is to minimize threats by the defendant to disclose classified information in the course of litigation by requiring rulings, before trial, on the admissibility of such information. See Id. Such threats can arise in various circumstances, such as the following: (1) in pretrial discovery the defendant pressures the government to release classified information the threatened disclosure of which might force the government to abandon the prosecution; (2) the government expects to disclose classified information in the prosecution, and endeavors to restrict the dissemination of the information; and (3) the defendant has acquired classified information before the initiation of prosecution and seeks to disclose such information during the litigation. See United States v. Pappas, 94 F.3d 795, 799-800 (2d Cir. 1996). Section 3 of CIPA provides that, on motion of the government, the court must issue a protective order to guard against the disclosure of classified information disclosed by the government to the defendant during criminal litigation. See Id. at 800. The legislative history of CIPA makes it clear that Congress intended Section 3 protective orders to apply to the defendant's previously acquired information, and may prohibit disclosure of such information in connection with the trial of the case. See Id.

To the extent that the defendant himself does not need to know classified information to effectively assist in his defense, a protective order issued pursuant to CIPA may prohibit counsel for the defendant from disclosing classified information to the defendant that has been provided by the government in discovery. See United States v. Rezaq, 156 F.R.D. at 524.

The secrecy agreements signed by the defendant in connection with his employment by the Federal Bureau of Investigation are an appropriate exercise of the Executive Branch's statutory mandate to protect intelligence sources and methods from unauthorized disclosure. See Snepp v. United States, 444 U.S. 507, 510 n.3, 100 S. Ct. 763, 766 n.3 (1980) (regarding the Central Intelligence Agency). The government may seek court intervention to enjoin the defendant from violating such agreements. See Id.; see also Agee v. Central Intelligence Agency, 500 F. Supp. 506 (D.D.C. 1980). Enforcement of the secrecy agreements signed by the defendant is supported under ordinary principles of contract law. See United States v. Pappas, 94 F.3d at 801-02.

Finally, although the above-described procedures of CIPA do not expressly apply until the time the defendant has been indicted, it is respectfully submitted that the Court has the inherent administrative authority to extend their application to the current pre-indictment phase of this case, in the interests of justice.

WHEREFORE, the government respectfully moves that the Court issue the attached Protective Order.

Respectfully submitted,

HELEN F. FAHEY
UNITED STATES ATTORNEY

By:
Randy I. Bellows
Justin W. Williams
Assistant United States Attorneys

Laura A. Ingersoll
Senior Trial Attorney
Internal Security Section
U.S. Department of Justice

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[filed March 1, 2001]

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 01-185-M
v.	)	Judge Buchanan
	)	
ROBERT PHILIP HANSSEN,	)	

GOVERNMENT PROFFER IN SUPPORT OF DETENTION

On February 20, 2001, the United States moved for detention of the defendant pursuant to 18 U.S.C. Section 3142.[1] A detention hearing is set for March 5, 2001 at 2 p.m. We now make a proffer in support of detention.[2]

[1] Title 18 U.S. C. §3142(f)(I)(B) provides for a detention hearing where the Government seeks such a hearing in a case that involves "an offense for which the maximum sentence is life imprisonment or death."

[2] It is well-established that the Government may support its motion for detention by the proffer of evidence. See, e.g., United States v. Gerald Smith, 79 F.3d 1208, 1209-1210 (D.C. Cir. 1996) (and cases cited therein) (noting that every circuit that has considered the question of whether the Government may proceed by proffer at a detention hearing has found that the Government may proceed in this manner.) See, also, United States v. Ferranti, 66 F.3d 540, 542 (2d Cir. 1995).

A. Summary

The Government seeks detention on two grounds, first, that there are no conditions of release "that will reasonably assure the appearance of the person as required," see Title 18 U.S.C. §3142(g) and, second, that there are no conditions of release that will reasonably assure "the safety of any other person and the community," Id. We proffer to this Court, in support of detention, both the Affidavit of February 16, 2001, concerning which United States Magistrate Judge Thomas Rawles Jones, Jr. found probable cause, and the Affidavit of February 21, 2001, concerning which United States Magistrate Judge Alan Kay found probable cause.[3]

[3] The Affidavit of February 16, 2001 is already a part of the record of this proceeding and, therefore, is not attached to this pleading. It is referred to herein as "the Affidavit." The Affidavit of February 21, 2001 was submitted in the District of Columbia in support of search warrants for the defendant's current and former office space. It is attached to this pleading, and is referred to herein as "the Supplemental Affidavit." We note two corrections to the Affidavit. In Paragraph 108, the reference to the "Charlie" drop site should be to the "Doris" drop site. In Paragraph 139, the reference to the date "10/31/01" should read "10/13/01."

The Government respectfully suggests that this Court has rarely been confronted with a more compelling case in support of detention. Hanssen is charged with one of the gravest violations of federal criminal law and, as detailed below, the case against him is overwhelming; if convicted, he faces either life in prison or the death penalty; his perfidy, as alleged in the affidavit, has already resulted in the compromise of extraordinarily sensitive and highly classified information, including the identification of human sources who were subsequently executed. Given his prior access, his expertise as a counterintelligence specialist, and his clear willingness to betray his position of high trust, Hanssen poses a clear and present danger that he will compromise additional information of a sensitive and classified nature.

Moreover, the risk of flight is not fanciful; indeed, it could hardly be less fanciful. He has $800,000 waiting for him in Moscow. He has a Swiss bank account. And he specifically wrote the Russians *more than 15 years ago* concerning the need for an "escape plan" (because "[n]othing lasts forever"). Recent events did

nothing to quell his anxiety; to the contrary, in his final letter to the Russians, deposited in Foxstone Park on February 18, 2001, he wrote: "Something has aroused the sleeping tiger" and warned the Russians that they "should have concerns for the integrity" of the operation. (Supplemental Affidavit at Paragraph 8.) In his briefcase, he carried his current and valid passport and, among other financial documents, a current statement for his Swiss bank account. Virtually up to the moment of his arrest, he was querying the FBI's internal classified computer system for indicators that he was under investigation. It is reasonable to assume that he was not doing this for the purpose of determining when best to surrender.

In short, the release of this defendant under any conditions poses a grave risk of flight and an equally grave danger to the security of our community.

B. Nature of the Pending Charges

There are three key points that must be made about the pending charges:

First, there is the inherent gravity of the crimes charged in the instant complaint.[4] The crime of espionage -- particularly given the defendant's high position of trust as a sworn law enforcement officer and an FBI counterintelligence expert -- is as serious, momentous and grievous as any offense that could be lodged against any defendant.

> [4] The first of the criteria listed in Title 18 U.S.C. §3142(g) is "[t]he nature and circumstances of the offense charged...."

Second, there are the substantive allegations in the Affidavit. Hanssen is alleged to have betrayed his country over the course of more than 15 years, an astonishing tenure for a spy. Moreover, the specific compromises alleged in the Affidavit are of the most serious nature, including divulging the identities of human sources who were subsequently imprisoned or executed, compromising dozens of United States classified documents, some of which were classified at the Top Secret/Sensitive Compartmented Intelligence (TS/SCI) level, compromising technical operations of extraordinary importance and value, compromising United States Intelligence Community communications intelligence capabilities and even specific targets, and compromising numerous FBI counterintelligence investigative techniques, sources, methods and operations.

Hanssen was both aggressive and, unfortunately for the United States, productive in his espionage activities. The affidavit alleges that he passed more than 6,000 pages of documentary material to the KGB/SVR, and that he passed 27 letters to the KGB/SVR as well. Moreover, the affidavit alleges that there were essentially *no limits* as to what Hanssen was willing to do in support of his espionage activities. For example, Hanssen gave up the true identities of three United States Intelligence Community human sources, and a particular highly sensitive and classified information collection technique, for the *explicit* purpose of protecting his own security. *In other words, Hanssen was willing to sacrifice the lives of others in order to protect himself.*[5] Hanssen also compromised technical operations of extraordinary importance and value to the United States, with no apparent regard to the consequences of his conduct to the national security of the United States.

> [5] It is worth noting that although we now know that Ames had also compromised these human sources (Motorin, Martynov and Yuzhin), and had done so several months earlier, Hanssen would certainly not have known this in October 1985 when he compromised their identities.

Third, it is worth considering what penalty Hanssen might face if convicted at trial. In all espionage prosecutions brought under Title 18 U.S.C. §794, the maximum penalty is life imprisonment (or the death penalty if certain statutory criteria are met). In many cases, however, the actual penalty under the United States Sentencing Guidelines is less than life imprisonment. In the instant case, however, the defendant's compromises of classified information included substantial material classified at the Top Secret level; therefore, if convicted and if the Government did not seek the death penalty, the defendant would certainly face a true life sentence.[6]

> [6] The Base Offense Level for espionage involving Top Secret documents is a Level 42, see U.S.S.G. §2M3.1(a)(1), which does not include enhancements for Abuse of Position of Trust, etc.

C. Strength of the Government's Case

A principal factor in assessing whether a defendant may be released is "the weight of the evidence against" the defendant. See Title 18 U.S.C. §3142(g)(2). In the instant case, the weight of the evidence is overwhelming.

First, the Affidavit indicates that the Government has possession of detailed and precise information concerning the actual contents of communications from Hanssen -- who was given the codename "B" -- to the KGB/SVR and from the KGB/SVR to Hanssen, including the locations of drop sites, the protocols used in communicating with the KGB/SVR, the payments of money to Hanssen, and the identification of classified information compromised by Hanssen.

Second, the Affidavit indicates that the Government actually has a recording of "B's" communication with one of his KGB contacts, and the voice of "B" has reliably been identified as that of Hanssen.

Third, the Affidavit indicates that the Government has in its possession a plastic bag used by "B" in a drop to the KGB, and has recovered two prints from that bag which have been identified as being those of Robert Hanssen.

Fourth, the Affidavit indicates that the FBI recently recovered from a memory storage card, found in Hanssen's briefcase, five letters to and from the SVR. What could be more compelling proof of Hanssen's direct involvement in espionage?

Fifth, of course, are the events associated with Hanssen's arrest. One can scarcely imagine more incriminating evidence than Hanssen's activities of February 18, 2001: his marking of a known signal site at Foxstone Park; his depositing at the "Ellis" drop site of a package containing classified documents; and his final note to the Russians indicating that he now suspected he was under investigation and that it was "time to seclude myself from active service," but that he "will be in contact next year, same time same place." See Supplemental Affidavit at Paragraph 8.

Sixth is the array of incriminating evidence recovered by the FBI in its various post-arrest searches. The review of such evidence is still underway but it is clear that evidence has been recovered from these searches which corroborates Hanssen's incriminating correspondence with the KGB/SVR. For example, thumb tacks and chalk were recovered from the Ford Taurus. Each of these items was a designated means of communication with the SVR. For another example, the FBI recovered from Hanssen's residence a Diplomatic license plate (Item #199 on the search warrant return) whose license number is identical to one provided by "B" to the KGB in September 1987 as part of a proposal for a new drop protocol. See Affidavit at Paragraph 73. In addition, the FBI recovered from Hanssen's briefcase at his residence statements concerning Hanssen's bank account at Credit Suisse, in Zurich, Switzerland (Items #84 and #167 on the search warrant return). Of course, possession of a Swiss bank account, *by itself*, would mean little. In this case, however, it was certainly not *by itself*. It must be viewed in the context of this espionage conspiracy. Thus, the Affidavit indicates that in August 1987, the KGB rejected "B's" suggestion of an account in Switzerland. See Affidavit at Paragraph 106. The Affidavit also indicates that on or before June 2000, "Ramon" -- a name Hanssen used in communicating with the KGB/SVR -- specifically addressed the issue of "Swiss money laudering [sic].'" "Ramon" noted: "[Y]ou and I both know it is possible but not simple." See Affidavit at Paragraph 131. Similarly, in a letter from the SVR to "Ramon" on or before July 2000, the Russians indicated that it considered it "very risky to transfer money in Zurich because now it is impossible to hide its origin...." See Affidavit at Paragraph 132. "Ramon" responded that "It certainly could be done" if the transfers of funds were "insulated by laundering on both the in and out sides...." See Affidavit at Paragraph 133. Clearly, Hanssen's Swiss bank account was anything but innocent, regardless of its current balance.

These are only some examples of the strength of the Government's case against Hanssen. There is much more: the reference in Hanssen's Palm III to "2/18" and the "Ellis" drop site; the many statements and disclosures made by "B" to the KGB/SVR that are, by themselves, identifying of Hanssen (e.g., the choice of the particular "old friend" who "B" proposed to the KGB for recruitment); and so on.

D. Danger to the United States

Hanssen is a 25 year veteran of the FBI who spent almost his entire career until his termination[7] in the field of counterintelligence. As the Affidavit indicates, in the course of his career Hanssen was privy to a broad range of information concerning intelligence and counterintelligence activities involving FBI resources. For a number of years he was assigned to the Soviet Analytical Unit, which supported FBI foreign counterintelligence operations and investigations involving Soviet intelligence services. At the time of his

arrest, Hanssen possessed a Top Secret security clearance and, in the days up to his arrest, continued to have access to classified information through the FBI's internal computer system.

[7] Hanssen was fired late last week.

Given this background, it is clear that Hanssen poses a continuing and serious danger to the national security of the United States. If Hanssen were to flee the United States, he would not only be in a position to compromise additional classified information but he would have the freedom to do so with abandon. For more than 15 years, Hanssen compromised classified information to the KGB/SVR *despite* the substantial difficulties in doing so. Hanssen's commitment to betraying the United States was so complete that he was obviously willing and eager to employ all the arcana of espionage trade craft -- the dead drops, the signal sites, the accommodation addresses, the encrypted disks, the code names, and soon-in order to accomplish his mission. If Hanssen were to be released, and fled this country, he would not need to operate under any such constraints and could be debriefed at leisure and at length.

Moreover, even if one were to assume that Hanssen gave the Russians his "best" information, there are numerous other countries that would likely be keenly interested in acquiring the same classified information which Hanssen is already known to have divulged to the KGB/SVR.

Finally, in assessing the risks to this country, one cannot underestimate the significance of the fact that Hanssen's espionage activity continued up to the moment of his arrest. We are not talking here about a spy who was active in the 1980s and who has been dormant for the past decade. Rather, this is a spy who remained active until he was handcuffed. If released, there is every reason to believe he would flee and, after making good on his escape, would resume making disclosures of classified information -- only this time without the impediment of operating in a clandestine and covert manner.

E. Risk of Flight

Just as the case against Hanssen is overwhelming, so too is the risk of flight. Hanssen has the motive, the expertise and, it is reasonable to assume, the resources to flee.

First, we have a defendant who explicitly raised with the KGB the need for an "escape plan," see Affidavit at Paragraph 59, and was actually provided an emergency communications plan for contact with the KGB in Vienna, Austria, see Affidavit at Paragraph 67.

Second, we have a defendant who was told quite recently that his reserve funds in Moscow had risen to $800,000. See Affidavit at Paragraph 129. In his letter to the Russians, on or before November 2000, "B" asked whether the Russians wanted him "to lecture in your 101 course in my old age?" See Affidavit at Paragraph 133. Many years earlier, he had suggested to the KGB that he might some day be accepted as a "guest lecturer." See Affidavit at Paragraph 59. With $800,000 awaiting him in Moscow, and a potential lifetime in prison awaiting him in the United States -- or worse -- one can only imagine the alacrity with which Hanssen would seek to assume his post as "guest lecturer." (One might note here that Hanssen studied Russian during college. See Affidavit at Paragraph 25.)

Third, a fundamental element of any release order is the defendant's "bond" -- his promise and commitment to appear at all court proceedings. There is abundant reason to believe, however, that Hanssen's bond is *worthless*. The Affidavit at Paragraphs 41, 42, 43, 45, and 46 recount various formal and written pledges, promises and commitments which Hanssen made to the United States Government and to the FBI -- each of which, by his conduct, he blatantly violated. Indeed, while he signed the FBI Pledge for Law Enforcement Officers in January 1976, which read in part: "I shall always be loyal to my duty, my organization, and my country," see Affidavit at Paragraph 42, it is clear that his one true *consistent* loyalty was to the KGB and SVR. Thus, Hanssen wrote the SVR on or before November 17, 2000: "Giving up on me is a mistake. I have proven inveterately loyal and willing to take grave risks which even could cause my death...." See Affidavit at Paragraph 133.

Fourth, a Court must have particular concern as to flight risk when it is faced with a defendant with this degree of expertise in spy tradecraft. Hanssen is alleged to have spied for the KGB/SVR for more than 15 years. His unfortunate longevity as a spy is largely attributable to his sophisticated knowledge of FBI counterintelligence and law enforcement techniques. He still has that knowledge, of course, and would therefore pose a far greater danger of successfully fleeing law enforcement authorities than would the average defendant.[8]

[8] Nor can one ignore the obvious fact that Hanssen is a trained law enforcement officer with expertise in the use of multiple weapons. Indeed, the FBI seized from his home at least eleven weapons, and substantial ammunition. See search warrant return at Items #20, #21, #22, #23, #24, #25, #26, #27, #31, #32, and #39.

Finally, there is the $600,000 in cash and diamonds which the defendant is alleged to have received. Prior to the defendant's arrest, the Government was unable to conduct a thorough financial investigation as to the disposition of these funds for fear of alerting the defendant. That investigation is now underway. We do know that Hanssen knew, as far back as 1985, that "Nothing lasts forever." See Affidavit at Paragraph 59. We also know he continued to receive very substantial sums of money from the Russians in recent years. See Affidavit at Paragraph 129. Given his intense concern with security -- which is a constant theme throughout his communications with the KGB/SVR -- it is reasonable to assume he may have put aside some portion of these funds to facilitate an escape if, and when, capture appeared imminent.[9]

[9] It is also worth noting that the defendant is financially sophisticated. He received an MBA degree in Accounting and Information Systems in 1971 and became a Certified Public Accountant in 1973.

In short, this is a defendant who has, in every way that counts, made it clear that, if released, he will flee.

E. Conclusion

Robert Philip Hanssen poses a grave risk of flight and an equally grave danger to this country, and no conditions of release will reasonably assure either his appearances in court or the safety of our country. Therefore, the Government respectfully requests that Hanssen be detained.

Respectfully submitted,

HELEN F. FAHEY
UNITED STATES ATTORNEY

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United States Department of Justice

Transcription and HTML by FAS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	CRIMINAL NO.
ROBERT PHILIP HANSSEN,	)	
a/k/a "B"	)	
a/k/a "Ramon Garcia"	)	
a/k/a "Jim Baker"	)	
a/k/a "G. Robertson"	)	

AFFIDAVIT IN SUPPORT OF SEARCH WARRANTS

I, Stefan A. Pluta, being duly sworn, depose and state as follows:

1. I am presently employed as s Special Agent of the Federal Bureau of Investigation (FBI) and am assigned to the Washington Field Office in the District of Columbia. My background, as well as facts relevant to the application in support of which this Affidavit is submitted, are laid out in the Affidavit in Support of Criminal Complaint, Arrest Warrant and Search Warrants, subscribed by me in the Eastern District of Virginia on February 16, 2001, in connection with this case, which is hereby incorporated, in its totality, by reference.[1]

[1] That Affidavit contains a transcription error in paragraph 139: the date given in the typed note was "10/13/01."

2. This Affidavit is in support of applications for the following:

A) The personal office space of ROBERT PHILIP HANSSEN within Room 9930, Federal Bureau of Investigation Headquarters, 935 Pennsylvania Avenue, N.W., Washington, D.C., in the District of Columbia.

B) Suites 106, 107 and 108 in Room 2510C, Office of Foreign Missions, United States Department of State, 2201 C Street, N.W., Washington, D.C., in the District of Columbia.

3. In addition to the facts stated in the above-mentioned previously subscribed-to Affidavit, the results of the continuing investigation in this matter have established the following facts:

4. On February 16, 2001, United States Magistrate Judge T. Rawles Jones, Jr., of the United States District Court for the Eastern District of Virginia, issued a criminal complaint charging ROBERT PHILIP HANSSEN with conspiracy to commit espionage (18 U.S.C. §794(c)) and espionage (18 U.S.C. §794(a)). He also authorized the issuance of search warrants for HANSSEN's residence in Virginia, and for three automobiles located at that residence. The probable cause for the complaint and search warrants was set forth in the attached and incorporated Affidavit which were subscribed and sworn to by me on February 16, 2001.

5. At approximately 4:21 pm on February 18, 2001, surveillance personnel observed HANSSEN, alone, drive his Ford Taurus vehicle into the parking lot of the Pike 7 Plaza shopping center at Route 7 and Gosnell Road at Tysons Corner, Virginia, where he stopped. They observed him get out of the vehicle, walk to its trunk, open the trunk, and remove from it a black plastic trash bag into which he placed something. He got back into the vehicle and, after a brief period, drove away.

6. At approximately 4:34 pm on February 18, 2001, FBI surveillance personnel observed HANSSEN at the Foxstone Park sign which is the signal site associated with the nearby dead drop site codenamed "ELLIS", which are described in paragraph 106 of the attached previously subscribed-to Affidavit. As noted in paragraph 132 of the attached Affidavit, HANSSEN and the KGB/SVR had established "ELLIS" as the site to be used for a "full exchange operation" once a year, on February 18. As noted in paragraph 150 of the

attached Affidavit, HANSSEN's Palm III personal digital assistant device was recently found to contain a reference to "ELLIS" and the date February 18.

At the sign, HANSSEN was observed placing a piece of white adhesive tape on the Foxstone Park sign, and then walking into the wooded park, in the direction of a footbridge. Approximately nine minutes later, HANSSEN walked back out of the wooded area, whereupon he was placed under arrest.

7. At the time of his arrest, HANSSEN was carrying on his person his FBI credentials and a small roll of white adhesive tape.

8. FBI personnel recovered from under the footbridge nearest to the Foxstone Park sign, a package wrapped in a taped-up black plastic trash bag. The package was transported to the FBI laboratory, where it was photographed, opened, and its contents examined.

Inside the package was a computer diskette containing an encrypted letter which, when decrypted, read as follows:

> Dear Friends:
>
> I thank you for your assistance these many years. It seems, however, that my greatest utility to you has come to an end, and it is time to seclude myself from active service.
>
> Since communicating last, and one wonders if because of it, I have been promoted to a higher do-nothing Senior Executive job outside of regular access to information within the counterintelligence program. It is as if I am being isolated. Furthermore, I believe I have detected repeated bursting radio signal emanations from my vehicle. I have not found their source, but as you wisely do, I will leave this alone, for knowledge of their existence is sufficient. Amusing the games children play. In this, however, I strongly suspect you should have concerns for the integrity of your compartment concerning knowledge of my efforts on your behalf. Something has aroused the sleeping tiger. Perhaps you know better than I.
>
> Life is full of its ups and downs.
>
> My hope is that, if you respond to this constant-conditions-of-connection message, you will have provided some sufficient means of re-contact besides it. If not, I will be in contact next year, same time same place. Perhaps the correlation of forces and circumstances then will have improved.
>
> your friend,
>
> Ramon Garcia

Also inside the package were seven FBI documents printed from the FBI's ACS system, classified SECRET and dated from October through December 2000, relating to recent activity in ongoing FBI foreign counterintelligence investigations against Russian targets.

9. The statements as to Location of Evidence, Fruits, Instrumentalities, and Proceeds, in the attached previously subscribed to Affidavit, are also applicable to the Application in support of which this Affidavit is submitted.

HANSSEN'S FBI HEADQUARTERS OFFICE

10. As noted in paragraph 39 of the attached previously subscribed-to Affidavit, since January 13, 2001, HANSSEN has occupied an office in Room 9930 of FBI Headquarters, 935 Pennsylvania Avenue, N.W., in the District of Columbia. That office has been subjected to limited searches, pursuant to court authority. Immediately after HANSSEN's arrest on February 18, 2001, electronic access to this office was removed from all but two senior officials of the FBI, and this access has remained limited and the officials have not entered the office, pending execution of the search for which authorization is hereby requested.

HANSSEN'S FORMER DOS/OFM OFFICE

11. As noted in paragraph 38 of the attached previously subscribed-to Affidavit, HANSSEN was administratively moved out of the FBI office space within the Department of State's Office of Foreign Missions (DOS/OFM) on January 12, 2001. That office space is designated Suites 106, 107, and 108 within the DOS/OFM office at Room 2510C of the United States Department of State building at 2201 C Street,

N.W., in the District of Columbia. Since January 12, 2001, that FBI space has been occupied by another FBI special agent who was witting of this investigation, but HANSSEN has retained access to the office space, and appeared there unexpectedly on at least one occasion, on February 9, 2001.

12. On February 7, 2001, FBI personnel conducted a limited search of the FBI office space within DOS/OFM pursuant to court authority. Within three safes located there were found, among other materials:

A) a personnel file of HANSSEN containing an FD-776, Cryptographic Access Briefing Acknowledgment dated 10/1996;

B) a document from HANSSEN, dated 1998, requesting authorization to upgrade from SECRET to TOP SECRET storage;

C) a file containing a SECRET communication written by HANSSEN, dated 1998, regarding information about an Intelligence Community penetration;

D) a file entitled Russian Espionage, containing20-30 documents including classified documents downloaded from the FBI ACS system on Felix Bloch and a sensitive classified technical collection program;

E) a file entitled "Russian Issues" containing over 100 documents, mostly classified SECRET, including FBI and State Department communications involving sensitive unnamed sources;

F) a classified memorandum in which HANSSEN used the word "never-the-less" (which is the way in which this word was spelled by "B" in an early letter to the KGB, as described in paragraph 59 of the attached previously subscribed-to Affidavit); and

G) other classified documents, including two containing HANSSEN's original handwriting.

13. Other classified documents remain in the FBI office space located in DOS/OFM.

CONCLUSION AS TO PROBABLE CAUSE TO SEARCH

14. Based upon the facts and circumstances stated above and in the attached previously subscribed-to Affidavit, which is hereby incorporated, in its totality, by reference, I believe there is probable cause that evidence, fruits, instrumentalities, and proceeds of espionage activity by ROBERT PHILIP HANSSEN, in violation of Title 18, United States Code, Section 794(a) (Transmitting National Defense Information) and 794(c) (Conspiracy to Commit Espionage), are located in -- and accordingly I respectfully request search warrants for --

A) The personal office space of ROBERT PHILIP HANSSEN within Room 9930, Federal Bureau of Investigation Headquarters, 935 Pennsylvania Avenue, N.W., Washington, D.C., in the District of Columbia.

B) Suite 106, 107 and 108 in Room 2510C, Office of Foreign Missions, United States Department of State, 2201 C Street, N.W., Washington, D.C., in the District of Columbia.

ATTESTATION

The above facts are true and correct to the best of my knowledge and belief.

[signed]
Stefan A. Pluta
Special Agent
Federal Bureau of Investigation

Sworn and Subscribed to before me
this 21 day of February, 2001

[signed: Alan Kay]
UNITED STATES MAGISTRATE JUDGE

Source: FBI Hardcopy
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FBI Press Release
For Immediate Release
February 20, 2001

Statement of FBI Director Louis J. Freeh
On the Arrest of FBI Special Agent Robert Philip Hanssen

Sunday night the FBI arrested Robert Philip Hanssen who has been charged with committing espionage. Hanssen is a Special Agent of the FBI with a long career in counterintelligence.

The investigation that led to these charges is the direct result of the longstanding FBI/CIA efforts, ongoing since the Aldrich Ames case, to identify additional foreign penetrations of the United States Intelligence Community. The investigation of Hanssen was conducted by the FBI in partnership with the CIA, the Department of State, and, of course, the Justice Department.

The complaint alleges that Hanssen conspired to and did commit espionage for Russia and the former Soviet Union. The actions alleged date back as far as 1985 and, with the possible exception of several years in the 1990s, continued until his arrest on Sunday. He was arrested while in the process of using a "dead drop" to clandestinely provide numerous classified documents to his Russian handler.

It is alleged that Hanssen provided to the former Soviet Union and subsequently to Russia substantial volumes of highly classified information that he acquired during the course of his job responsibilities in counterintelligence. In return, he received large sums of money and other remuneration. The complaint alleges that he received over $600,000.

The full extent of the damage done is yet unknown because no accurate damage assessment could be conducted without jeopardizing the investigation. We believe it was exceptionally grave.

The criminal conduct alleged represents the most traitorous actions imaginable against a country governed by the Rule of Law. As difficult as this moment is for the FBI and for the country, I am immensely proud of the men and women who conducted this investigation. Their actions represent counterintelligence at its very best and under the most difficult and sensitive of circumstances. Literally, Hanssen's colleagues and coworkers at the FBI conducted this investigation and did so quietly, securely and without hesitation. Much of what these men and women did remains undisclosed but their success and that of their CIA counterparts represents unparalleled expertise and dedication to both principle and mission.

The complaint alleges that Hanssen, using the code name "Ramon," engaged in espionage by providing highly classified information to the KGB and its successor agency, the SVR, using encrypted communications, dead drops, and other clandestine techniques. The information he is alleged to have provided compromised numerous human sources, technical operations, counterintelligence techniques, sources and methods, and investigations, including the Felix Bloch investigation.

The affidavit alleges that Hanssen voluntarily became an agent of the KGB in 1985 while assigned to the intelligence division at the FBI field office in New York City as supervisor of a foreign counterintelligence squad. Hanssen allegedly began spying for the Soviets in 1985 when, in his first letter to the KGB, he volunteered information that compromised several sensitive techniques. He also independently disclosed the identity of two KGB officials who, first compromised by Aldrich Ames, had been recruited by the U.S. Government to serve as "agents in place" at the Soviet Embassy in Washington. When these two KGB officials returned to Moscow, they were tried and convicted on espionage charges and executed.

Hanssen subsequently was assigned to a variety of national security posts that legitimately provided him access to classified information relating to the former Soviet Union and Russia. As a result of these assignments within the FBI, Hanssen gained access to some of the most sensitive and highly classified information in the United States Government. To be very clear on this issue, at no time was he authorized to communicate information to agents of the KGB/SVR. Nor can there be any doubt that he was keenly aware of the gravity of his traitorous actions. He later wrote to his KGB handler, speaking about the severity with which U.S. laws punishes his alleged actions, and acknowledging "...I know far better than most what minefields are laid and the risks."

Hanssen was detailed to the Office of Foreign Missions at the Department of State from 1995 to 2000. The complaint, however, does not allege any compromises by him at the State Department. In one letter to his Russian handlers, Hanssen complains about lost opportunities to alert them that the FBI had discovered the microphone hidden at the State Department, known then by the FBI but apparently not by Hanssen as being monitored by a Russian intelligence officer. In this assignment, however, Hanssen did continue to have access to sensitive FBI information as he remained assigned to the FBI's National Security Division and routinely dealt with sensitive and classified matters.

For many years, the CIA and FBI have been aggressively engaged in a sustained analytical effort to identify foreign penetrations of the Intelligence Community. That effort is complemented by substantial FBI proactive investigation of foreign service intelligence officers here and by the critical work done by the CIA. Because of these coordinated efforts, the FBI was able to secure original Russian documentation of an American spy who appeared to the FBI to be Hanssen -- a premise that was soon to be confirmed when Hanssen was identified by the FBI as having clandestinely communicated with Russian intelligence officers.

As alleged in the complaint, computer forensic analysis, substantial covert surveillance, court authorized searches and other sensitive techniques revealed that Hanssen has routinely accessed FBI records and clandestinely provided those records and other classified information to Russian intelligence officers. As alleged, he did so using a variety of sophisticated means of communication, encryption, and dead drops.

Further, the complaint alleges that Hanssen, using his training and experience to protect himself from discovery by the FBI, never met face-to-face with his Russian handlers, never revealed to them his true identity or where he worked, constantly checked FBI records for signs he and the drop sites he was using were being investigated, refused any foreign travel to meet with the Russians, and even declined to accept any "trade craft." Hanssen never displayed outward signs that he was receiving large amounts of unexplained cash. He was, after all, a trained counterintelligence specialist. For these reasons, the FBI learned of his true identity before the Russians; they are learning of it only now. Even without knowing who he was or where he worked, Hanssen's value to the Russians was clear both by the substantial sums of money paid and the prestigious awards given to their own agents for Hanssen's operation.

While this arrest represents a counterintelligence investigative success, the complaint alleges that Hanssen located and removed undetected from the FBI substantial quantities of information that he was able to access as a result of his assignments. None of the internal information or personnel security measures in place alerted those charged with internal security to his activities. In short, the trusted insider betrayed his trust without detection.

While the risk that an employee of the United States Government will betray his country can never be eliminated, there must be more that the FBI can do to protect itself from such an occurrence. I have asked Judge William H. Webster, and he has graciously agreed, to examine thoroughly the internal security functions and procedures of the FBI and recommend improvements. Judge Webster is uniquely qualified as a former FBI Director, CIA Director and Director of Central Intelligence to undertake this review. This is particularly timely as we move to the next generation of automation to support the FBI's information infrastructure. Judge Webster and anyone he selects to assist him will have complete access and whatever resources are necessary to complete this task. He will report directly to the Attorney General and me and we will share his report with the National Security Council and Congress. I intend to act swiftly on his recommendations.

Before concluding, I would like to take this opportunity to thank Director of Central Intelligence George Tenet for the cooperation and assistance of his agency in this investigation. Through our cooperative efforts, the FBI and CIA were able to learn the true identity of "Ramon" and the FBI was able to conduct a solid investigation. Our joint efforts over the last several years and specifically in this case should give pause to those contemplating betrayal of the Nation's trust. Without the current unprecedented level of trust and cooperation between the CIA and FBI, making this case would not have been possible. Nor would many other intelligence and counterintelligence accomplishments that routinely but quietly contribute to the security of this Nation.

Through Attorney General John Ashcroft, I would like to thank the Department of Justice and the U.S. Attorney's Office for the Eastern District of Virginia. The level of support and expertise from Acting Deputy Attorney General Robert Mueller, Counsel for Intelligence Policy Frances Fragos Townsend, U.S. Attorney Helen Fahey and Assistant United States Attorney Randy Bellows is superb. We particularly appreciate the unhesitating leadership and support of Attorney General Ashcroft from the moment he took office.

Director Tenet and I have briefed the intelligence committees of Congress because of the clear national security implications.

As Director of the FBI, I am proud of the courageous men and women of the FBI who each day make enormous sacrifices in serving their country. They have committed their lives to public service and to upholding the high standards of the FBI. Since becoming Director over seven years ago, I have administered the FBI oath to each graduating class of Special Agents at the FBI Academy. Each time, I share the pride and sanctity of those words when new agents swear to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same."

Regrettably, I stand here today both saddened and outraged. An FBI Agent who raised his right hand and spoke those words over 25 years ago has been charged today with violating that oath in the most egregious and reprehensible manner imaginable. The FBI entrusted him with some of the most sensitive secrets of the United States Government and instead of being humbled by this honor, Hanssen has allegedly abused and betrayed that trust. The crimes alleged are an affront not only to his fellow FBI employees but to the American people, not to mention the pain and suffering he has brought upon his family. Our hearts go out to them. I take solace and satisfaction, however, that the FBI succeeded in this investigation. As an agency, we lived up to our responsibility, regardless of how painful it might be.

Source: FBI

FBI Press Release
For Immediate Release
February 20, 2001

Veteran FBI Agent Arrested and Charged With Espionage

Attorney General John Ashcroft, FBI Director Louis J. Freeh and United States Attorney Helen Fahey announced today that a veteran FBI counterintelligence Agent was arrested Sunday by the FBI and charged with committing espionage by providing highly classified national security information to Russia and the former Soviet Union.

At the time of the arrest at a park in Vienna, Virginia, Robert Philip Hanssen, age 56, was clandestinely placing a package containing highly classified information at a pre-arranged, or "dead drop," site for pick-up by his Russian handlers. Hanssen had previously received substantial sums of money from the Russians for the information he disclosed to them.

FBI Director Louis J. Freeh expressed both outrage and sadness. He said the charges, if proven, represent "the most serious violations of law -- and threat to national security."

"A betrayal of trust by an FBI Agent, who is not only sworn to enforce the law but specifically to help protect our nation's security, is particularly abhorrent. This kind of criminal conduct represents the most traitorous action imaginable against a country governed by the Rule of Law. It also strikes at the heart of everything the FBI represents -- the commitment of over 28,000 honest and dedicated men and women in the FBI who work diligently to earn the trust and confidence of the American people every day."

"These kinds of cases are the most difficult, sensitive and sophisticated imaginable. I am immensely proud of the men and women of the FBI who conducted this investigation. Their actions represent counterintelligence at its very best, reflecting dedication to both principle and mission. It is not an easy assignment to investigate a colleague, but they did so unhesitatingly, quietly and securely."

Hanssen was charged in a criminal complaint filed in Federal court in Alexandria, Virginia, with espionage and conspiracy to commit espionage, violations that carry a possible punishment of life in prison, and under certain circumstances, the death penalty. Following the arrest, FBI Agents began searching Hanssen's residence, automobiles and workspace for additional evidence.

A detailed affidavit, filed in support of the criminal complaint and search warrants, provides a troubling account of how Hanssen first volunteered to furnish highly sensitive documents to KGB intelligence officers assigned to the Soviet embassy in Washington, D.C. The affidavit chronicles the systematic transfer of highly classified national security and counterintelligence information by Hanssen in exchange for diamonds and cash worth more than $600,000. Hanssen's activities also have links to other, earlier espionage and national security investigations including the Aldrich Ames and Felix Bloch cases, according to the affidavit.

The affidavit alleges that on over 20 separate occasions, Hanssen clandestinely left packages for the KGB, and its successor agency, the SVR, at dead drop sites in the Washington area. He also provided over two dozen computer diskettes containing additional disclosures of information. Overall, Hanssen gave the KGB/SVR more than 6,000 pages of valuable documentary material, according to the affidavit.

The affidavit alleges that Hanssen compromised numerous human sources of the U.S. Intelligence Community, dozens of classified U.S. Government documents, including "Top Secret" and "codeword" documents, and technical operations of extraordinary importance and value. It also alleges that Hanssen compromised FBI counterintelligence investigative techniques, sources, methods and operations, and disclosed to the KGB the FBI's secret investigation of Felix Bloch, a foreign service officer, for espionage.

Freeh said that although no formal damage assessment could be conducted before the arrest without jeopardizing the investigation, it is believed that the damage will be exceptionally grave.

During the time of his alleged illegal activities, Hanssen was assigned to New York and Washington, D.C., where he held key counterintelligence positions. As a result of his assignments, Hanssen had direct and

legitimate access to voluminous information about sensitive programs and operations. As the complaint alleges, Hanssen effectively used his training, expertise and experience as a counterintelligence Agent to avoid detection, to include keeping his identity and place of employment from his Russian handlers and avoiding all the customary "tradecraft" and travel usually associated with espionage. The turning point in this investigation came when the FBI was able to secure original Russian documentation of an American spy who appeared to the FBI to be Hanssen, which subsequent investigation confirmed.

Freeh said the investigation that led to the charges is a direct result of the combined and continuing FBI/CIA effort ongoing for many years to identify additional foreign penetrations of the U.S. intelligence community. The investigation of Hanssen was conducted by the FBI with direct assistance from the CIA, Department of State and the Justice Department, and represents an aggressive and creative effort which led to this counterintelligence success. Freeh said, "We appreciate the unhesitating leadership and support of Attorney General John Ashcroft from the moment he took office."

Freeh also expressed his gratitude to Helen Fahey, United States Attorney for the Eastern District of Virginia, Assistant United States Attorney Randy Bellows, and senior Justice Department officials Robert Mueller, Frances Fragos Townsend, John Dion and Laura Ingersoll for their contributions to the case.

United States Attorney Fahey said, "In the past decade, it has been our unfortunate duty to prosecute a number of espionage cases -- Ames, Pitts, Nicholson, Squillacote, Kim, Boone, and others. With each case, we hope it will be the last. Today, however with the arrest of Robert Hanssen, we begin again the process of bringing to justice a U.S. Government official charged with the most egregious violations of the public trust. The full resources of the Department of Justice will be devoted to ensuring that those persons who would betray their country and the people of the United States are prosecuted and severely punished."

"I want to express my appreciation for the outstanding work done by the National Security Division and the Washington Field Office of the FBI in this investigation. Their superlative work in this extraordinarily sensitive and important investigation is testament to their professionalism and dedication. We also express our deep appreciation for the outstanding assistance provided by the Internal Security Section of the Criminal Division of the Department of Justice."

Freeh and CIA Director George Tenet kept the Intelligence Committees of Congress, because of the clear national security and foreign policy implications, informed about the case.

As a result of Hanssen's actions, Freeh has ordered a comprehensive review of information and personnel security programs in the FBI. Former FBI Director and Director of Central Intelligence William H. Webster will lead the review. Webster, currently in private law practice, brings a "unique experience and background in government management and counterintelligence," Freeh said. "Moreover, the respect he enjoys throughout the intelligence community and elsewhere in government is second to none. Judge Webster will have complete access and whatever resources that are necessary to complete the task and will report directly to Attorney General Ashcroft and me. I will share his report with the National Security Council and then Congress as well," Freeh said.

Source: FBI

Veteran FBI Agent Arrested and Charged with Espionage

Robert Philip Hanssen

"ELLIS" Drop Site
On the "Foxstone Park" sign.

"ELLIS" Drop Site
Under a footbridge over Wolftrap Creek near Creek Crossing Road at Foxstone Park near Vienna, Virginia.

"ELLIS" Drop Site
Under a footbridge over Wolftrap Creek near Creek Crossing Road at Foxstone Park near Vienna, Virginia.

"ELLIS" Drop Site
Package dropped by Hanssen at the Ellis drop site on 2/18/01.

"LEWIS" Signal Site
Wooden utility pole located at the North-West corner of the intersection of 3rd Street and Carlin Springs Road near the metrobus stop.

"LEWIS" Drop Site
The far-left corner of the wooden podium (when facing the podium) located in the amphitheater of Long Branch Nature Center.

"LEWIS" Drop Site
Package recovered at the Lewis drop site containing $50,000 cash left by Russians for Hanssen.

Source: FBI

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	CRIMINAL NO.
ROBERT PHILIP HANSSEN,	)	
a/k/a "B"	)	
a/k/a "Ramon Garcia"	)	
a/k/a "Jim Baker"	)	
a/k/a "G. Robertson"	)	

AFFIDAVIT IN SUPPORT OF
CRIMINAL COMPLAINT, ARREST WARRANT AND SEARCH WARRANTS

I, Stefan A. Pluta, being duly sworn, depose and state as follows:

1. I am presently employed as a Special Agent of the Federal Bureau of Investigation (FBI) and am assigned to the Washington Field Office in the District of Columbia. I have been employed as an FBI Special Agent for approximately 13 years. I have completed FBI training in foreign counterintelligence matters. As a result of my training and experience, I am familiar with the tactics, methods, and techniques of foreign intelligence services and their agents.

2. This affidavit is in support of applications for the following:

A) A warrant for the arrest of ROBERT PHILIP HANSSEN (DOB 4/18/44) for violations of Title 18 United States Code, Sections 794 (a) (Transmitting National Defense Information) and 794 (c) (Conspiracy to Commit Espionage); and

B) Search warrants for:

1) The residence of ROBERT PHILIP HANSSEN, such premises known and described as a single family residence located at:

9414 Talisman Drive
Vienna, Virginia 22182

as more fully described in Attachment B, and which is within the Eastern District of Virginia;

2) One silver 1997 Ford Taurus, bearing VIN IFALP52U9VG211742 and Virginia license plate number ZCW9538, which is owned by ROBERT PHILIP HANSSEN and anticipated to be within the Eastern District of Virginia;

3) One 1993 Volkswagen van, bearing VIN WV2KC0706PH080424 and Virginia license plate number ZCW9537, which is owned by ROBERT PHILIP HANSSEN and anticipated to be within the Eastern District of Virginia;

4) One 1992 Isuzu Trooper, bearing VIN JACDH58W7N7903937 and Virginia license plate YRP3849, which is owned by ROBERT PHILIP HANSSEN and anticipated to be within the Eastern District of Virginia.

3. In my capacity as case agent assigned to this matter, I have examined documents and other records pertinent to this investigation from numerous sources. Searches and various forms of surveillance have also been conducted pursuant to the Foreign Intelligence Surveillance Act (FISA) and orders of the Foreign Intelligence Surveillance Court (FISC).

I. SUMMARY OF INVESTIGATION

4. The results of this investigation to date indicate that there is probable cause to believe that, beginning in 1985 and continuing to the present, ROBERT PHILIP HANSSEN (hereinafter "HANSSEN"), a United States citizen, has conspired with officers and agents of the Union of Soviet Socialist Republics (hereinafter "USSR" or "Soviet Union") and with its principal successor state, the Russian Federation (hereinafter "Russia") to commit espionage against the United States on behalf of a foreign government, specifically the Soviet Union or Russia, and has in fact engaged in such espionage.

5. The evidence establishes that between 1985 and the present, HANSSEN — who the KGB/SVR referred to as "B" — has engaged in the following conduct in violation of 18 U.S.C. §§794 (a) and (c):

(a) He compromised numerous human sources of the United States Intelligence Community. Three of these sources were compromised by both HANSSEN and former CIA officer Aldrich Ames, resulting in their arrest, imprisonment and, as to two individuals, execution. HANSSEN compromised these three individuals expressly in order to enhance his own security and enable him to continue spying against the United States.

(b) He compromised dozens of United States Government classified documents, including documents concerning the National MASINT (Measurement and Signature Intelligence) Program (classified TOP SECRET/SCI), the United States Double Agent Program (classified SECRET), the FBI Double Agent Program (classified TOP SECRET), the United States Intelligence Community's Comprehensive Compendium of Future Intelligence Requirements (classified TOP SECRET), a study concerning KGB recruitment operations against the CIA (classified SECRET), an assessment of the KGB's effort to gather information concerning certain United States nuclear programs (classified TOP SECRET), a CIA analysis of the KGB's First Chief Directorate (classified SECRET), a highly classified and tightly restricted analysis of the foreign threat to a specific named highly compartmented classified United States Government program (classified TOP SECRET/SCI), and other classified documents of exceptional sensitivity.

(c) He compromised United States Intelligence Community technical operations of extraordinary importance and value. This included specific electronic surveillance and monitoring techniques and precise targets of the United States Intelligence Community. In one case, he compromised an entire technical program of enormous value, expense and importance to the United States Government. In several other cases, he compromised the United States Intelligence Community's specific communications intelligence capabilities, as well as several specific targets.

(d) He compromised numerous FBI counterintelligence investigative techniques, sources, methods and operations, and FBI operational practices and activities targeted against the KGB/SVR. He also advised the KGB/SVR as to specific methods of operation that were secure from FBI surveillance and warned the KGB/SVR as to certain methods of operation which were subject to FBI surveillance.

(e) He disclosed to the KGB the FBI's secret investigation of Felix Bloch, a Foreign Service Officer, for espionage, which led the KGB to warn Bloch that he was under investigation, and completely compromised the investigation.

(f) HANSSEN's conspiratorial activities continue to the present. HANSSEN continues to monitor a particular SVR signal site, doing so on numerous occasions in December 2000, January 2001 and February 2001. A recent search of HANSSEN's personal vehicle, pursuant to court authorization, disclosed a number of classified SECRET documents, entries in a personal journal concerning matters related to the instant investigation, and items typically used to mark signal sites. It has also been determined that HANSSEN continues to attempt to ascertain whether he has become the subject of FBI investigative interest, including checking FBI records to determine whether there have been recent entries as to his own name, his home address, or the signal site.

(g) Over the course of HANSSEN's espionage activities, he communicated on numerous occasions with KGB/SVR personnel. This Affidavit cites 27 letters he sent to the KGB/SVR, and it describes 33 packages the KGB/SVR left for HANSSEN at secret locations, and 22 packages HANSSEN left for the KGB/SVR at secret locations. The Affidavit also describes two telephone conversations HANSSEN had with KGB personnel. The Affidavit describes 26 computer diskettes that HANSSEN passed to the KGB/SVR, containing additional disclosures of information, and 12 diskettes that the KGB/SVR passed to "B". HANSSEN provided the KGB/SVR more than 6,000 pages of documentary material.

(h) For his services to the KGB/SVR, HANSSEN was paid over $600,000 in cash and diamonds. In addition, the KGB/SVR placed funds in escrow in a Moscow bank on HANSSEN's behalf. Some time in the last two years, the KGB/SVR informed HANSSEN that the escrowed funds are now worth at least $800,000.

II. KEY TERMS AND ENTITIES

6. The term counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassination conducted for or on behalf of foreign powers, organizations or persons.

7. The KGB (*Komitet Gosudarstvenoy Bezopasnosti*, or Committee for State Security) was the intelligence service of the former Soviet Union. The KGB's First Chief Directorate (FCD) was responsible for foreign intelligence, active measures, and counterintelligence. KGB FCD intelligence officers assigned to Soviet diplomatic missions could be assigned to Line KR (Foreign Counterintelligence), Line N (Illegals Operations), Line PR (Political), or Line X (Science and Technology), among others. The KGB's Second Chief Directorate (SCD) was responsible, among other things, for domestic counterintelligence, that is, counterintelligence activities within the Soviet Union. The KGB's Moscow headquarters was referred to as the Moscow Center.

8. Since December 1991, the SVR (*Sluzhba Vneshney Razvedki Rossii*, or Russian Foreign Intelligence Service) has been the Russian Federation's successor agency to the KGB's foreign intelligence arm.

9. The GRU (*Glavnoye Razvedyvateinoye Upravlenie*, or Chief Intelligence Directorate of the General Staff) was the military intelligence agency of the former Soviet Union, and continues to serve that function for the Russian Federation.

10. The Soviet/Russian Embassy in Washington, D.C., is located at 1125 16th Street, N.W.; the Soviet/Russian Diplomatic-Compound is located at 2650 Wisconsin Avenue, N.W. The KGB/SVR presence in a Soviet/Russian diplomatic mission is called the *Rezidentura*. headed by the KGB/SVR *Rezident*.

11. An agent-in-place is a person who remains in a position while acting under the direction of a hostile intelligence service, so as to obtain current intelligence information. It is also called a recruitment-in-place.

12. An illegal is an intelligence officer or a recruited agent who operates in a foreign country in the guise of a private person, and is often present under false identity.

13. A double agent is an agent engaged in clandestine activity for two or more intelligence services who provides information about one service to another.

14. A dead drop is a prearranged hidden location used for the clandestine exchange of packages, messages, and payments, which avoids the necessity of an intelligence officer and an agent being present at the same time.

15. A signal site is a prearranged fixed location, usually in a public place, on which an agent or intelligence officer can place a predetermined mark in order to alert the other to operational activity. Such a mark may be made by, for example, chalk or a piece of tape. The operational activity signaled may be the fact that a dead drop has been "loaded" and is ready to be "cleared." A call-out signal may be used to trigger a contact between an agent and an intelligence officer.

16. An accommodation address is a "safe" address, not overtly associated with intelligence activity, used by an agent to communicate with the intelligence service for whom he working.

17. The FBI has documented the use by the KGB/SVR of agents-in-place, illegals, double agents, dead drops, signal sites, call-out signals, and accommodation addresses, including their use in the Northern Virginia area, in the Eastern District of Virginia.

18. The United States Intelligence Community is the aggregation of those Executive Branch entities and programs that, in accordance with applicable United States law and the provisions of Executive Order 12333, conduct intelligence activities that are necessary for the conduct of foreign relations and the protection of the national security of the United States, and that make up the total national intelligence effort. It includes the FBI's National Security Division, the Central Intelligence Agency (CIA), the National Security Agency (NSA), the National Reconnaissance Organization (NRO), the Defense Intelligence

Agency (DIA), the Bureau of Intelligence and Research of the Department of State (DOS/INR), and the intelligence elements of the military service branches, among other entities.

19. The Foreign Intelligence Surveillance Act (FISA), Title 50, United States Code, Sections 1801-1811 and 1821-1829, provides for electronic surveillance and searches within the United States directed at persons for whom there is probable cause to believe they are knowingly engaged in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States, as authorized by the Foreign Intelligence Surveillance Court (FISC).

20. Aldrich Hazen Ames is a former CIA officer who in 1994 was arrested and subsequently pled guilty to having committed espionage as an agent of the KGB and SVR. Ames volunteered to the KGB in April 1985, and provided information to the KGB and the SVR until the date of his arrest in February 1994.

21. Classified information is defined by Executive Order 12958 and its predecessor orders (including E.O. 12356), as follows: information in any form that (1) is owned by, produced by or for, or under the control of the United States Government; (2) falls within one or more of the categories set forth in Section 1.5 of the Order (including intelligence sources or methods, cryptology, military plans, and vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security), and (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security. Where such unauthorized release could reasonably result in "serious" damage, the information may be classified as SECRET. Where such damage is "exceptionally grave," the information may be classified TOP SECRET. Access to classified information at any level may be further restricted through compartmentation in SENSITIVE COMPARTMENTED INFORMATION (SCI) categories. Dissemination of classified information at any level may also be restricted through caveats such as: NOFORN (Not Releasable to Foreign Nationals), NOCONTRACT (Not Releasable to Contractors or Contractor/Consultants), WNINTEL (Warning Notice: Intelligence Sources and Methods Involved), and ORCON (Dissemination and Extraction of Information Controlled by Originator).

III. BACKGROUND OF ROBERT PHILIP HANSSEN

22. ROBERT PHILIP HANSSEN was born on April 18, 1944, in Chicago, Illinois, where he was raised. He is a United States citizen.

23. HANSSEN received an AB degree in Chemistry from Knox College, in Illinois, in 1966. He studied dentistry at Northwestern University, in Chicago, Illinois, from 1966 to 1968, and received an MBA degree in Accounting and Information Systems from Northwestern University in 1971. He became a Certified Public Accountant in 1973.

24. From 1971 to 1972, HANSSEN was employed as a junior accountant at an accounting firm in Chicago, Illinois. In 1972, HANSSEN joined the Chicago Police Department as an investigator in the Financial Section of the Inspection Services Division.

25. HANSSEN studied the Russian language during college.

A. FEDERAL BUREAU OF INVESTIGATION EMPLOYMENT AND DUTIES

26. On January 12, 1976, HANSSEN entered on duty as a Special Agent of the Federal Bureau of Investigation. He has served as an FBI Special Agent continuously since that date.

27. After initial training, HANSSEN was assigned to the FBI Field Office in Indianapolis, Indiana, and served on a White Collar Crime squad at the Resident Agency in Gary, Indiana, until August 1, 1978.

28. From August 2, 1978 to January 10, 1981, HANSSEN was assigned to the FBI Field Office in New York, New York, initially working on accounting matters in the Field Office's criminal division.

29. In March 1979, HANSSEN was detailed to the New York Field Office's intelligence division to help establish the FBI's automated counterintelligence data base in that office. At that time, this was a new automated database of information about foreign officials, including intelligence officers, assigned to the United States. Its contents were classified up to the SECRET level.

30. From January 12, 1981, to September 22, 1985, HANSSEN was assigned to FBI Headquarters in Washington, D.C., as a Supervisory Special Agent in the Intelligence Division. From January 1981 to

August 1983, HANSSEN was assigned to the Budget Unit, which managed the FBI's portion of the United States Intelligence Community' s National Foreign Intelligence Program, and prepared budget justifications to Congress. This office had access to the full range of information concerning intelligence and counterintelligence activities involving FBI resources. From August 1983 until September 1985, HANSSEN was assigned to the Soviet Analytical Unit, which supported FBI FCI operations and investigations involving Soviet intelligence services, and provided analytical support to senior FBI management and the Intelligence Community.

While at FBI Headquarters, HANSSEN was assigned to the intelligence component of a particular highly-compartmented classified United States Government program. He also served on the FBI's FCI Technical Committee, which was responsible for coordinating technical projects relating to FCI operations.

31. From September 23, 1985, to August 2, 1987, HANSSEN was assigned to the intelligence division of the FBI Field Office in New York, New York, as supervisor of an FCI squad.

32. From August 3, 1987, to June 24, 1990, HANSSEN was reassigned to FBI Headquarters in Washington, D.C., where he again served as a Supervisory Special Agent in the Intelligence Division's Soviet Analytical Unit.

33. From June 25, 1990, to June 30, 1991, HANSSEN was assigned to the FBI Headquarter' s Inspections Staff as an Inspector's Aide. In this assignment he traveled to FBI Field Offices, Resident Agencies, and FBI Legal Attache offices in United States Embassies abroad.

34. On July 1, 1991, HANSSEN returned to the Intelligence Division at FBI Headquarters, where he served for six months in the Soviet Operations Section as a program manager in the unit responsible for countering efforts by the Soviets (and particularly the KGB's Line X) to acquire United States scientific and technical intelligence.

35. From January 6, 1992, to April 11, 1994, HANSSEN served as Chief of the National Security Threat List (NSTL) Unit in the Intelligence Division (renamed the National Security Division, or NSD, in 1993) at FBI Headquarters. There he focused the Unit's efforts on economic espionage.

36. In April 1994, HANSSEN was temporarily assigned to the FBI's Washington Metropolitan Field Office (now called Washington Field Office).

37. In December 1994, HANSSEN was reassigned to FBI Headquarters, in the Office of the Assistant Director for NSD.

38. From February 12, 1995, to January 12, 2001, HANSSEN was detailed to serve as the FBI's senior representative to the Office of Foreign Missions of the United States Department of State (DOS/OFM). In that position he functioned as the head of an interagency counterintelligence group within DOS/OFM, and as FBI's liaison to the State Department's Bureau of Intelligence and Research (DOS/INR). His office was in an area designated Suites 106, 107 and 108 of Room 2510C of the State Department building at 2201 C Street, N.W., Washington, D.C.

39. Effective January 13, 2001, HANSSEN was assigned to a newly-created position in the Information Resources Division, at FBI Headquarters, in order that the FBI could more effectively monitor his daily activities without alerting him to the ongoing investigation of his activities. His current office is Room 9930 of FBI Headquarters, 935 Pennsylvania Avenue, N.W., Washington, D.C.

40. At no time during his employment with the FBI was HANSSEN ever authorized, directly or indirectly, to deliver, communicate, or transmit the classified information and documents described in this Affidavit to agents, officers, or employees of the KGB, SVR, or any other hostile foreign intelligence service.

B. OATHS OF OFFICE

41. On January 12, 1976, upon entering service with the FBI, HANSSEN signed an Oath of Office in which he swore that:

> I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

42. On January 12, 1976, HANSSEN also signed the FBI Pledge for Law Enforcement Officers, in which he pledged, in part, as follows:

> Humbly recognizing the responsibilities entrusted to me, ... I accept the obligation in connection with my assignments to . . . consider the information, coming into my knowledge by virtue of my position as a sacred trust, to be used solely for official purposes. . . . In the performance of my duties and assignments, I shall not engage in unlawful and unethical practices .. .. While occupying the status of a law enforcement officer or at any other time subsequent thereto, I shall not seek to benefit personally because of my knowledge of any confidential matter which has come to my attention. I am aware of the serious responsibilities of my office and in the performance of my duties . . . I shall wage vigorous warfare against the enemies of my country, of its laws, and of its principles; . . . I shall always be loyal to my duty, my organization, and my country.

43. On January 12, 1976, HANSSEN also signed an Employment Agreement in which he stated, in part:

> I hereby declare that I intend to be governed by and I will comply with the following provisions:
>
> (1) That I am hereby advised and I understand that Federal law such as Title 18, United States Code, Sections 793, 794, and 798; Order of the President of the United States (Executive Order 11652); and regulations issued by the Attorney General of the United States (28 Code of Federal Regulations, Sections 16.21 through 16.26) prohibit loss, misuse, or unauthorized disclosure or production of national security information, other classified information and other nonclassified information in the files of the FBI;
>
> (2) I understand that unauthorized disclosure of information in the files of the FBI or information I may acquire as an employee of the FBI could result in impairment of national security, place human life in jeopardy, or result in the denial of due process to a person or persons who are subjects of an FBI investigation, or prevent the FBI from effectively discharging its responsibilities. I understand the need for this secrecy agreement; therefore, as consideration for employment I agree that I will never divulge, publish, or reveal either by word or conduct, or by other means disclose to any unauthorized recipient without official written authorization by the Director of the FBI or his delegate, any information from the investigatory files of the FBI or any information relating to material contained in the files, or disclose any information or produce any material acquired as part of the performance of my official duties or because of my official status. . . .
>
> (4) That I understand unauthorized disclosure may be a violation of Federal law and prosecuted as a criminal offense and in addition to this agreement may be enforced by means of an injunction or other civil remedy.
>
> C. SECURITY CLEARANCES AND ACKNOWLEDGMENTS

44. HANSSEN received his initial TOP SECRET security clearance on January 12, 1976, and has held various SCI accesses since his initial SCI indoctrination on June 23, 1980.

45. On June 23, 1980, HANSSEN signed a Nondisclosure Agreement for Sensitive Compartmented Information, in which he acknowledged receiving a security indoctrination for a particular SCI program, and further acknowledged, among other things:

> 3. I have been advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of the designated Sensitive Compartmented Information by me could cause irreparable injury to the United States, and be used to advantage by a foreign nation. . . .
>
> 4. In consideration of being granted access to the designated Sensitive Compartmented Information, I pledge that I will never divulge such information, in any form or any manner, to anyone who is not authorized to receive it, without prior written authorization from an appropriate official of the United States Government.
>
> 5. I have been advised that any unauthorized disclosure of the designated Sensitive Compartmented Information by me may be a substantial violation of this agreement, and may result in the termination of my employment. In addition, I have been advised that any such unauthorized disclosure by me may constitute violations of United States civil or criminal laws, including, as to the latter, the provisions of Sections 793, 794, and 798, Title 18, United States Code, and of Section 783, Title 50, United States Code. . . . I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 1001 of Title 18, United States Code, Section 783 of Title 50, United

States Code, Executive Order 12065, as amended and the Information Security Oversight Office Directive of 2 October 1978, as amended, which implements this Executive Order, so that I may read them at any time, if I so choose. . . .

I make this agreement without any mental reservation or purpose of evasion.

HANSSEN signed further iterations of this SCI Nondisclosure Agreement, in order to have access to additional SCI program information, on the following dates: October 1, 1981; March 1, 1982; September 9, 1983; April 10, 1985; and May 31, 1991.

46. On October 15, 1984, HANSSEN signed a Classified Information Nondisclosure Agreement in which he stated, in part:

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. . . .

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information . . . .

3. I have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government Department or Agency . . . last granting me a security clearance that such disclosure is permitted. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. . . . I have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a violation or violations of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and 952, Title 18, United States Code, the provisions of Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation. . . .

10. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available to me Sections 641, 793, 794, 798, and 952 of Title 18, United States Code, Section 783(b) of Title 50, United States Code, the Intelligence Identities Protection Act of 1982, and Executive Order 12356, so that I may read them at this time, if I so choose.

D. RESIDENCES

47. From 1981 until 1985, HANSSEN owned a house and resided with his family on Whitecedar Court in Vienna, Virginia.

48. In approximately August 1987, after returning from his tour of duty in New York City, HANSSEN purchased a residence at 9414 Talisman Drive in Vienna, Virginia, where he and his family have lived continuously since.

IV. BASIS FOR THE INFORMATION IN THIS AFFIDAVIT

49. This Affidavit is based on numerous different types and sources of information, including the following:

A. Letters, and other forms of communications from "B" to the KGB/SVR, and from the KGB/SVR to "B";

B. A recording of a telephone conversation between "B" and a KGB/SVR officer;

C. Computer media, including hard drives and storage devices;

D. The actual plastic material that constituted the inner wrapping of a package that "B" passed to the KGB/SVR;

E. Information provided by former KGB/SVR personnel;

F. Records of the FBI, the CIA, and other agencies of the United States Intelligence Community;

G. The contents of an actual package that the KGB/SVR passed to "B";

H. Forensic testing and examination;

I. Interviews;

J. Physical searches and electronic surveillance conducted by the FBI pursuant to FISC authority;

K. Public records;

L. Other law enforcement and intelligence techniques, sources and methods; and

M. KGB/SVR operational and production files.

V. THE KGB's "B" OPERATION

50. The sources of information described in the foregoing section have established the following regarding "B":

51. On or about October 4, 1985, a KGB Line PR officer in Washington, D.C., named Viktor M. Degtyar, received an envelope by mail, at his residence in Alexandria, Virginia, in the Eastern District of Virginia. The envelope was postmarked "Prince George's Co, MD" on October 1, 1985. Inside was an inner envelope, marked: "DO NOT OPEN. TAKE THIS ENVELOPE UNOPENED TO VICTOR I. CHERKASHIN." At that time, Viktor Ivanovich Cherkashin was the Line KR Chief at the Soviet Embassy in Washington, D.C. Inside the inner envelope was an unsigned typed letter from the person whom the KGB came to call "B." The letter read in part as follows:

> DEAR MR. CHERKASHIN:
> SOON, I WILL SEND A BOX OF DOCUMENTS TO MR. DEGTYAR. THEY ARE FROM CERTAIN OF THE MOST SENSITIVE AND HIGHLY COMPARTMENTED PROJECTS OF THE U.S. INTELLIGENCE COMMUNITY. ALL ARE ORIGINALS TO AID IN VERIFYING THEIR AUTHENTICITY. PLEASE RECOGNIZE FOR OUR LONG-TERM INTERESTS THAT THERE ARE A LIMITED NUMBER OF PERSONS WITH THIS ARRAY OF CLEARANCES. AS A COLLECTION THEY POINT TO ME. I TRUST THAT AN OFFICER OF YOUR EXPERIENCE WILL HANDLE THEM APPROPRIATELY. I BELIEVE THEY ARE SUFFICIENT TO JUSTIFY A $100,000 PAYMENT TO ME.
> I MUST WARN OF CERTAIN RISKS TO MY SECURITY OF WHICH YOU MAY NOT BE AWARE. YOUR SERVICE HAS RECENTLY SUFFERED SOME SETBACKS. I WARN THAT MR. BORIS YUZHIN (LINE PR, SF), MR. SERGEY MOTORIN, (LINE PR, WASH.) AND MR. VALERIY MARTYNOV (LINE X, WASH.) HAVE BEEN RECRUITED BY OUR "SPECIAL SERVICES."

"B" proceeded to describe in detail a particular highly sensitive and classified information collection technique. In addition, "TO FURTHER SUPPORT MY BONA FIDES" he provided specific closely-held items of information regarding then-recent Soviet detectors. "B" added:

> DETAILS REGARDING PAYMENT AND FUTURE CONTACT WILL BE SENT TO YOU PERSONALLY. . . . MY IDENTITY AND ACTUAL POSITION IN THE COMMUNITY MUST BE LEFT UNSTATED TO ENSURE MY SECURITY. I AM OPEN TO COMMO SUGGESTIONS BUT WANT NO SPECIALIZED TRADECRAFT. I WILL ADD 6, (YOU SUBTRACT 6) FROM STATED MONTHS, DAYS AND TIMES IN BOTH DIRECTIONS OF OUR FUTURE COMMUNICATIONS.

The information concerning the FBI's recruitment of Yuzhin, Motorin, and Martynov was classified at least at the SECRET level, as was the defector information. The sensitive information collection technique described above was classified at the TOP SECRET level.

52. Valeriy Fedorovich Martynov was a KGB Line X officer assigned to the Soviet Embassy in Washington, D.C., from October 1980 to November 1985. In April 1982, the FBI recruited Martynov to serve as an agent-in-place, and he was debriefed jointly by the FBI and the CIA. Martynov was

compromised to the KGB by Ames in June 1985 and by "B" in October 1985, as described above. Based in part on the information provided by "B", the KGB directed Martynov to return to Moscow in November 1985, ostensibly to accompany KGB officer Vitaliy Yurchenko, who was returning to the Soviet Union after his August 1985 defection to the United States. Upon arriving in Moscow on or about November 7, 1985, Martynov was arrested, and he was subsequently tried on espionage charges. Martynov was convicted and executed.

53. Sergey Mikhailovich Motorin was a KGB Line PR officer assigned to the Soviet Embassy in Washington D.C., from June 1980 to January 1985. In January 1983, the FBI recruited Motorin to serve as an agent-in-place, and he was debriefed by the FBI. Motorin returned to Moscow at the end of his tour of duty in January 1985. Motorin, like Martynov, was compromised to the KGB by Ames in June 1985 and by "B" in October 1985, as described above. Based in part on the information "B" gave the KGB, Motorin was arrested in November or December 1985, tried and convicted on espionage charges during the period of October-November 1986, and executed in February 1987.

54. Boris Nikolayevich Yuzhin was a KGB Line PR officer assigned to San Francisco under cover as a student from 1975 to 1976, and then as a TASS correspondent from 1978 to 1982. The FBI recruited him to serve as an agent-in-place, and debriefed him. After returning to the Soviet Union, Yuzhin became the subject of an internal KGB investigation. Yuzhin was compromised to the KGB by Ames in June 1985 and by "B" in October 1985. Based in part on the information "B" gave the KGB, Yuzhin was arrested in December 1986, convicted of espionage, and sentenced to serve 15 years in prison. In 1992, he was released under a general grant of amnesty to political prisoners, and subsequently emigrated to the United States.

55. On or about October 15, 1985, Degtyar received by mail, at his residence in Alexandria, Virginia, in the Eastern District of Virginia, a package from "B" containing a large number of classified documents, including some original documents, of the United States Intelligence Community.

56. At 8:35 am on October 16, 1985, FBI surveillance personnel observed Degtyar arriving at the Soviet Embassy carrying a large black canvas bag which he did not typically carry.

57. Thereafter, Degtyar received by mail, at his residence in Alexandria, Virginia, in the Eastern District of Virginia, a typed message from "B," in an envelope bearing a handwritten address and postmarked "New York, NY" on October 24, 1985. The message included the following text:

> DROP LOCATION
>
> Please leave your package for me under the corner (nearest the street) of the wooden foot bridge located just west of the entrance to Nottoway Park. (ADC Northern Virginia Street Map, #14, D3)
>
> PACKAGE PREPARATION
>
> Use a green or brown plastic trash bag and trash to cover a waterproofed package.
>
> SIGNAL LOCATION
>
> Signal site will be the pictorial "pedestrian-crossing" signpost just west of the main Nottoway Park entrance on Old Courthouse Road. (The sign is the one nearest the bridge just mentioned.)
>
> SIGNALS
>
> My signal to you: One vertical mark of white adhesive tape meaning I am ready to receive your package.
>
> Your signal to me: One horizontal mark of white adhesive tape meaning drop filled.
>
> My signal to you: One vertical mark of white adhesive tape meaning I have received your package.
>
> (Remove old tape before leaving signal.)

The message established a date and times for the signals and drops, and concluded: "I will acknowledge amount with my next package."

The KGB designated this dead drop site by the codename "PARK". It is located in Fairfax County, Virginia, in the Eastern District of Virginia.

58. On Saturday, November 2, 1985, the KGB loaded the "PARK" dead drop site with $50,000 in cash and a message proposing procedures for future contacts with "B".

59. On or about November 8, 1985, Deglyar and Cherkashin received a typed letter from "B", which read in part as follows:

> Thank you for the 50,000.
>
> I also appreciate your courage and perseverance in the face of generically reported bureaucratic obstacles. I would not have contacted you if it were not reported that you were held in esteem within your organization, an organization I have studied for years. I did expect some communication plan in your response. I viewed the postal delivery as a necessary risk and do not wish to trust again that channel with valuable material. I did this only because I had to so you would take my offer seriously, that there be no misunderstanding as to my long-term value, and to obtain appropriate security for our relationship from the start.

"B" then rejected the contact plans proposed by the KGB, and suggested a particular communications scheme based on "a microcomputer 'bulletin board'" at a designated location, with "appropriate encryption." Meanwhile, he wrote: "Let us use the same site again. Same timing. Same signals." "B" proposed that the next dead drop occur on "September 9" which, according to the "6" coefficient that he established with the KGB in his first letter, actually meant that the dead drop operation would take place on March 3, 1986.

"B" also wrote:

> As far as the funds are concerned, I have little need or utility for more than the 100,000. It merely provides a difficulty since I can not spend it, store it or invest it easily without triping [sic] "drug money" warning bells. Perhaps some diamonds as security to my children and some good will so that when the time comes, you will accept by [sic] senior services as a guest lecturer. Eventually, I would appreciate an escape plan. (Nothing lasts forever.)

Referring to Yuzhin, Motorin, and Martynov, whom he had identified in his first letter as United States intelligence recruitments, "B" wrote:

> I can not provide documentary substantiating evidence without arousing suspicion at this time. Never-the-less, it is from my own knowledge as a member of the community effort to capitalize on the information from which I speak. I have seen video tapes of debriefings and physically saw the last, though we were not introduced. The names were provided to me as part of my duties as one of the few who needed to know. You have some avenues of inquiry. Substantial funds were provided in excess of what could have been skimmed from their agents. The active one has always (in the past) used a concealment device -- a bag with bank notes sewn in the base during home leaves.

In conclusion, "B" warned of a "new technique" used by NSA, which he described.

60. On March 3, 1986, the KGB loaded dead drop site "PARK", but "B" did not appear and the KGB removed its package from the dead drop site the same day.

61. On or about June 30, 1986, Deglyar received a typed letter from "B" at his residence in Alexandria, Virginia, in the Eastern District of Virginia. The letter read in part as follows:

> I apologize for the delay since our break in communications. I wanted to determine if there was any cause for concern over security. I have only seen one item which has given me pause. When the FBI was first given access to Victor Petrovich Gandarev, they asked . . . if Gundarev knew Viktor Cherkashin. I thought this unusual. I had seen no report indicating that Viktor Cherkashin was handling an important agent, and here-to-fore he was looked at with the usual lethargy awarded Line Chiefs. The question came to mind, are they somehow able to monitor funds, ie., to know that Viktor Cherkashin received a large amount of money for an agent? I am unaware of any such ability, but I might not know that type of source reporting.

"B" then described a United States Intelligence Community technical surveillance technique. He concluded:

If you wish to continue our discussions, please have someone run an advertisement in the Washington Times during the week of 1/12/87 or 1/19/87, for sale, "Dodge Diplomat, 1971, needs engine work, $1000." Give a phone number and time-of-day in the advertisement where I can call. I will call and leave a phone number where a recorded message can be left for me in one hour. I will say, "Hello, my name is Ramon. I am calling about the car you offered for sale in the Times." You will respond, "I'm sorry, but the man with the car is not here, can I get your number." The number will be in Area Code 212. I will not specify that Area Code on the line.

"B" signed the letter: "Ramon".

According to the established "6" coefficient, the weeks the advertisement was actually to run were July 6, 1986, or July 13, 1986.

62. Viktor Gundarev was a KGB Line KR officer who defected to the United States on February 14, 1986. A classified FBI debriefing report, dated March 4, 1986, reports that FBI debrief ers showed Gundarev a photo of Cherkashin and asked if he knew Cherkashin.

63. The following advertisement appeared in the Washington Times from July 14, 1986, to July 18, 1986:

DODGE - '71, DIPLOMAT, NEEDS ENGINE WORK, $1000. Phone (703) 451-9780 (CALL NEXT Mon., Wed., Fri. 1 p.m.)

64. The number 703/451-9780 at that time belonged to a public telephone located in the vicinity of the Old Keene Mill Shopping Center, in Fairfax County, Virginia, in the Eastern District of Virginia. On Monday, July 21, 1986, "B" called that number and gave the number 628-8047. The call was taken by Aleksandr Kirillovich Fefelov, a KGB officer assigned to the Soviet Embassy in Washington, D.C.

65. One hour later, Fefelov telephoned 212/628-8047 and told "B" that the KGB had loaded the "PARK" dead drop site. The KGB mistakenly placed the package under the wrong corner of the wooden footbridge at the "PARK" site.

66. On or about August 7, 1986, Degtyar received a letter from "B" slating that he had not found the package at the dead drop site, and indicating that he would phone 703/451-9780 on August 18, 20, or 22. The KGB then retrieved its package from the "PARK" dead drop site.

67. On Monday, August 18, 1986, "B" telephoned 703/451-9780, and spoke with Fefelov. The latter portion of the conversation was recorded as follows: ([UI] = unintelligible)

"B": Tomorrow morning?

FEFELOV: Uh, yeah, and the car is still available for you and as we have agreed last time, I prepared all the papers and I left them on the same table. You didn't find them because I put them in another corner of the table.

"B": I see.

FEFELOV: You shouldn't worry, everything is okay. The papers are with me now.

"B": Good.

FEFELOV: I believe under these circumstances, mmmm, it's not necessary to make any changes concerning the place and the time. Our company is reliable, and we are ready to give you a substantial discount which will be enclosed in the papers. Now, about the date of our meeting. I suggest that our meeting will be, will take place without delay on February thirteenth, one three, one p.m. Okay? February thirteenth.

"B": [UI] February second?

FEFELOV: Thirteenth. One three.

"B": One three.

FEFELOV: Yes. Thirteenth. One p.m.

"B": Let me see if I can do that. Hold on.

FEFELOV: Okay. Yeah.

[pause]

"B": [whispering] [UI]

FEFELOV: Hello? Okay.

[pause]

"B": [whispering] Six .... Six ....

[pause]

"B": That should be fine.

FEFELOV: Okay. We will confirm you, that the papers are waiting for you with the same horizontal tape in the same place as we did it at the first time.

"B": Very good.

FEFELOV: You see. After you receive the papers, you will send the letter confirming it and signing it, as usual. Okay?

"B": Excellent.

FEFELOV: I hope you remember the address. Is . . . if everything is okay?

"B": I believe it should be fine and thank you very much.

FEFELOV: Heh-heh. Not at all. Not at all. Nice job. For both of us. Uh, have a nice evening, sir.

"B": Do svidaniya.

FEFELOV: Bye-bye.

According to the established "6" coefficient, the operation discussed in this conversation was actually scheduled to occur on August 19, 1986, at 7:00 am.

The KGB then loaded the "PARK" dead drop site with $10,000 in cash, as well as: proposals for two additional dead drop sites to be used by "B" and the KGB; a new accommodation address codenamed "NANCY"; and emergency communications plans for "B" to personally contact KGB personnel in Vienna, Austria. The "NANCY" address was the residence of KGB Line PR officer Boris M. Malakhov in Alexandria, Virginia, in the Eastern District of Virginia, who was to become Degtyar's replacement as the Soviet Embassy press secretary. "B" was instructed to mis-spell Malakhov's name as "Malkow." "B" subsequently cleared the dead drop.

68. Thereafter, Degtyar received an envelope at his residence in Alexandria, Virginia, in the Eastern District of Virginia. The envelope bore a handwritten address and return address: "Ramon Garcia, 125 Main St, Falls Church VA." It was postmarked from "NO VA MSC 22081" on August 19, 1986. MSC designates the Merrifield Service Center, located in the Eastern District of Virginia. Inside the envelope was a handwritten note: "RECEIVED $10,000. RAMON."

69. On or about September II, 1987, Malakhov received an envelope at his residence in the Eastern District of Virginia. The envelope bore a handwritten address to "B.N. MALKOW" at the "NANCY" address, and a handwritten return address of "R. GARCIA, 125 MAIN ST, ALEXANDRIA, VA", and was postmarked September 8, 1987. Inside was the following typed letter:

Dear Friends:
No, I have decided. It must be on my original terms or not at all. I will not meet abroad or here. I will not maintain lists of sites or modified equipment. I will help you when I can, and in time we will develop methods of efficient communication. Unless a [sic] see an abort signal on our post from you by 3/16, I will mail my contact a valuable package timed to arrive on 3/18. I will await your signal and package to be in place before 1:00 pm on 3/22 or alternately the following three weeks, same day and time. If my terms are unacceptable then place no signals and withdraw my contact. Excellent

work by him has ensured this channel is secure for now. My regards to him and to the professional way you have handled this matter.

sincerely,
Ramon

According to the established "6" coefficient, the dates referred to in this letter were actually September 10, 12, and 16.

70. On Monday, September 14, 1987, the KGB received in the mail a package of documents including TOP SECRET National Security Council documents.

71. On Tuesday, September 15, 1987, the KGB loaded the "PARK" dead drop site with $10,000 cash. The KGB also proposed two additional dead drop sites, one codenamed "AN" located in Ellanor C. Lawrence Park in Western Fairfax County, in the Eastern District of Virginia, and another codenamed "DEN" at a different location farther away. The KGB proposed that "B" load the dead drop at "PARK" or "AN" on September 26, 1987, and that the KGB respond by loading "DEN".

72. On Wednesday, September 16, 1987, the KGB determined that "B" had cleared the "PARK" dead drop and removed the signal 73. On September 26, 1987, the KGB recovered from the "PARK" dead drop site a package from "B". The package contained a handwritten letter reading as follows:

My Friends:
Thank you for the $10,000.
I am not a young man, and the commitments on my time prevent using distant drops such as you suggest. I know in this I am moving you out of your set modes of doing business, but my experience tells me the [sic] we can be actually more secure in easier modes.

"B" then suggested an exchange procedure involving a parked car instead of a dead drop site, and a related communications procedure, but stated: "If you cannot do this I will clear this once ‘AN' on your scheduled date (rather than the other)." He then asked the KGB to "Find a comfortable Vienna VA signal site to call me to an exchange any following Monday." He closed the letter, "Good luck with your work", and signed it "Ramon."

The package also contained a document which the KGB described as having the title which roughly translates into English as: "National Intelligence Program for 87".

74. Thereafter, the KGB proposed to "B" a signal site in Vienna, Virginia, in the Eastern District of Virginia, on the post of a stop sign on the shoulder of Courthouse Road near its junction with Locust Street. This signal site was referred to as "V".

75. On September 29, 1987, the KGB deposited $100,000 into an escrow account established for "B" in a Soviet bank in Moscow.

76. On November 10, 1987, Malakhov received a letter from "B" at his residence in the Eastern District of Virginia. The envelope bore a return address of "J. Baker" in "Chicago" and was postmarked on November 7, 1987. In the letter, "B" advised that Saturday for "AN" was not suitable, and he postponed the operation for two days, until Monday, November 16. He advised that he had an urgent package for the KGB, and asked the KGB to place a signal confirming receipt of the letter. That same day, the KGB placed a signal at the "PARK" signal site.

Thereafter, whenever "B" used the word "Chicago" in a return address, it was to signal that he intended for a dead drop exchange to occur the following Monday.

77. On Sunday, November 15, 1987, the KGB loaded the "AN" dead drop site with a package. It was not cleared by "B" and, on November 17, the KGB removed the package.

78. On Thursday, November 19, 1987, the KGB received a handwritten letter from "B". The envelope bore a return address of "G. Robertson" in "Houston" and was postmarked on November 17, 1987. The letter read as follows:

Unable to locate AN based on your description at night. Recognize that I am dressed in business suit and can not slog around in inch deep mud. I suggest we use once again original site. I will place my urgent material there at next AN times. Replace it with your package. I will select some few sites

good for me and pass them to you. Please give new constant conditions of recontact as address to write. Will not put substantive material through it. Only instructions as usual format.

Ramon

79. On Monday, November 23, 1987, "B" and the KGB carried out an exchange operation at the "PARK" dead drop site. The package from "B" to the KGB contained: a cable-type report about a meeting in October 1987 with a valuable source, whom the KGB referred to as "M"; a survey of information provided by Vitaliy Yurchenko; and an official technical document describing COINS-II.

In 1987, COINS-II was the then-current version of the United States Intelligence Community's "Community On-Line Intelligence System," which constituted a classified Community-wide intranet.

The package from the KGB to "B" contained $20,000 cash and a letter conveying "regards" from the KGB Director and advising that $100,000 had been deposited in a bank at 6-7% interest. The letter also asked "B" for a variety of specific classified information. The KGB gave "B" two new accommodation addresses and asked "B" to propose new dead drop sites.

80. On February 4, 1988, the KGB received a note from "B" at one of the new accommodation addresses it had given to "B" in the November 23, 1987, dead drop. The address was the residence of a Soviet diplomatic official known to the FBI as a KGB co-optee, located in the Eastern of Virginia. The note read simply: "OK". It was in an envelope bearing a return address of "Jim Baker" in "Langley" and postmarked in Washington, D.C., on February 3, 1988.

81. On Monday, February 8, 1988, "B" and the KGB carried out an exchange operation at the "PARK" dead drop site in Nottoway Park, which the KGB had now renamed "PRIME". The package from "B" to the KGB contained a typed, unsigned letter. In the letter, "B" acknowledged receipt of $20,000 and identified two additional drop sites. He then went on to provide detailed information concerning a Soviet detector, and advised the KGB that he had arranged time to review the detector's file. "A full report will follow as soon as possible." He then disclosed to the KGB certain specific information concerning the United States Intelligence Community's communication intelligence capabilities.

Enclosed with the letter was the first computer diskette "B" passed to the KGB. Also in the package from "B" were classified documents.

The package from the KGB to "B" contained $25,000 cash, and a letter conveying thanks of the KGB Chairman, Vladimir Kryuchkov, for the information about the valuable source "M". The KGB also asked "B" for more information about "M" and the "agent network" in New York City, and about a particular KGB officer.

On the next day, February 9, 1988, the KGB observed that the signal at "PARK/PRIME" had been removed, indicating that "B" had cleared the dead drop.

82. On March 16, 1988, the KGB received a second computer diskette from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of "Jim Baker" in "Chicago" and was postmarked in Washington, D.C., on March 15, 1988.

83. On March 17, 1988, the KGB received a letter from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of "Jim Baker" in "Chicago" and was postmarked in Northern Virginia on March 16, 1988. In the letter, "B" instructed the KGB to use the "PARK/PRIME" dead drop site until the KGB approved the other sites.

84. On Monday, March 21, 1988, the KGB observed a signal from "B" at the "PARK/PRIME" site, but was unable to check the dead drop site because strangers were present in the park.

85. On March 26, 1988, the KGB received a third computer diskette from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of "Jim Baker" in "Chicago" and was postmarked in Washington, D.C., on March 24, 1988. The KGB found no text on the diskette, which it referred to as "D-3".

86. On Monday, March 28, 1988, "B" and the KGB carried out an exchange operation at the "PARK/PRIME" dead drop site.

The package from "B" to the KGB included his fourth computer diskette ("D-4"), a TOP SECRET document entitled "The FBI's Double Agent Program" and a document that the KGB described as a

Director of Central Intelligence (DCI) document entitled "Stealth Orientation."

The package from the KGB to "B" included $25,000 cash and a letter explaining why the KGB had not been able to check the "PARK/PRIME" dead drop site on March 21. In the letter, the KGB also advised it had been unable to read the diskettes "B" had passed to the KGB. The KGB asked "B" for information about codes and cryptograms, intelligence support for the Strategic Defense Initiative, submarines, and other classified material.

The next day, the KGB observed that "B" had removed the signal from the "PARK/PRIME" site, indicating he had removed the package.

87. On April 4, 1988, the KGB received an envelope from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of "Jim Baker" in "Alexandria" and was postmarked in Northern Virginia, on March 31, 1988. The envelope contained a note from "B" reading: "use 40 TRACK MODE. this letter is not a signal."

The term "use 40-track mode" refers to a technical process for re-formatting a computer diskette in order to conceal data by putting the data onto specific tracks on the diskette. Unless a person uses the correct codes to decrypt such a diskette, the diskette would appear to be blank.

88. On April 6, 1988, the KGB received a package from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of "Jim Baker" in "Fairfax" and a postmark of "MSC NO VA" (Merrifield Service Center, Northern Virginia, in the Eastern District of Virginia) on April 5. The package contained a fifth diskette ("D-5"). On the diskette, "B" provided what the KGB characterized as "everything" about a particular KGB officer, additional information about a KGB defector named Victor Sheymov, and information about two specific Soviet FBI recruitments. "B" also explained why the KGB had been unable to read his diskettes. "B" also asked the KGB for diamonds. The KGB subsequently purchased several diamonds for use in the "B" operation.

89. On May 24, 1988, the KGB received a letter from "B" at an accommodation address in the District of Columbia. The envelope bore a return address of "Jim Baker" in "Chicago" and was postmarked in "MSC NO VA" on May 17, 1988. With the letter was "B"'s sixth diskette ("D-6"), which contained information about a number of matters. The diskette also contained information about a specific recent FBI Soviet recruitment operation.

90. On Monday, May 30, 1988, a KGB officer arrived at the "PARK/PRIME" dead drop site at 9:03 pm, three minutes after the end of the prearranged dead drop exchange period. The KGB officer saw a man who apparently removed the signal, got into hi; car, and drove away.

91. On July 15, 1988, the KGB received a letter from "B" a an accommodation address in the Eastern District of Virginia. The envelope bore a return address "Chicago" and was postmarked "WDC 200" on July 13, 1988. The zip codes for Washington, D.C., begin "200". The typed letter read as follows:

> I found the site empty. Possibly I had the time wrong. I work from memory. My recollection was for you to fill before 1:00 a.m. I believe Viktor Degtyar was in the church driveway off Rt. 123, but I did not know how he would react to an approach. My schedule was tight to make this at all. Because of my work, I had to synchronize explanations and flights while not leaving a pattern of absence or travel that could later be correlated with communication times. This is difficult and expensive.
> I will call the number you gave me on 2/24, 2/26 or 2/28 at 1:00 a.m., EDST. Please plan filled signals. Empty sites bother me. I like to know before I commit myself as I'm sure you do also. Let's not use the original site so early at least until the seasons change. Some type of call-out signal to you when .1 have a package or when I can receive one would be useful. Also, please be specific about dates, e.g., 2/24. Scheduling is not simple for me because of frequent travel and wife. Any ambiguity multiplies the problems.
> My security concerns may seem excessive. I believe experience has shown them to be necessary. I am much safer if you know little about me. Neither of us are children about these things. Over time, I can cut your losses rather than become one.
> Ramon
> P.S. Your "thank you" was deeply appreciated.

92. On Monday, July 18, 1988, "B" and the KGB carried out an exchange operation at the "PARK/PRIME" dead drop site.

The package from "B" contained over 530 pages of material, including:

(A) A CIA document concerning certain nuclear programs, dated approximately November 1987 classified TOP SECRET and with the caveats NOFORN NOCONTRACT ORCON.

(B) A DCI document entitled "Compendium of Future Intelligence Requirements: Volume II", dated September 1987, prepared by the Staff of the Intelligence Producers Council and classified TOP SECRET/SCI with the caveat NOFORN.

(C) A CIA Counterintelligence Staff Study entitled "The Soviet Counterintelligence Offensive: KGB Recruitment Operations Against CIA," dated March 1988 and classified SECRET with the caveats NOFORN NOCONTRACT ORCON. This document contains the following preface:

Warning Notice	Intelligence Sources or Methods Involved (WNINTEL)
National Security Information	Unauthorized Disclosure Subject to Criminal Sanctions

and also specifically defining "NOFORN" as "Not Releasable to Foreign Nationals."

(D) A TOP SECRET comprehensive historical FBI review of allegations from recruitments and detectors over a period of years that the Soviet intelligence services had penetrated the United States Intelligence Community. It identified Soviet recruitments and detectors with specificity, and describes particular information they provided. It contained the following warning:

IN VIEW OF THE EXTREME SENSITIVITY OF THIS DOCUMENT. THE UTMOST CAUTION MUST BE EXERCISED IN ITS HANDLING. THE CONTENTS INCLUDE A COMPREHENSIVE REVIEW OF SENSITIVE SOURCE ALLEGATIONS AND INVESTIGATIONS OF PENETRATION OF THE FBI BY THE SOVIET INTELLIGENCE SERVICES. THE DISCLOSURE OF WHICH WOULD COMPROMISE HIGHLY SENSITIVE COUNTERINTELLIGENCE OPERATIONS AND METHODS. ACCESS SHOULD BE LIMITED TO A STRICT NEED-TO-KNOW BASIS.

The package from the KGB to "B" contained $25,000 cash and a letter asking for information about surveillance systems, the agent network in New York City, illegal intelligence, and several specific FBI recruitment operations. The KGB proposed two new dead drop and related signal sites. One, named "BOB", was under a footbridge in Idylwood Park, between Vienna and Falls Church, in the Eastern District of Virginia. The other, named "CHARLIE", was under a footbridge in Eakin Community Park, south of Vienna, in the Eastern District of Virginia. For these dead drop sites, the KGB instructed "B" to load the dead drops by 9:00 pm on the designated day; the KGB would clear it by 10:00 pm and load it with a package which "B" was to clear after 10:00 pm.

93. On July 31, 1988, the KGB received an envelope from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of Alexandria and contained a letter dated July 29 and "B"'s seventh diskette ("D-7"), which contained information on technical surveillance systems, a new recruitment in New York City, illegal intelligence, and several other specific Soviet recruitment targets.

94. On August 22, 1988, the KGB deposited $50,000 in an escrow account for "B" at a Moscow bank.

95. On September 21, 1988, the KGB received an envelope from "B" at an accommodation address in the Eastern District of Virginia. The envelope bore a return address of "Chicago" and was postmarked "WDC" on September 20. The envelope contained "B"'s eighth diskette ("D-8") and a note that read: "At BOB". The diskette contained information about particular Soviet recruitment targets of the FBI.

96. On Monday, September 26, 1988, "B" and the KGB carried out an exchange operation at the "BOB" dead drop site.

The package from "B" contained approximately 300 pages of material, including an FBI memo about a particular individual believed at the time to be a KGB Line KR officer in New York City, information on technical means of Soviet intelligence, a transcript of a Counterintelligence Group meeting, and information on several other matters.

The package from the KGB contained a diamond valued at $24,720, and a letter advising "B" that $50,000 had been deposited in his account. The letter also expressed gratitude to "B" from the KGB Chairman

(Vladimir A. Kryuchov). The letter also discussed communications procedures, security measures, a personal meeting, and passports. It also asked "B" to provide information about classified technical operations in the Soviet Union, agent network details, allies' sources, FBI programs, past cases, and a certain missile technology.

97. On December 1, 1988, the KGB received a package from "B" at an accommodation address in the Eastern District of Virginia. It bore a return address of "G. Robertson, Baker's Photo" and was postmarked "WDC" on November 30, 1988. The package contained a letter and his ninth diskette ("D-9"), which contained information about a number of classified matters.

98. On Monday, December 26, 1988, "B" and the KGB carried out an exchange operation at the "CHARLIE" dead drop site in the Eastern District of Virginia.

The package from "B" contained his tenth diskette ("D-IO") and approximately 356 pages of material. On the diskette, "B" provided additional classified information. He also provided six recent National HUMINT Collection Plan (NHCP) documents, and a document whose title the KGB noted as "Soviet Armed Forces and Capabilities for Conducting Strategic Nuclear War Until the End of the 1990s."

The package from the KGB to "B" contained $10,000 cash, a second diamond, valued at $17,748, and a message in which the KGB asked "B" for additional specific information about a wide variety of classified technical and recruitment matters.

The next day, the KGB observed that the signal at the "CHARLIE" site had been removed, indicating "B" had removed the KGB's package.

99. On Tuesday, January 31, 1989, the KGB observed an emergency call-out signal at a signal site that it had issued to "B", located at the intersection of Q Street and Connecticut Avenue, N.W., Washington, D.C. By prearrangement, the KGB immediately unloaded a package from "B" at the "BOB" dead drop site. The package contained a cable, with a note reading: "Send to the Center right away. This might be useful." Also in the package was "B"'s eleventh diskette ("D-ll"), which contained comments on the cable, as well as information on several specific individuals about whom the KGB had asked for information.

100. On Thursday, March 16, 1989, "B" marked a call-out signal site that the KGB has issued to him, located at the Taft Bridge in Northwest Washington, D.C.

101. On Monday, March 20, 1989, "B" and the KGB carried out an exchange operation at the "CHARLIE" dead drop site in the Eastern District of Virginia.

"B" passed two packages to the KGB. One contained a TOP SECRET SCI document entitled "DCI Guidance for the National MASINT Intelligence Program (FY 1991-FY 2000)," prepared by the Measurement and Signature Intelligence (MASINT) Committee and dated November 1988. The document bears the caveats NOFORN and NOCONTRACT, and contains the following preface:

Warning Notice
Intelligence Sources or Methods Involved
(WNINTEL)
NATIONAL SECURITY INFORMATION
Unauthorized Disclosure Subject to Criminal Sanctions

According to its Introduction, this document contains the MASINT Committee's recommendations to the DCI for the collection, processing, and reporting of MASINT, and represents the Intelligence Community's consensus on specific MASINT objectives and studies leading to needed capabilities. Its contents are highly specific and technical. In passing this document to the KGB, "B" requested that it be returned.

The second package from "B" to the KGB contained his twelfth computer diskette ("D-12") and approximately 539 pages of materials including classified information on a variety of matters.

The KGB package to "B" contained $18,000 cash and a third diamond, valued at $11,700. It also-contained a letter that confirmed the KGB had received "B"'s packages on December 26 and January 31, discussed a personal meeting, requested new dead drop sites, and asked how to increase operational security. The KGB also asked "B" about his security precautions for the diamonds. ("B" told the KGB that he would say the diamonds came from his grandmother.) The KGB also asked for information about a wide variety of technical and operational subjects. The KGB thanked "B" for the information he provided on January 31, and asked him "for everything else that's possible."

On Tuesday, March 21, 1989, the KGB observed that the signal at "CHARLIE" had been removed, indicating that "B" had removed the KGB's package.

102. On March 24, 1989, the KGB marked the "V" signal site on Courthouse Road in Vienna, in the Eastern District of Virginia, indicating that "B" should pick up a package at the "PARK/PRIME" dead drop site the following Monday. On Monday, March 27, 1989, the KGB loaded the dead drop with the MASINT document, for return to "B", but "B" did not clear the drop.

103. In April 1989, the KGB presented several awards to KGB officers involved in the "B" operation, including the highly- coveted Order of the Red Banner, the Order of the Red Star, and the Medal for Excellent Service.

104. On Monday, May 22, 1989, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "BOB" dead drop site, in the Eastern District of Virginia.

The package "B" passed to the KGB contained the first and third diamonds the KGB had given to him and which "B" returned for cash, and his thirteenth diskette ("D-13") in which he suggested an account in Switzerland and bonds to be transferred to it. The package also contained approximately 80 pages of material, including a document whose title the KGB noted as "National Intelligence Program 90-91." The diskette contained classified information about a variety of technical and operational matters.

"B" also provided information about United States Foreign Officer Felix Bloch and an illegal in Vienna, Austria. This disclosure compromised the FBI's then-ongoing espionage investigation of Bloch, as described below.

The package that the KGB passed to "B" on May 22, 1989, did not contain a payment, but in a letter the KGB promised to do so the next time. The KGB also returned the MASINT Committee document, and described its two prior failed efforts to return it.

The next day, the KGB observed that the signal associated with the "BOB" dead drop site had been removed, indicating that "B" had retrieved the KGB's package.

105. Felix Bloch had been identified as an associate of Austria-based known Soviet illegal Reino Gikman on the basis of a telephone call between them on April 27, 1989. One day later, the FBI opened a classified investigation of Bloch, who at the time was assigned to the State Department in Washington, D.C. Meetings between Bloch and Gikman were observed in Paris on May 14, 1989, and Brussels on May 28, 1989. In early June 1989, after "B" had compromised the Bloch investigation, Gikman suddenly left for Moscow. Early on the morning of June 22, 1989, Bloch received a telephone call at his home in Washington, D.C., from a man identifying himself as "Ferdinand Paul". According to a recording of that call, "Ferdinand Paul" told Bloch that he was calling "in behalf of Pierre" who "cannot see you in the near future" because "he is sick", and that "a contagious disease is suspected." (Bloch knew Gikman as "Pierre".) "Paul" then told Bloch: "I am worried about you. You have to take care of yourself." Having concluded that this call alerted Bloch that his association with Gikman had been compromised, the FBI interviewed Bloch on June 22 and 23, 1989. Bloch denied he had engaged in espionage and ultimately declined to answer any further questions. The FBI was unable further to develop its investigation of Bloch.

106. On Monday, August 7, 1989, after two call-out signals from "B", he and the KGB carried out an exchange operation at the "CHARLIE" dead drop site in the Eastern District of Virginia.

In the package from "B" were five rolls of film containing a highly-restricted TOP SECRET/SCI analysis of the foreign threat to a specific and named highly-compartmented United States Government program, dated May 1987.

Also in the package from "B" was his fourteenth diskette ("D-14"), which contained information from the Bloch-Gikman file, and several FBI recruitment attempts. "B" approved a new dead drop site the KGB had proposed, codenamed "DORIS", located under a footbridge in Canterbury Park in Springfield, Virginia, in the Eastern District of Virginia.

The KGB's package to "B" contained $30,000 cash and a letter promising to compensate him for the returned diamonds. The KGB rejected his suggestions for an account in Switzerland. The KGB discussed communications plans, and proposed a new dead drop site, codenamed "ELLIS", under a footbridge over Wolftrap Creek near Creek Crossing Road at Foxstone Park, near Vienna, Virginia, in the Eastern District of Virginia, with a signal site on the "Foxstone Park" sign.

The next day, the KGB observed that the signal associated with the "CHARLIE" dead drop site had been removed, indicating that "B" had retrieved the KGB's package.

107. On August 17, 1989, the KGB deposited $50,000 into an escrow account established for "B" in a Soviet bank in Moscow.

108. On Monday, September 25, 1989, "B" and the KGB carried out an exchange operation at the "DORIS" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained approximately 80 pages of material including part of a document concerning a highly-sensitive United States technical operation classified at the TOP SECRET/SCI level. In passing this document, "B" compromised a program of enormous value, expense, and importance to the United States. Also in the package was his fifteenth diskette ("D-15"), containing additional classified information.

The package from the KGB to "B" contained $30,000 cash, a letter, and, for the first time from the KGB, a computer diskette.

The next day, the KGB observed that the signal associated with the "CHARLIE" dead drop site had been removed, indicating that "B" had retrieved the KGB's package.

109. On October 2, 1989, the KGB received a letter from "B" at an accommodation address in the Eastern District of Virginia. It bore a return address of "G. Robertson, 1408 Ingeborg Ct., McLean VA" and was postmarked "NO VA" on October 28, 1989. The letter reported that: "The disk is clean. I tried all methods -- completely demagnetized."

110. On October 17, 1989, the KGB received an envelope from "B" at an accommodation address, in the Eastern District of Virginia. It bore a return address of "G. Robertson, 1101 Kingston Ct., Houston, TX" and was postmarked "NO VA MSC 220" on October 16, 1989. The envelope contained "B"'s sixteenth diskette ("D-16").

111. On Monday, October 23, 1989, "B" and the KGB carried out an exchange operation at the "ELLIS" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained an exact duplicate of the sixteenth diskette ("D-16"), which "B" had sent by mail the week before. The diskette contained additional classified information about technical and recruitment matters. "B" requested the KGB to load the "ELLIS" dead drop site at any time, and advised that he would check the signal site periodically about the loading.

The package from the KGB t.o "B" contained $55,000 cash and a letter advising "B" that $50,000 had been deposited into his escrow account in Moscow. "B" never signaled that he had cleared this dead drop, and on October 26 the KGB retrieved its package.

112. On Tuesday, October 31, 1989, the KGB loaded the "ELLIS" dead drop site with a package containing the $55,000 cash and a second KGB diskette. The diskette provided a new accommodation address, and instructions to "B" on how to inform the KGB which materials should be opened by the KGB in Washington, D.C., and which should go to the Center. It conveyed regards from the KGB Chairman and made extensive requests for additional information concerning particular United States intelligence activities targeting the Soviet Union. On November 11, 1989, the KGB observed that the "ELLIS" signal site was removed, indicating that "B" had removed the KGB's package.

113. On Monday, December 25, 1989, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "BOB" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained his seventeenth diskette ("D-17") and several documents including a DCI National Intelligence Estimate entitled "The Soviet System in Crisis: Prospects for the Next Two Years" and dated November 1989. This document was classified SECRET, bore the caveats NOFORN NOCONTRACT WNINTEL, and contained the notice: "Unauthorized Disclosure Subject to Criminal Sanctions." He also provided additional documents on the highly sensitive technical operation referred to above.

The diskette contained a message in which "B" complimented the KGB's efficient actions, and provided current information about: several ongoing FBI recruitment operations against Soviet intelligence officers;

three new tightly-protected FBI sources within the KGB and other Soviet entities; and four detectors. He also provided updated information on the Bloch-Gikman matter.

The package from the KGB to "B" contained $38,000 cash as payment for the October 16-23 period plus compensation for the two returned diamonds, and two KGB diskettes. The diskettes contained Christmas greetings from the KGB, discussed communications plans, and asked "B" for specific information about a variety of classified technical operations.

114. On Monday, March 5, 1990, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "CHARLIE" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained his eighteenth diskette ("D-18"), on which "B" provided classified information on a wide variety of topics, including: four Soviet nationals, a KGB officer, a Soviet illegal, and two KGB detectors, who were all serving as FBI-CIA sources; communications intelligence operations; and the identification of a particular named NSA employee and the sensitive office in which the employee worked. The package also contained a 120-page document whose title, according to KGB records, was "Soviet Armed Forces and Strategic Nuclear Capabilities for the 1990s," dated February 1990.

The package from the KGB contained $40,000 cash and a KGB diskette. The diskette discussed communications plans and asked "B" to provide information on a wide variety of classified technical, operational, and recruitment matters. The KGB also asked "B" what the Soviets could use of the certain highly classified and sensitive program information he had previously disclosed.

115. On Monday, May 7, 1990, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "DORIS" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained his nineteenth diskette ("D-19") and approximately 232 pages of material, including another document on the tightly-compartmented classified program that was the subject of the document "B" passed to the KGB on August 7, 1989. "B" also gave the KGB permission to use the certain highly classified and sensitive program information he had previously disclosed.

"B" also advised that because of a promotion he would be traveling for one year, and he discussed communications plans and a method of renewing contact.

The package from the KGB to "B" contained $35,000 cash and a KGB diskette. The diskette contained communications plans, and identified a new dead drop site, codenamed "FLO", located under a footbridge in Lewinsville Park near the intersection of Warner Avenue and Westbury Road in McLean, Virginia, in the Eastern District of Virginia, and a nearby signal site. The diskette also contained specific requests for information, including operational leads and materials on recruitments of Soviets. It read, in part, as follows:

> Dear Friend:
>
> . . . . We attach some information requests which we ask Your kind assistance for. We are very cautious about using Your info and materials so that none of our actions in no way causes [sic] no harm to Your security. With this on our mind we are asking that sensitive materials and information (especially hot and demanding some actions) be accompanied by some sort of Your comments or some guidance on how we may or may not use it with regard to Your security.
> We wish You good luck and enclose $35,000.
> Thank you.
>
> Sincerely,
>
> Your friends.

116. On or about May 17, 1990, the KGB received a letter and a diskette from "B" at an accommodation address in the Eastern District of Virginia.

117. On Monday, May 21, 1990, the KGB loaded the "ELLIS" dead drop site with a package containing two KGB diskettes, and marked a call-out signal for "B." "B" picked up the KGB's package, but did not leave one for the KGB.

The KGB diskettes contained a letter that discussed in detail communications plans and recontact procedures. It read, in part:

Dear Friend:

Congratulations on Your promotion. We wish You all the very best in Your life and career.

We appreciate Your sympathy for some difficulties our people face - Your friendship and understanding are very important to us. Of course You are right, no system is perfect and we do understand this.

Speaking about the systems. We don't see any problem for the system of our future communications in regard to this new circumstances of Yours. Though we can't but regret that our contacts may be not so regular as before, like You said.

We believe our current commo plan - though neither perfect - covers ruther [sic] flexibly Your needs: You may have a contact with us anytime You want after staying away as long as You have to. So, do Your new job, make Your trips, take Your time. The commo plan we have will still be working. We'll keep covering the active call out signal site no matter how long it's needed. And we'll be in a ready-to-go mode to come over to the drop next in turn whenever You are ready: that is when You are back home and decide to communicate. All You'll have to do is to put Your call out signal, just as now. And You have two addresses to use to recontact us only if the signal sites for some reason don't work or can't be used. . . . But in any case be sure: You may have a contact anytime because the active call out site is always covered according to the schedule no matter how long you've been away. . . .

Thank You and good luck.
Sincerely,

Your friends.

The KGB particularly asked "B" to "give us some good leads to possible recruitments" among "interesting people in the right places." The KGB also asked for information about a Soviet Embassy employee who "B" had previously identified as an FBI recruitment-in-place, and who the KGB believed was about to defect.

118. On August 20, 1990, the KGB received from "B" an envelope, containing his twentieth diskette ("D-20"), at an accommodation address in the Eastern District of Virginia. The envelope bore the return address "J. Baker, Box 1101, Alexandria VA". The diskette contained classified information about several matters. "B" instructed the KGB to load the "FLO" dead drop site on September 3, 1990.

119. On Monday, September 3, 1990, the KGB loaded the "FLO" dead drop site with a package containing $40,000 cash, and a KGB diskette containing a letter which identified more call-out signal sites and contained numerous specific requests for classified information. The letter noted that some of the materials "B" had provided about "political issues of interest . . . were reported to the very top." "B" subsequently picked up the KGB's package.

120. On Saturday, February 2, 1991, in response to an emergency call-out signal from "B", the KGB retrieved a package from "B" at the "CHARLIE" dead drop site in the Eastern District of Virginia. The package contained "B"'s twenty-first diskette ("D-21"), which included a letter in which "B" acknowledged receipt of the $40,000, which he characterized as "too generous." He disclosed to the KGB that the FBI's chief of counterintelligence in the New York Field Office had told him that the FBI had recruited a specific number of sources at a particular Soviet establishment. "B" also advised that he would be ready for an operation on February 18, 1991.

In exchange, the KGB left a package for "B" but he did not pick it up and the KGB later retrieved it.

121. On Monday, February 18, 1991, the KGB loaded the "CHARLIE" dead drop site with a package containing $10,000 cash and a KGB diskette. The diskette established two new dead drop sites, one of which was codenamed "GRACE" and located under a footbridge in Rock Creek Park in Washington, D.C. It also asked "B" to provide specific classified technical and operational information, and instructed that the next contact would be at the "DORIS" dead drop site.

122. On Monday, April 15, 1991, in response to a call-out signal from "B", he and the KGB carried out an exchange operation at the "DORIS" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained his twenty-second diskette ("D-22") in which he confirmed receipt of cash. "B" also provided classified FBI material about a specific recruitment operation about

which the KGB had previously asked. The package from the KGB to "B" contained $10,000 and a KGB diskette which read, in part, as follows:

> Dear Friend:
>
> Time is flying. As a poet said:
>
> > "What's our life,
> > If full of care
> > You have no time
> > To stop and stare?"
>
> You've managed to slow down the speed of Your running life to send us a message. And we appreciate it.
>
> We hope You're O'K and Your family is fine too. We are sure You're doing great at Your job. As before, we'll keep staying alert to respond to any call from You whenever You need it.
>
> We acknowledge receiving one disk through CHARLIE. One disk of mystery and intrigue. Thank you.
>
> Not much a business letter this time. Just formalities. We consider Site-9 cancelled. And we are sure You remember: our next contact is due at ELLIS.
>
> Frankly, we are looking forward to JUNE. Every new season brings new expectations.
>
> Enclosed in our today's package please find $10,000. Thank You for Your friendship and help.
>
> We attach some information requests. We hope You'll be able to assist us on them.
>
> Take care and good luck.
> Sincerely,
>
> > Your friends.

The KGB asked "B" for information about several specific classified matters, including United States Intelligence Community plans to respond to domestic turmoil in the Soviet Union and new United States communications intelligence efforts.

123. On Monday, July 15, 1991, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "ELLIS" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained his twenty-third diskette ("D-23") and approximately 284 pages of material. The diskette read, in part: "I returned, grabbed the first thing I could lay my hands on" and " I was in a hurry so that you would not worry, because June has passed, they held me there longer." He also noted that he had at least five years until retirement, and remarked: "Maybe I will hang in there for that long." "B" also reported on a particular FBI-CIA operation. The classified documents passed by "B" included FBI documents, human intelligence plans, and documents concerning nuclear and missile weapons proliferation.

The package from the KGB to "B" contained $12,000 cash and a KGB diskette reading, in part, as follows:

> Dear friend:
>
> Acknowledging the disk and materials . . . received through "DORIS" we also acknowledge again Your superb sense of humor and Your sharp-as-a-razor mind. We highly appreciate both.
>
> Don't worry. We will not steam out incorrect conclusions from Your materials. Actually, Your information grately [sic] assisted us in seeing more clearly many issues and we are not ashamed to correct our notions if we have some. So, thank You for Your help. But if some of our requests seem a bit strange to You, please try to believe us there were sufficient reasons to put them and that what we wanted was to sort them out with Your help.
>
> In regard to our "memo" on Your security. Just one more remark. If our natural wish to capitalize on Your information confronts in any way Your security interests we definitely cut down our thirst for

profit and choose Your security. The same goes with any other aspect of Your case. That's why we say Your security goes first. . . .

We are sure You remember our next contact is due at "FLO".

As always we attach some information requests, which are of current interest to us.

We thank You and wish You the very best.

Sincerely,

Your friends.

Enclosed in the package please find $12,000.

The KGB gave "B" new communications plans, and numerous specific requests for classified technical, operational, and recruitment matters. The KGB also asked follow-up questions about information "B" had previously provided, and requested specific United States Intelligence Community activity towards the Soviet Union.

124. On Monday, August 19, 1991, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "FLO" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained a recent FBI memorandum concerning specific methods of surveillance of a particular Soviet intelligence officer. It also contained "B"'s twenty-fourth diskette ("D-24") on which he discussed communications plans and provided information about classified technical and operational matters. On this diskette, he also discussed how the Soviet Union could benefit from a thorough study of the period of Chicago' s history when the city was governed by Mayor Richard J. Daley.

The package from the KGB to "B" contained $20,000 cash and a message welcoming "B" back and advising that the next exchange would be at the "GRACE" dead drop site.

125. On Monday, October 7, 1991, after a call-out signal from "B", he and the KGB carried out an exchange operation at the "GRACE" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained his twenty-fifth diskette ("D-25") and a classified document entitled "The US Double-Agent Program Management Review and Policy Recommendations" dated September 10, 1991. On the diskette, "B" provided information about various classified recruitment operations. "B" also identified by name a particular "old friend" whom he suggested the KGB try to recruit; he explained that the man was a military officer who had recently been told he would not be promoted.

The package from the KGB to "B" contained $12,000 cash and a KGB diskette reading, in part, as follows:

Dear friend:

Thanks for the package of 02.13. [The] materials are very promising, we intend to work on the scenario so wisely suggested by You. And the magical history tour to Chicago was mysteriously well timed. Have You ever thought of foretelling the things? After Your retirement for instance in some sort of Your own "Cristall [sic] Ball and Intelligence Agency" (CBIA)? There are always so many people in this world eager to get a glimpse of the future.

But now back to where we belong. There have been many important developments in our country lately. So many that we'd like to reassure You once again. Like we said: we've done all in order that none of those events ever affects Your security and our ability to maintain the operation with You. And of course there can be no doubt of our commitment to Your friendship and cooperation which are too important to us to loose [sic]....

Please note: our next contact is due at HELEN.

Enclosed in the package please find $12,000 and attached as always are some information requests which we'd ask Your kind attention to.

Thank You and good luck.

Sincerely,

Your friends.

The KGB provided new communications plans and asked "B" for specific information about a variety of classified technical, operational, and analytical matters. The KGB also asked for the current 1991 issue of a particular document reporting on Soviet knowledge of United States satellite reconnaissance systems, commenting that: "It's fun to read about the life in the Universe to understand better what's going on on our own planet." Asking about some pages that appeared to be missing from "B"'s July package, the KGB noted: "Sometimes it happens, we understand. Life is becoming too fast."

126. On December 12, 1991, the KGB received an envelope from "B" at an accommodation address in Alexandria, Virginia, in the Eastern District of Virginia. The envelope, which was addressed by hand, bore a handwritten return address of "J. Baker, Box 1101, Houston, TX" and was postmarked Washington, D.C. The envelope contained a handwritten note reading: "— @ BOB on 6/22; T. DEVICE APPROVED 6/16, COMING SOON". Using the established "6" coefficient, the reference to "6/22" actually refers to December 16. The reference to "T. DEVICE" related to information "B" had previously passed to the KGB regarding a classified technical operation.

127. On Monday, December 16, 1991, "B" and the KGB carried out an exchange operation at the "BOB" dead drop site in the Eastern District of Virginia.

The package from "B" to the KGB contained several documents, including:

(A) A DCI Counterintelligence Center research paper entitled "The KGB's First Chief Directorate: Structure, Functions, and Methods," dated November 1990. The document was classified SECRET with the caveats NOFORN NOCONTRACT ORCON. It also bore the following notices:

WARNING NOTICE

This document should be disseminated only to persons having both the requisite clearances and a need to have access to its contents for performance of their duties. No further distribution or reproduction is authorized without the approval of the Associate Deputy Director for Operations for Counterintelligence, CIA.

and

National Security Information	Unauthorized Disclosure Subject to Criminal Sanctions

(B) A current volume of the DCI Congressional Budget Justification that detailed the programs and resource needs of the FBI's Foreign Counterintelligence Program. The document was classified SECRET with the caveats NOFORN NOCONTRACT ORCON, and the warning: "Unauthorized Disclosure Subject to Criminal Sanctions."

The package from "B" also contained his twenty-sixth diskette ("D-26") in which he expressed embarrassment over the pages missing from his earlier package, and advised that he had been promoted to a position of increased salary and authority that had moved him temporarily out of direct responsibility for Soviet matters. He noted that a new mission for his new group had not yet been defined, and he quoted a particular remark by General Patton about the Japanese. "B" discussed communications plans, and provided information about various classified technical and operational matters. He also proposed a new communications system, in which he would set up an office at a location in town not subject to electronic surveillance, where he and the KGB could communicate directly using a computer that would be specially-equipped with certain advanced technology.

The package from the KGB to "B" contained $12,000 cash and a KGB diskette discussing communications plans and asking for specific information about various classified matters.

128. In one message to "B" the KGB warned him to: "Examine from the point of security Your practice of copying materials."

129. On or before October 6, 1999, "B" received the following letter from the SVR:

Dear friend: welcome!

It's good to know you are here. Acknowledging your letter to V. K. we express our sincere joy on the occasion of resumption of contact with you. We firmly guarantee you for a necessary financial help.

Note, please, that since our last contact a sum set aside for you has risen and presents now about 800.000 dollars. This time you will find in a package 50.000 dollars. Now it is up to you to give a secure explanation of it.

As to communication plan, we may have need of some time to work out a secure and reliable one. This why we suggest to carry on the 13th of November at the same drop which you have proposed in your letter to V. K. We shall be ready to retrieve your package from DD since 20:00 to 21:00 hours on the 12th of November after we would read you [sic] signal (a vertical mark of white adhesive tape of 6-8 cm length) on the post closest to Wolf trap Creek of the "Foxstone Park" sign. We shall fill our package in and make up our signal (a horizontal mark of white adhesive tape).

After you will clear the drop don't forget to remove our tape that will mean for us - exchange is over.

We propose a new place where you can put a signal for us when in need of an urgent DD operation. LOCATION: the closest to Whithaven [sic] Parkway wooden electricity utility pole at the south-west corner of T- shaped intersection of Foxhall Road and Whitehaven Parkway (map of Washington, DC, page 9, grid Bll). At any working day put a white thumb tack (I cm in diameter, colored sets are sold at CVS) into the Northern side of the pole at the height of about 1.2 yards. The tack must be seen from a car going down Foxhall Road. This will mean for us that we shall retrieve your package from the DD Foxstone Park at the evening of the nex [sic] week's Tuesday (when it's getting dark).

In case of a threatening situation of any kind put a yellow tack at the same place. This will mean that we shall refrain from any communication with you until further notice from your side (the white tack).

We also propose for your consideration a new DD site "Lewis". DD LOCATION: wooden podium in the amphitheatre of Long-branch Nature Center (map of N.Virginia, page 16, grid G8). The package should be put under the FAR-LEFT corner of the podium (when facing the podium). Entter [sic] Longbranch Nature Center at the sign from Carlin Springs Road (near 6th Road south) and after parking your car in the lot follow the sign "To Amphitheatre." LOCATION OF THE DD SIGNAL: a wooden electricity utility pole at the north- west corner of the intersection of 3d Street and Carlin Springs Road neaqr [sic] the Metrobus stop (the same map, grid F7). The signals are the same as in the "Foxstone Park" DD. The white adhesive tape should be placed on the NORTHERN side of the pole, so that it could be noticed fro [sic] a car moving along Carlin Springs Road in the southern direction from Route 50.

Please, let us know during the November operation of your opinion on the proposed places (the new signal and DD "Lewis").

We are intending to pass you a permanent communications plan using drops you know as well a new portion of money. For our part we are very interested to get from you any information about possible actions which may threaten us.

Thank you. Good luck to you. Sincerely,

Your friends.

The initials "V. K." are those of a known SVR Line KR senior officer in Washington, D.C.

130. On or before March 14, 2000, "B" wrote a letter to the SVR, reading, in part, as follows:

.... I have come about as close as I ever want to come to sacrificing myself to help you, and I get silence. I hate silence. . . .

Conclusion: One might propose that I am either insanely brave or quite insane. I'd answer neither. I'd say, insanely loyal. Take your pick. There is insanity in all the answers.

I have, however, come as close to the edge as I can without being truly insane. My security concerns have proven reality-based. I'd say, pin your hopes on 'insanely loyal' and go for it. Only I can lose.

I decided on this course when I was 14 years old. I'd read Philby's book. Now that is insane, eh! My only hesitations were my security concerns under uncertainty. I hate uncertainty. So far I have judged the edge correctly. Give me credit for that.

Set the signal at my site any Tuesday evening. I will read your answer. Please, at least say goodbye. It's been a long time my dear friends, a long and lonely time.

Ramon Garcia

131. On or before June 8, 2000, "B" wrote a letter to the SVR which read, in part, as follows:

Dear Friends:

Administrative Issues:

Enclosed, once again, is my rudimentary cipher. Obviously it is weak in the manner I used it last -- reusing key on multiple messages, but I wanted to give you a chance if you had lost the algorythm [sic].

Thank you for your note. It brought me great joy to see the signal at last. As you implied and I have said, we do need a better form of secure communication -- faster. In this vein, I propose (without being attached to it) the following:

One of the commercial products currently available is the Palm VII organizer. I have a Palm III, which is actually a fairly capable computer. The VII version comes with wireless internet capability built in. It can allow the rapid transmission of encrypted messages, which if used on an infrequent basis, could be quite effective in preventing confusions if the existance [sic] of the accounts could be appropriately hidden as well as the existance [sic] of the devices themselves. Such a device might even serve for rapid transmittal of substantial material in digital form. Your FAPSI could review what would be needed, its advisability, etc., obviously -- particularly safe rules of use. While FAPSI may move with the rapidity of the Chinese army, they can be quite effective, in juggernaut fashion, that is to say thorough. . . .

New topics:

If you are wise, you will reign [sic] in the GRU. They are causing no end of grief. But for the large number of double-agents they run, there would be almost no ability to cite activity warranting current foreign counterintelligence outlays. Of course the Gusev affair didn't help you any. If I'd had better communications I could have prevented that. I was aware of the fact that microphones had been detected at the State Department. (Such matters are why I need rapid communications. It can save you much grief.) Many such things are closely held, but that closeness fails when the need for action comes. Then the compartments grow of necessity. I had knowledge weeks before of the existence of devices, but not the country placing them. . . . I only found out the gruesome details too late to warn you through available means including the colored stick-pin call. (Which by the way I doubted would work because of your ominous silence.) Very frustrating. This is one reason I say 'you waste me' in the note. . . .

The U.S. can be errantly likened to a powerfully built but retarded child, potentially dangerous, but young, immature and easily manipulated. But don't be fooled by that appearance. It is also one which can turn ingenius [sic] quickly, like an idiot savant, once convinced of a goal. The [ ] Japanese (to quote General Patten [sic] once again) learned this to their dismay....

I will not be able to clear TOM on the first back-up date so don't be surprised if we default to that and you find this then. Just place yours again the following week, same protocol.

I greatly appreciate your highly professional inclusion of old references to things known to you in messages resulting from the mail interaction to assure me that the channel remains unpirated. This is not lost on me.

On Swiss money laudering [sic], you and I both know it is possible but not simple. And we do both know that money is not really 'put away for you' except in some vague accounting sense. Never patronize at this level It offends me, but then you are easily forgiven. But perhaps I shouldn't tease you. It just gets me in trouble.

thank you again,

Ramon

132. On or before July 31, 2000, "B" received the following letter from the KGB/SVR:

Dear Ramon:

We are glad to use this possibility to thank You for Your striving for going on contact with us.

We received Your message. The truth is that we expended a lot of efforts to decipher it.

First of all we would like to emphasize that all well known events wich [sic] had taken place in this country and in our homeland had not affected our resources and we reaffirm our strong intentions to maintain and ensure safely our long-term cooperation with You.

We perceive Your actions as a manifestation of Your confidence in our service and from our part we assure You that we shall take all necessary measures to ensure Your personal security as much as possible.

Just because proceeding from our golden rule - to ensure Your personal security in the first place - we have proposed to carry out our next exchange operation at the place which had been used in last august [sic]. We did not like to give You any occasion to charge us with an inadequate attention to problems of Your security. We are happy that, according to the version You have proposed in Your last letter, our suggestions about DD, known as "Ellis", coincided completely. However a situation around our collegues [sic] at the end of passed [sic] year made us to refuse this operation at set day.

1. We thank You for information, wnich [sic] is of a great interest for us and highly evaluated in our service.

We hope that during future exchanges we shall receive Your materials, which will deal with a [sic] work of IC, the FBI and CIA in the first place, against our representatives and officers. We do mean its human, electronic and technical penetrations in our residencies here and in other countries. We are very interested in getting of the objective information on the work of a special group which serches [sic] "mole" in CIA and FBI. We need this information especially to take necessary additional steps to ensure Your personal security....

2. Before staling a communication plan that we propose for a next future, we would like to precise [sic] a following problem. Do You have any possibility to meet our collegues [sic] or to undertake the exchange ops in other countries? If yes, what are these countries? Until we receive Your answer at this [sic] questions and set up a new communication plan, we propose to use for the exchange ops DD according to the following schedule:

= DD "LEWIS" on 27 of may 2001 (with a coefficient it will mean on 21 of november 2000). We draw Your attention on the fact that we used a former coefficient - 6 (sender adds, addressee subtracts). A time will be shown at real sense. We will be ready to withdraw Your package beginning by 8 PM on 27 may 2001 after we shall read Your signal. After that we put DD our package for You. Remove Your signal and place our signal by 9 PM of the same day. After that You will withdraw our package and remove our signal. That will mean an exchange operation is over. We shall check signal site (i.e., its absence) the next day (28 of May) till 9 PM. If by this time a signal had not been removed we shall withdraw our package and shall put it in for You repeatedly dates with DD "ELLIS" — in each seven days after 28 May till 19 of June 2001 (i.e., 13 of December 2000).

= We propose to carry out our next operation on 16 of October 2001 (i.e., 10 of April) at the DD "LINDA" in "Round Tree park" (if this place suits for Your [sic] we would like to receive Your oppinion [sic] about that during exchange in may). A time of operation from 8 pm to 9 pm, signals and schedule of alternate dates are the same. In the course of exchange ops we shall pass to You descriptions of new DD and SS that You can check them before. You will find with this letter descriptions of two new DD "LINDA" and "TOM". Hope to have Your opinion about them.

In case of break off in our contacts we propose to use DD "ELLIS", that you indicated in your first message. Your note about a second bridge across the street from the 'F' sign, as back up, is approved. We propose to use "ELLIS" once a year on 12 August (i.e., with coeff. it will be 18 February) at the same time as it was in August 1999. On that day we can carry out a full exchange operation -- You will enload your package and put a signal, we shall withdraw it, load our package and put our signal. You will remove our package and put your signal. Alternate dates - in seven days 'til next month.

= As it appears from your message, you continue to use post channel as a means of communication with us. You know very well our negative attitude toward this method. However if you send by post a short note where date (i.e., with coefficient), time and name of DD for urgent exchange are mentioned, you could do it by using address you had used in September (i.e., with coeff.) putting in a sealed envelope for V. K.

In future, it is inexpedient to use a V. K. name as a sender. It will be better to choose any well known name in this country as you did it before.

3. We shall continue work up [sic] new variants of exchanging messages including PC disks. Of course we shall submit them to your approval in advance. If you use a PC disk for next time, please give us key numbers and program you have used.

4. We would like to tell you that an insignificant number of persons know about you, your information and our relationship.

5. We assess as very risky to transfer money in Zurich because now it is impossible to hide its origin...

133. On or before November 17, 2000, "B" wrote a letter to the KGB/SVR, reading, in part, as follows:

Dear Friends:

Bear with me. It was I who sent the message trying to use TOM to communicate material to you. On reflection, I can understand why you did not respond. I see that I failed to furnish you sufficient information for you to recognize that the message you left for me in ELLIS did not go astray. You do this often (communicate such assurances through the mention of items like the old date offset we used), and believe me, it is not lost on me as a sign of professionalism. I say bear with me on this because you must realize I do not have a staff with whom to knock around all the potential difficulties. (For me breaks in communications are most difficult and stressful.) Recent changes in U.S. law now attach the death penalty to my help to you as you know, so I do take some risk. On the other hand, I know far better than most what minefields are laid and the risks. Generally speaking you overestimate the FBI's capacity to interdict you, but on the other hand, cocksure officers, (those with real guts and not as much knowledge as they think) can, as we say, step in an occasional cowpie. (Message to the translator: Got a good word for cowpie in Russian?? Clue, don't blindly walk behind cows.). . . .

I have drawn together material for you now over a lengthy period. It is somewhat variable in import. Some were selected as being merely instructive rather than urgently important. I think such instructive insights often can be quite as valuable or even more valuable long-term because they are widely applicable rather than narrow. Others are of definite value immediately.

My position has been most frustrating. I knew Mr. Gusev was in eminent [sic] danger and had no effective way of communicating in time. I knew microphones of an unknown origin were detected even earlier and had no regular way of communicating even that. This needs to be rectified if I am to be as effective as I can be.

No one answered my signal at Foxhall. Perhaps you occasionally give up on me. Giving up on me is a mistake. I have proven inveterately loyal and willing to take grave risks which even could cause my death, only remaining quiet in times of extreme uncertainty. So far my ship has successfully navigated the slings and arrows of outrageous fortune.

I ask you to help me survive. . . .

On meeting out of the country, it simply is not practical for me. I must answer too many questions from family, friends, and government plus it is a cardinal sign of a spy. You have made it that way because of your policy. Policies are constraints, constraints breed patterns. Patterns are noticed. Meeting in this country is not really that hard to manage, but I am loath to do so not because it is risky but because it involves revealing my identity. That insulation has been my best protection against betrayal by someone like me working from whatever motivation, a Bloch or a Philby. (Bloch was such a shnook. . . . I almost hated protecting him, but then he was your friend, and there was your illegal I wanted to protect. If our guy sent to Paris had balls or brains both would have been dead meat. Fortunately for you he had neither. He was your good luck of the draw. He was the kind who progressed by always checking with those above and tying them to his mistakes. The French

said, "Should we take them down?" He went all wet. He'd never made a decision before, why start then. It was that close. His kindred spirits promoted him. Things are the same the world over, eh?)

On funds transfers through Switzerland, I agree that Switzerland itself has no real security, but insulated by laundering on both the in and out sides, mine ultimately through say a corporation I control loaning mortgage money to me for which (re) payments are made.... It certainly could be done. Cash is hard to handle here because little business is ever really done in cash and repeated cash transactions into the banking system are more dangerous because of the difficulty in explaining them. That doesn't mean it isn't welcome enough to let that problem devolve on me. (We should all have such problems, eh?) How do you propose I get this money put away for me when I retire? (Come on; I can joke with you about it. I know money is not really put into an account at MOST Bank, and that you are speaking figuratively of an accounting notation at best to be made real at some uncertain future. We do the same. Want me to lecture in your 101 course in my old age? My college level Russian has sunk low through inattention all these years; I would be a novelty attraction, but I don't think a practical one except in extremis.)

So good luck. Wish me luck. OK, on all sites detailed to date, but TOM'S signal is unstable. See you in 'July' as you say constant conditions.

yours truly,

Ramon

134. On the evening of Tuesday, December 12, 2000, FBI surveillance personnel observed HANSSEN driving four times past the Foxstone Park sign on Creek Crossing Road in Vienna, Virginia. As described above, the Foxstone Park sign is the signal site associated with the "ELLIS" dead drop site, which was used from early on in the KGB's "B" operation.

135. Also on the evening of Tuesday, December 12, 2000, FBI surveillance personnel observed HANSSEN walking into a particular store at a shopping center near Foxstone Park at the same time as a known SVR officer was in front of the store.

136. On Tuesday, December 26, 2000, FBI surveillance personnel observed HANSSEN three times at the Foxstone Park signal site:

a) At approximately 5:42 pm, HANSSEN stopped his vehicle in front of the Foxstone Park sign for approximately ten to fifteen seconds.

b) At approximately 8:53 pm, HANSSEN parked his car on a street off Creek Crossing Road and walked to the Foxstone Park signal site. HANSSEN stopped in front of the Foxstone Park sign, holding a lit flashlight, and swept the flashlight beam in a vertical motion over some wooden pylons located near the sign, between the road and the sign. He appeared to the FBI surveillance personnel to focus his flashlight beam on one of the pylons. He then turned and walked away, shrugging his shoulders and raising his arms in a gesture of apparent disgust or exasperation. HANSSEN returned to his vehicle, and drove away to a nearby Tower Records store.

c) At approximately 9:32 pm, HANSSEN drove back past the Foxstone Park signal site, stopped his vehicle in front of it for approximately two to three seconds, and then drove away.

137. During January 2001, FBI surveillance personnel observed HANSSEN drive past the Foxstone Park signal site, and either slowing or stopping at the site, on three occasions. At approximately 8:18 pm on Tuesday, January 9, 2001, HANSSEN drove past the Foxstone Park signal site, came to a complete stop in front of it for approximately 10 seconds, then drove away. Shortly before 6:00 pm on Tuesday, January 23, 2001, HANSSEN drove past the Foxstone Park signal site, came to a rolling stop near it, and then drove away. After 5:00 pm on Friday, January 26, 2001, HANSSEN drove past the Foxstone Park signal site, slowing down near it.

138. On the evening of Monday, February 5, 2001, FBI surveillance personnel observed HANSSEN driving past the Foxstone Park signal site three times between approximately 5:37 pm and approximately 7:44 pm.

139. On Monday, February 12, 2001, FBI surveillance personnel checking the "LEWIS" dead drop site found a package concealed at the site. FBI personnel removed the package and transported it to the FBI Laboratory, where it was opened, its contents were examined and photocopied, and it was restored to an

apparently intact condition. The package was then replaced at the dead drop site. The package contained $50,000 in used $100 bills and a typed note reading: "Next 10/31/01 TOM alt. 20,27". These were wrapped in white paper, which was taped, and which in turn was wrapped in a taped-up black plastic trash bag inside a second black plastic trash bag.

VI. FACTS ESTABLISHING THAT "B" IS ROBERT PHILIP HANSSEN

There is overwhelming evidence that "B" is ROBERT PHILIP HANSSEN.

A. FORENSIC EVIDENCE

140. When "B" made dead drops to the KGB/SVR, he would place the contents of the drop in a plastic garbage bag, which he would wrap with tape. The plastic bag would then be placed inside a second garbage bag. The FBI has come into possession of the inner plastic bag used by "B" on one occasion to wrap the contents of a package to the KGB.

141. An FBI fingerprint examiner has conducted an examination of the plastic bag and ascertained that it contains two latent fingerprints of comparison value. The examiner determined that these two fingerprints are those of ROBERT PHILIP HANSSEN.

B. MATERIAL OBTAINED FROM HANSSEN'S FBI OFFICE AND VEHICLE

142. On February 5, 2001, pursuant to court authorization, the FBI searched HANSSEN's current personal office within Room 9930 at FBI Headquarters. HANSSEN's briefcase, located in the office, contained (1) HANSSEN's current valid United States tourist passport; (2) a personal address book; (3) several personal checkbooks; (4) multiple sets of financial statements; (5) one computer floppy disk; (6) one 8MB Versa Card Flash Memory Adapter, which is a memory storage card for a computer; (7) one cell phone. These items were photographed, duplicated, or otherwise recorded, but not removed or altered. Upon examination, the FBI determined that the memory storage card contained several letters associated with the "B" operation, which are further described elsewhere in this Affidavit. That these letters were found in HANSSEN's possession is clear and unequivocal evidence that HANSSEN is "B".

143. On January 30, 2001, pursuant to court authorization, the FBI searched HANSSEN's Ford Taurus automobile, and found the following:

> (1) In the glove compartment were a roll of white Johnson & Johnson medical adhesive tape, and a box of Crayola colored chalk containing 12 pieces of chalk.
>
> (2) In one of four cardboard boxes in the trunk were seven classified documents printed from the FBI's Automated Case Support (ACS) system. Several pertained to ongoing FBI foreign counterintelligence investigations and were classified SECRET.
>
> (3) In another cardboard box in the trunk were six green fabric-covered United States government ledger notebooks, containing classified information.
>
> (4) Also in the trunk were a roll of Superior Performance Scotch clear mailing tape, and dark-colored Hefty garbage bags.

These items were not removed, although small samples were taken, and they were photographed.

144. On February 12, 2001, pursuant to court authorization, the FBI again searched HANSSEN's Ford Taurus automobile. In addition to the items described in part (1) of the foregoing paragraph, the glove compartment contained a small plastic box containing thumbtacks of various colors, including yellow and white. It was further ascertained that at least one of the pieces of chalk was pink. These items were not removed, although small samples were taken, and they were photographed. During this search, HANSSEN's briefcase was observed in the vehicle, but it was not removed.

C. RECORDING OF TELEPHONE CONVERSATION

145. On August 18, 1986, KGB Officer Aleksander Fefelov spoke by telephone with "B". A portion of that telephone call, lasting approximately two minutes, was recorded. Two FBI analysts, who have worked closely and routinely with HANSSEN for at least five years, have listened to both the recording and an FBI-enhanced version of the recording in which background noise has been minimized. They have both concluded without reservation that the voice of "B" is that of HANSSEN.

D. DEAD DROP SITES

146. There is a particularly clear correlation between HANSSEN's personal residence in Northern Virginia and two dead drop sites used frequently in the "B" operation.

147. In 1985, when "B" volunteered to the KGB, HANSSEN lived on Whitecedar Court, in Vienna, Virginia. The first dead drop site selected by "B" was Nottoway Park, which was less than a five minute walk from Whitecedar Court. Between 1985 and 1989, the Nottoway Park site was used for dead drops so frequently - 17 times - that it was designated by the KGB as the "PARK/PRIME" dead drop site.

148. In November 1985, the Whitecedar Court house was sold and HANSSEN moved to New York to undertake his new assignment in the New York Field Office. He returned to FBI Headquarters in August 1987, and moved into a home at 9414 Talisman Drive, Vienna, Virginia, which he had bought in July 1987.

149. In August 1989, the KGB designated drop site "ELLIS," located near Foxstone Park in Vienna, Virginia. The frequent use of this site -- at least seven times -- suggests that "B" lived very close to the site or passed it routinely. A further indication of this is that "B" told the KGB in October 1989 that the KGB could use the "ELLIS" site at any time. In fact, the "ELLIS" site is an approximately one-mile walk from HANSSEN's Talisman Drive residence.

E. PALM III

150. HANSSEN owns a Palm III device which is a hand-held personal digital assistant. The FBI has determined that HANSSEN's Palm III contains a reference to "ELLIS" and the date February 18, and the time 8:00. The term "ELLIS" is the KGB/SVR codename for the dead drop site located in the area of Foxstone Park that was used seven times by either "B", the KGB/SVR, or both.

F. CORRELATION OF HANSSEN'S WORK ASSIGNMENTS TO "B"'s DISCLOSURES TO THE KGB/SVR

151. "B"'s first letter to the KGB was postmarked in Prince George's County, Maryland, on Tuesday, October 1, 1985. Although at that time HANSSEN had recently been re-assigned to New York City, FBI records show that on that particular day he was in Washington, D.C., on administrative matters. Prince George's County is located on the route between Washington, D.C., and New York City.

152. In May 1990, "B" told the KGB that, due to a promotion, he would be traveling more and his access to materials would be limited. In May 1990, HANSSEN was reassigned from the Soviet Analytical Unit in the Intelligence Division to the Inspection Division at FBI Headquarters. An Inspection Division assignment is a typical feature of an FBI supervisory agent's career path and requires frequent travel to FBI field offices for inspections. While serving in this assignment, HANSSEN traveled frequently from June 1990 through June 1991 to conduct inspections in various FBI offices.

153. On July 15, 1991, "B" indicated to the KGB that he had "returned" from a trip. The KGB responded on August 15, 1991 with a message welcoming him back and noting that "it's great for you to touch the green, green grass o£ home." HANSSEN returned on May 24, 1991 from a lengthy overseas inspection tour.

154. On December 16, 1991, "B" told the KGB that he had "an increase in salary and authority [which] moved him temporarily out of direct responsibility, but a new mission for my new group has not been fully defined" and that "I hope to adjust to that . . . . As General Patton said . . . 'let's get this over with so we can go kick the [ ] out of the [ ] Japanese." (He quoted the same reference to Japanese in the letter he wrote to the SVR on or before June 8, 2000.) At that time, HANSSEN was preparing to assume new duties as Chief of the new National Security Threat List Unit at FBI Headquarters, where he focused the Unit's counterintelligence efforts on economic espionage. This new assignment resulted in an increase in salary (from GS-14 to GS- 15) and authority (Unit Chief). Several FBI employees recall that HANSSEN frequently quoted General Patton, and one employee who worked closely with HANSSEN specifically remembers HANSSEN once using the above-mentioned Patton quote in a discussion with him.

155. In February 1988, "B" told the KGB that he could read the Viktor Sheymov file because a special project relating to Sheyrnov was about to begin. At that time, HANSSEN was reviewing the Sheyrnov file in preparation for his participation in upcoming Intelligence Community debriefings of Sheymov.

156. Throughout the "B" operation, "B" reported on Sheymov's defection. HANSSEN took particular interest in the Sheymov case and developed a personal friendship with Sheymov. Recently, in fact,

HANSSEN told FBI co-workers that he was considering an offer of lucrative employment by Sheymov after retirement in April 2001.

157. On August 19, 1991, "B" passed detailed information to the KGB on FBI coverage of a particular suspected Soviet intelligence officer. On July 1, 1991, HANSSEN returned to the Intelligence Division at FBI Headquarters (after his tour of duty on the Inspection Staff) and became the Headquarters Supervisor responsible for FBI coverage of this suspected Soviet intelligence officer.

158. In his assignment to CI-3A, the FBI's Soviet Analytical Unit, HANSSEN had access to an extremely broad array of highly classified material. The FBI has determined that HANSSEN's access to classified material is consistent with "B"'s disclosure of classified material to the KGB/SVR.

159. During two extended periods when "B" was inactive, from November 1985 to June 1986, and August 1986 to August 1987, HANSSEN was assigned to the FBI's Field Office in New York City.

160. In July 1991, "B" told the KGB that he had at least five more years until retirement. HANSSEN was eligible for retirement from the FBI in 1996.

G. HANSSEN'S USE OF THE FBI AUTOMATED CASE SUPPORT SYSTEM

161. The Automated Case Support System (ACS) is the FBI's collected computerized databases of investigative files and indices. ACS came online in October 1995.

The main, and most extensive ACS database, is the Electronic Case File (ECF), which contains electronic communications and certain other documents related to ongoing FBI investigations, programs, and issues, and the indices to those documents. It is the equivalent of a closed FBI intranet. ACS users can access individual files by making full-text search requests for particular words or terms.

162. FBI personnel who are "approved users" of ACS, including HANSSEN, must log on with a user identification number and password unique to each user. Retrieval logs make it possible to conduct audits of individuals' use of ACS.

163. An audit of HANSSEN's use of ACS shows that he has been a consistent user of ECF in particular, and that he periodically conducted searches of the ECF database using a wide variety of very specific search terms. Although some of HANSSEN's ACS use appears to have been related to his official responsibilities, he made a substantial number of ACS searches apparently directly related to his own espionage activities. Through these searches, HANSSEN could retrieve certain FBI records that would indicate whether HANSSEN or his KGB/SVR associates, or their activities or operational locations, were known to or suspected by the FBI, and thus whether he was exposed to danger.

For example, on the following dates HANSSEN searched the ECF for the following terms, limiting some of the searches to a specified period of time as indicated:

July 25, 1997:	HANSSEN
March 30, 1998:	DEAD DROP AND KGB
May 18, 1998:	DEAD DROP DEAD DROP AND RUSSIA
July 6, 1998:	DEAD DROP DEAD DROP AND WASHINGTON FISA AND CELL PHONE HANSSEN
July 30, 1998:	9414 TALISMAN DEAD DEAD DROP DEAD DROP AND WASHINGTON DOUBLE D HANSSEN ROBERT P. HANSSEN
September 3, 1998:	ROBERT HANSSEN ROBERT P HANSSEN ROBERT P. HANSSEN

September 21, 1998:	'DEAD DROP' 'DEAD DROP' AND RUSSIA
October 13, 1998:	DEAD DROP DEAD DROP [Dates=08/01/1998-10/13/1998
October 27, 1998:	'DEAD DROP' 'DEAD DROP' AND WASHINGTON 'DEAD DROP' WASHINGTON
December 14, 1998:	DEAD DROP DEAD DROP AND WASHINGTON
April 7, 1999:	DROP SITE DROP SITE AND RUSSIA
April 12, 1999:	ROBERT HANSSEN TALISMAN TALISMAN DRIVE WHITE CEDAR WHITECEDAR COURT
August 11, 1999:	CCTV AND VIRGINIA CCTV AND VIRGINIA[Dates=01/01/1999- 08/11/1999 FOXSTONE
August 17, 1999:	DEAD DROP[Dates=01/01/1999-08/17/1999
August 30, 1999:	DEAD DROP DEAD DROP[Dates=07/01/1999-08/30/1999
September 2, 1999:	CCTV CCTV AND SVR 'DEAD DROP' AND SVR 'DEAD DROP' SVR
September 28, 1999:	DROP SITE DROP SITE[Dates=10/01/1999-10/21/1999 TALISMAN
October 21, 1999:	DEAD DROP[Dates=10/01/1999-10/21/1999
October 26, 1999:	VIENNA AND VIRGINIA VIENNA AND VIRGINIA AND FCI [Dates= 01/01/1999-10/27/1999]
October 27, 1999:	DEAD DROP [Dates=1/09/1999-1/28/1999
November 3, 1999:	FOXSTONE FOXSTONE AND VIENNA VIENNA AND DROP VIENNA AND DROP AND FCI [Dates=01/01/1999-ll/4/1999 VIENNA AND DROP[Dates=01/06/1999- 03/11/1999]
November 15, 1999:	DEAD DROP AND VIRGINIA FOXSTONE
January 13, 2000:	DEAD DROP[Dates=01/01/2000-01/13/2000 DEAD DROP [Dates=10/01/1999-12/31/1999
January 18, 2000:	DROP SITE AND VIRGINIA SVR AND DEAD DROP NOT GRU
March 14, 2000:	DEAD DROP AND SVR
March 31, 2000:	DEAD DROP DEAD DROP AND RUSSIA
May 22, 2000:	TALISMAN DRIVE
September 28, 2000:	DEAD DROP AND WASHINGTON

October 4, 2000:	DROP SITE[Dates=08/01/2000-10/04/2000
November 13, 2000:	DEAD DROP[Dates=10/01/2000-11/13/2000
December 21, 2000:	DEAD DROP [Dates=10/01/2000-12/22/2000 ESPIONAGE [Dates=11/01/2000-12/21/2000
January 3, 2001:	ROBERT HANSSEN
January 16, 2001:	DEAD DROP[Dates=12/01/2000-01/15/2001 ESPIONAGE [Dates=12/01/2000-01/15/2001
January 19, 2001:	DEAD DROP[Dates=12/01/2000-01/18/2001
January 22, 2001:	DEAD DROP[Dates=01/01/2000-01/12/2001 DEAD DROP[Dates=12/01/2000-01/22/2001 DEADDROP[Dates=01/01/2000-01/22/2001 FOXSTONE

H. "B"'S "OLD FRIEND"

164. In 1991, "B" proposed that the KGB consider recruiting a particular named individual who he described as an "old friend." HANSSEN had been friends with this individual since HANSSEN was a teenager.

VII. LOCATION OF EVIDENCE, FRUITS, INSTRUMENTALITIES,. AND PROCEEDS

165. Based on my training and experience, and that of other FBI personnel with whom I have consulted, and on my participation in this investigation, I know that:

166. Persons who have engaged in espionage activities on behalf of foreign intelligence services maintain records, notes, bank records, financial statements, calendars, journals, maps, instructions, classified documents, and other papers or documents relating to the transmittal of national defense and classified intelligence information to foreign governments and intelligence services. Such records, notes, bank records, financial statements, calendars, journals, maps, instructions, classified documents, and other papers or documents are maintained, albeit often secreted, on their persons, in and around their residences, at their places of employment, in home and office computers, in their automobiles, and in other remote locations such as safe deposit boxes and storage facilities.

167. Persons who have been engaged in espionage activities on behalf of foreign intelligence services often utilize espionage paraphernalia, including devices designed to conceal and transmit national defense and classified intelligence information. These paraphernalia and devices include materials used by espionage agents to communicate between each other and with a foreign government, to wit: coded pads, secret writing paper, chemicals used to develop coded and secret messages, microdots, and microfiche, together with instructions in the use of these materials; electronic recording and transmittal equipment; computers and computer disks; cameras and film; books, records, documents, and papers. The information that is frequently passed or recorded through such methods often includes: (1) national defense and classified intelligence information; (2) the identities of other foreign espionage agents and intelligence officers; (3) financial transactions, including payments to foreign espionage agents and hidden financial accounts; (4) records of previous illicit espionage transactions; and (5) the source and disposition of national defense and classified information.

168. Persons who have been engaged in espionage activities on behalf of foreign intelligence services routinely conceal in their residences large amounts of United States and foreign currency, financial instruments, precious metals and gems, jewelry, and other items of value and/or proceeds of illegal espionage transactions. They also conceal records relating to hidden foreign and domestic bank and financial records, including accounts in fictitious names.

169. Persons who have been engaged in espionage activities on behalf of foreign intelligence services often secrete national defense and classified documents and materials, as well as clandestine communications devices and instructions, contact instructions, codes, telephone numbers, maps, photographs, other papers and materials relating to communications procedures, and proceeds and records of illegal espionage transactions, in secure hidden locations and compartments within their residences, places of employment, safe deposit boxes, storage facilities, and/or motor vehicles, including hidden compartments within motor vehicles, for ready access and to conceal such items from law enforcement authorities.

170. Persons who have been engaged in espionage activities on behalf of foreign intelligence services are not unlike any other person in our society in that they maintain documents and records, often doing so for long periods of time regardless of whether their value to the person has diminished. These persons maintain documents and records that will identify and corroborate travel both in the United States and abroad made in connection with foreign intelligence activity, including personal meets with foreign intelligence officers. Such documents and records include passports, visas, calendars, journals, date books, telephone numbers, credit cards, hotel receipts, airline records, correspondence, carbon copies of money orders and cashier's checks evidencing large cash expenditures, and accounts and records in fictitious names.

171. Persons who have been engaged in espionage activities on behalf of foreign intelligence services often maintain identity documents, including those utilizing fictitious identities. United States foreign currency, instructions, maps, photographs. United States and foreign bank accounts' access numbers and instructions, and other papers and materials relating to emergency contact procedures and escape plans.

172. The above-described results of recent court authorized searches of HANSSEN's automobile and office demonstrate that HANSSEN has retained evidence of his espionage activity, and that such activity is ongoing.

173. Both the location of the dead drop site "ELLIS", and the location of the signal site associated with the "ELLIS" dead drop site — the Foxstone Park sign in the southern part of Foxstone Park -- are within an approximately one-mile driving and walking distance from HANSSEN's residence at 9414 Talisman Drive, Vienna, Virginia.

174. "B" had substantial communications with the KGB about using sophisticated computer techniques for communications, and he sent information to the KGB on encrypted computer diskettes. HANSSEN is known to be highly skilled in the use of computers and computer programming, and to maintain at least one computer with its own server in his residence at 9414 Talisman Drive, Vienna, Virginia. There is thus probable cause to believe that in continuing espionage activities HANSSEN is using one or more computers (in addition to his Palm III device) and related disks, diskettes, and other equipment now located in his residence at 9414 Talisman Drive, Vienna, Virginia.

VIII. SPECIAL NEEDS AND JUSTIFICATION TO SEIZE COMPUTERS AND RELATED HARDWARE AND ELECTRONIC STORAGE DEVICES FOUND AT HANSSEN'S RESIDENCE FOR OFF-SITE EXAMINATION

175. As noted above, HANSSEN has a high degree of computer technology expertise. In addition, there is probable cause to believe that HANSSEN is using computers as an instrumentality of his espionage activities. This is evidenced by the letters to and from the KGB/SVR found on the computer memory card in his briefcase, and by the reference "ELLIS" on his Palm III device, as well as HANSSEN's extensive accessing of the FBI's ACS system for information relevant to his espionage activities. HANSSEN has at least one computer and a server in his residence at 9414 Talisman Drive, Vienna, Virginia, and a portable laptop computer. Because of the likelihood that HANSSEN will have extraordinary amounts of information and files in his computers (including laptops) and any computer storage devices and that such information may be encrypted, it will be neither practical nor reasonable to require the searching agents to examine the defendant's computers onsite at his residence. Given HANSSEN's computer expertise and concern about detection, there is considerable risk that HANSSEN has set up self-destruct programs for his computers that could erase vital evidence and files if his system or systems were examined by anyone other than experts. Accordingly, the FBI intends to seize those components of HANSSEN' s computer hardware and related equipment as the FBI determines must be seized in order to be examined in an appropriate location by Computer Analysis Response Team (CART) personnel. Seizing and disabling the defendant's computer hardware will also help prevent HANSSEN or any co-conspirators from seeking to erase any data on HANSSEN's computer system (including his server) from any remote location and through any special destructive program.

176. In addition, it is highly probable that HANSSEN has access to and has used the computers (including laptops) of family members residing in the same residence. Accordingly, he may be using these computers of family members to store or transmit or conceal classified information or other evidence of the espionage activity set forth in this affidavit. It will therefore be necessary to seize and examine the computer hardware and files within of family members. Such computers and files therein will be speedily returned to those family members if examination discloses that they have in fact no evidence or documents connected to the espionage activity described in this Affidavit.

IX. REQUEST FOR AUTHORITY TO EXECUTE SEARCH WARRANTS DURING NIGHTTIME HOURS

Based on my experience and the experience of other FBI Special Agents known to me, I am aware that persons who have committed serious felonies, particularly those felonies with authorized punishments of death or incarceration for any term of years or life, will often attempt to destroy evidence, fruits, and instrumentalities of their crimes if alerted prematurely to law enforcement interest. I also know that foreign intelligence services, including the SVR, are able to communicate prearranged "danger" signals to their agents to alert them to destroy evidence, fruits and other instrumentalities of crime, as well as to execute emergency escape plans. I am also aware that these hostile foreign intelligence services, and in particular the SVR, actively seek to penetrate United States intelligence and law enforcement agencies by technical and human means to learn about FBI counterintelligence activities. As a result, law enforcement interest could be detected at any time and it may be necessary to execute a search warrant during night time hours to preserve evidence, fruits and instrumentalities of espionage from destruction.

In addition, it is noted that as a Special Agent of the Federal Bureau of Investigation, HANSSEN is authorized to carry a service weapon at all times, and he is known to have additional weapons in his residence, and may in his vehicles, that could pose an immediate danger and threat to any searching or arresting agents unless seized and secured as quickly as possible.

If the FBI is unsuccessful in apprehending HANSSEN immediately, he could return home during evening hours to destroy incriminating evidence, obtain a weapon and other items to assist his flight or evasion. In an undated letter to the KGB in November 1985, HANSSEN wrote: "Eventually I would appreciate an escape plan." HANSSEN currently carries his valid tourist passport in his briefcase. As noted above, the SVR has instructed HANSSEN to use a yellow tack in case of a "threatening situation", which could trigger an SVR-assisted escape, and he has recently possessed yellow tacks. It is highly likely that HANSSEN would have such an escape plan in place by 2001, and that authority to search at any time of the day or night would be essential to foil any such escape plan, especially if HANSSEN received warning from the SVR.

Finally, as noted above, much of the operational activity of the "B" operation occurred at night. Recently, HANSSEN was observed checking a known KGB/SVR signal site on several nighttime occasions in December 2000 and January and February. Accordingly, there is probable cause to believe that HANSSEN would go to the signal site or related dead drop site (both designated under the code name "ELLIS") at any time, and especially at night to avoid detection. Because an arrest of HANSSEN could well occur in the nighttime hours, and the searches should be conducted immediately upon his arrest, authority is requested to execute search warrants during nighttime hours.

X. CONCLUSION AS TO PROBABLE CAUSE TO SEARCH

177. Based on the above facts and circumstances, I believe there is probable cause that evidence, fruits, instrumentalities, and proceeds of espionage activity by ROBERT PHILIP HANSSEN, in violation of Title 18, United States Code, Section 794 (a) (Transmitting National Defense Information) and Section 794 (c) (Conspiracy to Commit Espionage), are located in:

1) The residence of ROBERT PHILIP HANSSEN, such premises known and described as a single family residence located at:

9414 Talisman Drive Vienna, Virginia 22182

as more fully described in Attachment B, and which is within the Eastern District of Virginia;

2) One silver 1997 Ford Taurus, bearing VIN IFALP52U9VG211742 and Virginia license plate number ZCW9538, which is anticipated to be within the Eastern District of Virginia;

3) One 1993 Volkswagen van, bearing VIN WV2KC0706PH080424 and Virginia license plate number ZCW9537, which is anticipated to be within the Eastern District of Virginia;

4) One 1992 Isuzu Trooper, bearing VIN JACDH58W7N7903937 and Virginia license plate YRP3849, which is anticipated to be within the Eastern District of Virginia;

XI. WARRANTS REQUESTED

Based on all the foregoing, I respectfully request a warrant for the arrest of ROBERT PHILIP HANSSEN, and search warrants for the locations described in the immediately foregoing Section of this Affidavit.

XII. ATTESTATION

The above facts are true and correct to the best of my knowledge and belief.

[signed]
Stefan A. Pluta
Special Agent
Federal Bureau of Investigation

Sworn and Subscribed to before me this 16th day of February, 2001.

[signed:] THOMAS RAWLES JONES, JR.
UNITED STATES MAGISTRATE JUDGE

ATTACHMENT A

1) Espionage paraphernalia, including devices designed to conceal and transmit national defense and classified intelligence information and material, and implements used by espionage agents to communicate with their handlers and with a foreign government, to wit: white tape, mailing tape, colored chalk (all used for signaling purposes), coded pads, secret writing paper, microdots, any letters, notes or other written communications (including contact instructions) between defendant ROBERT PHILIP HANSSEN and any agents of the SVR or other intelligence service of the Russian Federation; any computers, (including laptops), computer disks, cameras, film, codes, telephone numbers, maps, photographs and other materials relating to communication procedures, correspondence;

2) Records, notes, calendars, journals, maps, instructions, and classified documents and other papers and documents relating to the transmittal of national defense and classified intelligence information (including the identities of foreign espionage agents and intelligence officers and other foreign assets or sources providing information to the United States Intelligence Community, such as the FBI and CIA; United States Government ledger notebooks in which the defendant ROBERT PHILIP HANSSEN has notes pertaining to FBI foreign counterintelligence investigations; records of previous illicit espionage transactions, national defense and classified intelligence information, including copies of documents copied or downloaded by ROBERT PHILIP HANSSEN from the FBI's Automated Case Support System (ACS), which is the FBI's computerized databases of investigative indices and files; FBI investigative serials; records receipts, .papers or documents reflecting financial accounts, where ROBERT PHILIP HANSSEN received payments from the KGB, SVR, or other agents of the Soviet Union or successor Russian Federation, records or documents reflecting the source and disposition of national defense and classified intelligence and counterintelligence information;

3) Large amounts of United States and foreign currency, financial instruments, precious metals, jewelry, and other items of value, which are the proceeds of or assets derived from illegal espionage transactions; any financial records of foreign and domestic bank accounts, including canceled checks, monthly statements, deposit slips, withdrawal slips, wire transfer requests and confirmations, account numbers, addresses, credit cards and credit card statements, financial and investment account records (including dividend records, stock transaction records), all reflecting illicit proceeds or wealth from multiple years of engaging in espionage for pay from the Soviet Union and successor Russian Federation and their intelligence services; records of such financial accounts and records in the possession or control of defendant ROBERT PHILIP HANSSEN but in fictitious or alias names;

4) Passports, visas, calendars, date books, address books, credit card and hotel receipts, airline records, reflecting travel in furtherance of espionage activities, and any documents evidencing large cash expenditures derived from espionage activities;

5) Identity documents, including but not limited to passports, licenses, visas (including those in fictitious or alias identities), U.S. and foreign currency, instructions, maps, photographs, U.S. and foreign bank account access numbers and instructions and other papers and materials relating to emergency contact procedures and escape routes;

6) Safety deposit box records, including signature cards, bills, and payment records, safety deposit box keys, whether in the name of the defendant or a family member; any records pertaining to any commercial

storage sites where the defendant may be storing other classified intelligence and counter-intelligence documents or other records of his espionage activities;

7) Federal, state and local tax returns, work sheets, W-2 forms, 1099 forms, and any related schedules;

8) Records concerning real property purchases, sales, transfers, both within the United States and any foreign countries, including deeds, deeds of trust, land contracts, settlement statements, and mortgage documents, such records reflecting disposition of proceeds from and assets acquired from money paid to the defendant for his espionage on behalf of the Soviet Union, successor Russian Federation, and their intelligence services;

9) Telephone bills and records, including calling cards and pager records;

10) Photographs, including photographs of co-conspirators; correspondence (including envelopes) to and from ROBERT PHILIP HANSSEN and handlers, contacts and intelligence agents of the Soviet Union and successor Russian Federation;

11) Copies of applications, affidavits, search warrants, and returns filed with the Foreign Intelligence Surveillance Court (FISC), concerning current FBI foreign counterintelligence investigations and notes, reports and records pertaining to such investigations, including FBI requests for FISC authority;

12) Computer hardware, software, and storage media, known to be used by the defendant or to which he had access, including, but not limited to: any personal computer, laptop computer, modem, and server, which have been and are being used to commit the offenses of espionage and conspiracy to commit espionage; records, information and files contained within such computer hardware containing evidence and fruits of defendant's espionage activity between October 1, 1985, and the present, including classified documents, in whatever form and by whatever means they have been created or stored, including but not limited to any electrical, electronic, or magnetic form of storage device; floppy diskettes, hard disks, zip disks, CD-ROMs, optical discs, backup tapes, printer buffers, smart cards, memory calculators, pagers, personal digital assistants such as Palm III devices, removable hard drives, memory cards, zip drives, and any photographic forms of such records including microfilm, digital prints, slides, negatives, microfiche, photocopies, and videotapes, computer terminals and printers used by the defendant in said espionage activity.

ATTACHMENT B

9414 Talisman Drive, Vienna, Virginia, is the current residence of defendant ROBERT PHILIP HANSSEN, and his family. This residence is a single family detached house, the closet street intersecting 9414 Talisman Drive is McKinley Street. Talisman Drive ends in a cul de sac. It is further described as a wood multi-story building painted brown. This residence also includes an attached garage. 9414 Talisman Drive includes any appurtenances within the curtilege of this property, and any grounds, yard or woods constituting any part of the land upon which this residence is located.

ATTACHMENT C

One 1997 Ford Taurus four-door, silver in color, VIN #IFALP52U9VG211742, Virginia license tags ZCW9538, which is owned by, registered to, and used by ROBERT PHILIP HANSSEN. It is anticipated that this vehicle will be located in the Eastern District of Virginia in the vicinity of 9414 Talisman Drive in Vienna, Virginia, or elsewhere in the Eastern District of Virginia.

ATTACHMENT D

One 1993 Volkswagen van, Vin #WV2KC0706PH080424, Virginia license tags ZCW9537, owned and used by ROBERT PHILIP HANSSEN, and also used by his wife. It is anticipated that this vehicle will be located in the Eastern District of Virginia in the vicinity of 9414 Talisman Drive, Vienna, Virginia.

ATTACHMENT E

One 1992 Isuzu Trooper, VIN #JACDH58W7N7903937, Virginia license tags YRP3849. This vehicle is owned by, and possibly operated by ROBERT PHILIP HANSSEN. It is anticipated that this vehicle will be located in the Eastern District of Virginia in the vicinity of 9414 Talisman Drive, Vienna, Virginia.

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FAS Intelligence Resource Program

Squillacote and Stand v. United States of America

Theresa M. Squillacote and her husband Kurt A. Stand were convicted in 1998 of conspiring to commit espionage against the United States on behalf of East Germany, the Soviet Union, the Russian Federation, and the Republic of South Africa.

The investigation and prosecution of their case relied heavily on the Foreign Intelligence Surveillance Act (FISA), the statute under which the government conducted clandestine surveillance of their residence.

In appealing their conviction, Squillacote and Stand questioned the use of the FISA, among other things. Their Petition for review by the Supreme Court, presented below, is perhaps the strongest challenge to the FISA that has been presented in the history of that 1978 statute. Nevertheless, the Supreme Court denied the Petition without comment on April 16, 2001.

- Petition for a Writ of Certiorari, filed with the U.S. Supreme Court on December 7, 2000 by Petitioners Squillacote and Stand. "Some or all of the 20 FISA orders ... were unlawfully issued and the evidence gathered as a result of those orders should have been suppressed." (Appendix to the Petition in PDF format only; 4.2 MB)
- Brief for the United States in Opposition filed with the U.S. Supreme Court by Acting Solicitor General Barbara Underwood, March 2001. "The petition for a writ of certiorari should be denied."
- Reply Brief from Petitioners filed with the U.S. Supreme Court on March 27, 2001. "In America, this Court sits to accord both sides of a dispute the opportunity to be heard.... If this case does not warrant disclosure of the underlying [FISA] affidavits, no case ever will."

Maintained by Steven Aftergood

FAS Intelligence Resource Program

US v. Daniel M. King

Petty officer Daniel M. King, a Navy cryptanalyst, was arrested in 1999 on suspicion of espionage. The case against him was based on an inconclusive polygraph examination that led to an interrogation over 26 days lasting as long as 19 hours per session. This arduous interrogation culminated in a confession that was subsequently recanted and was uncorroborated by independent evidence. Petty Officer King was released in March 2001 following 520 days in confinement after the presiding military judge found that the evidence was likely to be insufficient to support the charge. The prosecution of this case raises numerous questions, some of which are set forth in the following documents.

Oversight of the Daniel M. King Case
03 April 2001 -- Senate Select Committee on Intelligence

- Statement of Jonathan Turley, attorney for the defense
- Statement of Lt. Robert A. Bailey, Judge Advocate General's Corps, attorney for the defense
- Statement of Lt. Matthew S. Freedus, Judge Advocate General's Corps, attorney for the defense

- Pentagon Press Briefing: Excerpts on the King Case, March 29, 2001. "Is there some strange aspect of military law that allows someone to be held for such a long time, almost two years, without being charged with anything?"
- Letter to Senate Intelligence Committee Chairman Sen. Richard C. Shelby from attorney Jonathan Turley, March 29, 2001. "We are eager to present evidence to the committee in closed session. However, we have been denied access to our classified notes and files in the case."
- Letter to Rep. Sherrod Brown from attorney Jonathan Turley, March 19, 2001. "This case has a troubling history of altered documents and concealment. We have seen ominous signs of an effort to cut off any review or charges in the last week."
- Letter to Senate Intelligence Committee Chairman Sen. Richard C. Shelby from attorney Jonathan Turley, March 16, 2001. "It is unlikely that an independent investigation will occur without the oversight of Congress."

- **Recommendation of CDR James P. Winthrop, Investigating Officer, March 9, 2001. This is the climactic document in the case: "I believe dismissal is warranted in the interests of justice."**

- Letter to DCI George Tenet from attorney Jonathan Turley, March 8, 2001. "Detailing ongoing national security violations in this case."
- Letter to Senate Intelligence Committee Chairman Sen. Richard C. Shelby from attorney Jonathan Turley, March 6, 2001. "I ask for your immediate intervention into this matter."
- Letter to DCI George Tenet from attorney Jonathan Turley, March 6, 2001. Even more allegations by the defense of Navy security violations.
- Letter to DCI George Tenet from attorney Jonathan Turley, October 23, 2000. Further allegations that Navy officials are violating security procedures.

- Letter to DCI George Tenet from defense attorney Jonathan Turley, October 16, 2000. The defense alleges, rather ironically, that Navy officials have engaged in wholesale violations of security classification procedures in the case and asks the DCI to intervene.

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http://www.fas.org/irp/ops/ci/king/index.html
Created by John Pike
Maintained by Steven Aftergood

FINAL REPORT

ATTORNEY GENERAL'S REVIEW TEAM ON THE HANDLING OF THE LOS ALAMOS NATIONAL LABORATORY INVESTIGATION

["The Bellows Report"]

May 2000

[Declassified Version released 12 December 2001]

[Cover and Cover Letter]

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http://www.fas.org/irp/ops/ci/bellows/index.html
Maintained by Steven Aftergood

FAS Note: FBI Assistant Director Neil J. Gallagher rebutted the allegations discussed in the following GAO report in a letter that he sent to GAO dated 27 June 2001 which may be found here. Former DOE counterintelligence official Notra Trulock disputed Gallagher's account in a 17 July 2001 letter sent to GAO and posted here.

United States General Accounting Office
Washington, DC 20548

June 28, 2001

The Honorable Arlen Specter
The Honorable Charles E. Grassley
The Honorable Robert G. Torricelli
United States Senate

Subject: FBI Official's Congressional Testimony Was Inaccurate Because He Failed to Present Certain Information That Had Been Made Available to Him About the Wen Ho Lee Investigation

This letter responds to your request that we investigate certain issues relating to information the Federal Bureau of Investigation (FBI) provided to the Congress regarding the FBI's investigation of Wen Ho Lee, a scientist formerly employed at the Los Alamos National Laboratory. In subsequent discussions with your staffs, we were requested to focus our investigation on determining whether the congressional testimony of Assistant Director Neil J. Gallagher of the FBI's National Security Division was false or purposely misleading. Mr. Gallagher testified before the Senate Committee on Governmental Affairs in June 1999 and the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary, in October 1999 regarding the FBI's investigation of Wen Ho Lee.

We provided classified briefings on the results of our investigation to Senator Specter's staff in February 2001 and to the majority and minority staffs of the Senate Select Committee on Intelligence in March 2001. Subsequently, you requested that we provide the results of our investigation to you in an unclassified letter. On June 8, 2001, we provided an unclassified briefing to the majority staff of the Senate Committee on the Judiciary.

We interviewed Mr. Gallagher regarding the testimony he gave to the Congress in 1999. We then interviewed knowledgeable senior officials of the FBI's National Security Division and Albuquerque Field Office and officials of the Department of Justice's Office of Intelligence Policy and Review and Office of the Deputy Attorney General about Mr. Gallagher's testimony. We also reviewed the hearing records and numerous classified and unclassified documents provided to the Congress by the Department of Justice, FBI, and Department of Energy. We conducted our investigation from September 2000 through February 2001 in accordance with investigative standards established by the President's Council on Integrity and Efficiency.

In brief, we found that the portion of Mr. Gallagher's congressional testimony before the Senate Committee on Governmental Affairs in which he expressed full confidence in an Administrative Inquiry conducted by Energy[1] was inaccurate and misleading. Prior to his congressional testimony, Mr. Gallagher had ample opportunity to know and should have known that the FBI's Albuquerque Field Office had concerns about the Administrative Inquiry. Although we determined that Mr. Gallagher's testimony was inaccurate, we were unable to determine whether he intentionally misled the Committee. Mr. Gallagher told us that he did not lie or purposely mislead the Committee, but that he inadvertently gave incomplete testimony. Justice and FBI officials we talked with generally corroborated Mr. Gallagher's statements to us. However, we were unable to resolve an area of disagreement between Mr. Gallagher and the Counsel for Justice's Office of Intelligence Policy and Review regarding a separate matter concerning the production of documents by the FBI to the Attorney General. Mr. Gallagher and the Counsel have different recollections of the reasons Mr. Gallagher gave the Counsel for removing references to certain FBI documents from the final version of a FBI electronic communication, a copy of which Mr. Gallagher provided to the Congress.

[1] In 1996, Energy completed an Administrative Inquiry, which (1) concluded that classified information concerning the W-88 warhead was most likely compromised at the Los Alamos National Laboratory and (2) identified Wen Ho Lee and 11 others as suspects in espionage. Mr. Gallagher told

us that the Administrative Inquiry was the responsibility of Energy and that the FBI only provided assistance.

Mr. Gallagher told us that he did not lie or purposely mislead the Senate Committee on Governmental Affairs, but that he inadvertently gave incomplete testimony before the Committee in June 1999. In his testimony before the Committee, Mr. Gallagher expressed his full confidence in Energy's Administrative Inquiry, stating that the inquiry made a compelling case for focusing the W-88 espionage investigation at the Los Alamos National Laboratory to include Wen Ho Lee. Mr. Gallagher said that following his testimony, he learned that as early as November 1998, the FBI's Albuquerque Field Office had serious concerns about the analysis made during the 1996 Administrative Inquiry. These concerns were detailed in a January 22, 1999, electronic communication from the field office to FBI headquarters[2] that, according to Mr. Gallagher, was included in a briefing book prepared for him prior to his testimony. In a November 10, 1999, letter to the Chairman, Senate Committee on Governmental Affairs, Mr. Gallagher explained that based on additional facts that had come to his attention, after his June 1999 testimony, he provided additional facts in order to have the record complete and accurate.

[2] The January 22, 1999, electronic communication from the Albuquerque Field Office to FBI headquarters has been classified by the FBI.

Mr. Gallagher added that he failed to read the briefing book in its entirety because he had previously received numerous briefings on this investigation and believed that he knew the facts relevant to the Committee's inquiry that day. He told us that he was aware in January 1999 that Wen Ho Lee had reportedly passed the Energy-administered polygraph examination and that the FBI's Albuquerque Field Office wanted to eliminate Wen Ho Lee as a suspect. At that time, he was also aware that the FBI and Energy were jointly considering expanding the Administrative Inquiry to include additional suspects. However, he subsequently learned that Wen Ho Lee had failed a FBI polygraph examination in February 1999 and that following that failure, Wen Ho Lee was again considered a suspect in the W-88 investigation.

Mr. Gallagher concluded by saying that he now regrets not reading all the material. He said that had he read the January 22, 1999, electronic communication before he testified, his testimony would have been different. We examined the briefing book prepared for Mr. Gallagher and determined that it included a copy of the January 22, 1999, electronic communication.

During Mr. Gallagher's October 1999 testimony before the Subcommittee on Administrative Oversight and the Courts, a January 29, 1999, memorandum to the Director of the FBI was discussed. The memorandum, which was signed by Mr. Gallagher, contains a brief summary of the January 22, 1999, electronic communication and noted that Energy's 1996 Administrative Inquiry needed to be expanded to include suspects in addition to those already being investigated. Mr. Gallagher told us that this memorandum was written by a subordinate and forwarded to him through the chain of command. He said he reviewed and signed the memorandum and sent it to the Director. We confirmed that Mr. Gallagher was not the author of this memorandum. Mr. Gallagher also said that the Subcommittee was incorrect in its characterization of the memorandum as an "executive summary" of the Wen Ho Lee investigation that Mr. Gallagher had authored. He said the memorandum is in fact a "note" to the Director, which is routine in big cases. He also said that the statement in the memorandum regarding the need to expand the Administrative Inquiry did not mean that the inquiry was flawed.

We also showed Mr. Gallagher a copy of a February 22, 1999, memorandum sent to John Dion, an official in Justice's Internal Security Section, which transmitted various FBI documents, including the January 22, 1999, electronic communication from the FBI's Albuquerque Field Office. The memorandum also noted that Wen Ho Lee had failed a polygraph examination administered by the FBI in early February 1999. This memorandum, on which the initials "NJG" are written near Mr. Gallagher's name, was discussed at the October 1999 hearing before the Subcommittee on Administrative Oversight and the Courts. Mr. Gallagher told us that he had not seen this memorandum until it was shown to him during his testimony before the Subcommittee. He said that, in addition to telling the Subcommittee that he had not seen the memorandum, he testified that he did not write the initials that appear next to his name and that he did not know who authored the document. Mr. Gallagher told us that he subsequently learned that a FBI National Security Division unit chief authored the memorandum and wrote the initials. He added that transmittal memorandums such as the one discussed at the hearing are routine and that even when his name appears as the author on such memorandums, he, following standard FBI practice, ordinarily does not see them. We confirmed that the National Security Division unit chief authored the memorandum and wrote Mr. Gallagher's initials in accordance with FBI procedures.

Mr. Gallagher told us that prior to his testimony in June 1999, he did not know that any FBI unit had raised concerns about the analysis made during the Administrative Inquiry. Mr. Gallagher also said he first learned about the January 22, 1999, electronic communication in late June or early July 1999, after his June 1999 congressional testimony, during a conversation with the Special Agent in Charge of the Albuquerque Field Office. According to Mr. Gallagher, the Special Agent in Charge informed him that the Albuquerque Field Office reported its concerns about the Administrative Inquiry in a January 22, 1999, electronic communication. Mr. Gallagher added that he then obtained a copy of this electronic communication and reviewed it.

Mr. Gallagher told us that in September 1999 after it became evident to him that there were problems with the Administrative Inquiry, he spoke to the FBI agent assigned to assist Energy in conducting the Administrative Inquiry. He said that the agent told him that he made written changes to a draft of the Administrative Inquiry in 1996 and suggested a more aggressive investigation of the original information. Mr. Gallagher told us that as a result of this conversation he determined that the agent's suggestions were ignored. He also learned that the agent did not see the final version of the Administrative Inquiry because he was no longer involved with the case after his review of the draft.

Other officials from the FBI's Albuquerque Field Office and National Security Division told us that there was a general belief that (1) the Administrative Inquiry was weak and (2) further investigation was needed to determine the extent that the information compromised was disseminated. National Security Division officials also said that it would be unlikely for Mr. Gallagher to have seen the January 22, 1999, electronic communication at the time it was received at FBI headquarters. One of these officials also told us that the January 22, 1999, electronic communication and the January 29, 1999, memorandum became less important after Wen Ho Lee failed the FBI polygraph in February 1999.

The Special Agent in Charge of the FBI's Albuquerque Field Office confirmed that he had a conversation with Mr. Gallagher during which the January 22, 1999, electronic communication was discussed. He said he was "shocked" when Mr. Gallagher told him that he had not seen the document and was not aware that there were concerns about the Administrative Inquiry.

With respect to the separate issue concerning the production of documents by the FBI to the Attorney General, Mr. Gallagher told us that after his talk with the Special Agent in Charge, he requested an outline of FBI Albuquerque Office concerns with Energy's Administrative Inquiry. Mr. Gallagher said he reviewed and made changes to two early drafts of this document before it was finalized as an Albuquerque Field Office electronic communication to FBI headquarters on September 3, 1999. Mr. Gallagher said that, among other things, he removed references in the drafts to the January 22, 1999, Albuquerque Field Office electronic communication as well as other documents from the November and December 1998 time period. He told us that he removed these references because he wanted to make a nonthreatening challenge to Energy and did not want to unnecessarily upset agency officials when they learned that the FBI was officially questioning the Administrative Inquiry. He also said he believed that the report became more focused with the references removed. Furthermore, Mr. Gallagher said that after reading the September 3, 1999, electronic communication, which raised questions about the Administrative Inquiry, Energy's Chief of Counterintelligence was nevertheless very upset with both him and the FBI.

According to the Counsel for Justice's Office of Intelligence Policy and Review, Mr. Gallagher told her during a September 17, 1999, telephone conversation that he removed the references to specific documents from the November and December 1998 time period from the drafts of the September 3, 1999, electronic communication. According to the Counsel, Mr. Gallagher explained to her that these references were removed because they were "errors in the draft" and did not exist any longer. Mr. Gallagher told us that he recalled having a conversation with the Counsel in September 1999 concerning the drafts and sent copies of them to the Counsel. According to Mr. Gallagher, (1) he has no recollection of a September 17, 1999, telephone conversation with the Counsel, (2) he did not make the statement that the Counsel attributes to him, and (3) the Counsel must have misunderstood him.

Mr. Gallagher's Comments

Mr. Gallagher reviewed a draft of this letter and said that he generally agreed with the facts presented. He told us that he believes that his testimony before the Senate Governmental Affairs Committee in June 1999 was neither inaccurate nor misleading, but, rather, incomplete. Mr. Gallagher suggested language changes and, where appropriate, we have made those changes.

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We are sending copies of this letter to the Attorney General, Secretary of Energy, Director of the FBI, and interested congressional committees. Copies of this letter will also be made available to others on request. The letter will also be available at www.gao.gov. If you have any questions, please contact me at (202) 512-7455 or Assistant Director Patrick F. Sullivan at (202) 512-6722. Senior Special Agent Thomas Wiley, Senior Analyst Shelia James, and Senior Attorney Barry Shillito made significant contributions to this investigation and letter.

Robert H. Hast
Managing Director
Office of Special Investigations

(600773)

Source: General Accounting Office (PDF version)

U.S. Department of Justice
Federal Bureau of Investigation
Washington, DC 20535-0001

June 27, 2001

Mr. Robert H. Hast
Managing Director
Office of Special Investigations
General Accounting Office
Washington, D.C.

Dear Mr. Hast:

I thank you for the opportunity to meet with your investigative staff to discuss with them your pending inquiry into my testimony before Congress on the Wen Ho Lee investigation.

Before I comment specifically on the report itself I must place this entire matter into perspective. I have been an FBI Special Agent for 28 years. During these years I have had the privilege to manage a number of high profile investigations in the Criminal Investigation, Counterterrorism, and Counterintelligence areas. Related to these I have appeared before Congress over the past decade on hundreds of occasions. These have included both formal testimony and numerous briefings. Prior to the Wen Ho Lee matter the validity and accuracy of my testimony and presentations to Congress has never been in question. I take great personal pride in the integrity and accuracy of my appearances before to Congress and I prepare carefully for them. For this reason, these allegations are personally and professionally difficult. With respect to the Wen Ho Lee investigation, I was assigned as the Assistant Director, National Security Division on November 23, 1998. Beginning in February 1999, I was asked to be the principal FBI representative at testimony and briefings on the Wen Ho Lee matter. I did so continuously using a series of briefing books that primarily focused on the investigation (1996-1997) that long preceded my association with the National Security Division. This testimony and briefings did not focus extensively on either the accuracy of the DOE Administrative Inquiry or the conduct of the polygraphs in late 1998 and early 1999. Nonetheless, these are the issues associated with the questions raised about my personal integrity and accuracy of testimony.

As I informed your investigators on June 21, 2001, I respectfully disagree with the conclusion of the report that a portion of my testimony was "misleading." This concern is heightened given the conclusionary nature of the subject line at the very beginning of your report. We discussed in some detail all of the facts and events surrounding my testimony. I agree that this testimony may have not been complete given that there was an aspect (the existence of the FBI documents which questioned the Department of Energy (DOE) administrative inquiry) which I was unaware of and did not testify concerning. In fact, subsequent to my testimony before the Senate Governmental Affairs Committee, and upon identifying that the DOE inquiry may, in fact, have some deficiencies, by letter dated November 10, 1999, I informed Senator Thompson of this. (I am enclosing a copy of this letter for your review and consideration). To the degree that your report suggests that I personally misled Congress, that is simply not accurate. While I would have preferred to have had known all available information at the time of my testimony, the fact remains that I did not, a conclusion supported both by witness statements and documents.

Concerning my testimony, your report stated that you were unable "to conclusively determine" that my testimony was "intentionally" misleading. You also cite that with one exception, the Department of Justice and FBI officials you interviewed "generally" corroborated my statement to your staff. You further cite a disagreement on fact between myself and a Senior Counsel for the Department of Justice Office of the Intelligence Policy and Review (OIPR). It is unclear to me whether that disagreement is the "one exception" noted above. If so, I point out that this disagreement on fact was subsequent to my testimony and had no bearing on the accuracy or completeness of my testimony. More importantly, in my meeting with your investigative staff, I referred to and now provide you a copy of a note prepared by me on September 16, 1999, which transmitted to the Senior Counsel the "draft copies" of the FBI communications concerning the administrative inquiry. This document explains in some detail an explanation as to the different drafts provided to the Department of Justice. It is in conflict with the assertion by the Department of Justice Senior Counsel that I had removed references because there were "errors in the draft and the

documents did not exist." This document is a contemporary record of our discussion. I ask that you include it in any reporting on this issue. Recognizing the existence of this document, I question the use of the terms "conclusively" and "generally" in determining your ability to corroborate the validity of my testimony and the corroboration of my statement to you. This becomes critical given the conclusionary nature of your subject line describing the report. Also extensive care must be given to any allegations that surface from the contentious dialogue surrounding the Department of Justice involvement in the Wen Ho Lee matter.

In your report, you cite that I had failed to read the briefing book in its entirety because I had "previously received numerous briefings... and believed I knew the relevant facts." As I explained to your investigators on June 21, 2001, this is incomplete and misleading. The reason I did not review the section of the briefing book on polygraph (where the January 1999 document is located) was because the details of the polygraph were not a critical aspect of the testimony and I did not anticipate any questions in that area. Also, I noted and I request that it be made a matter of record in your report that the same section was included in the briefing books provided to the Director, FBI; Senior Counsel, OIPR at Justice; and the Attorney General. Apparently for the same reasons as my not reviewing this section, no one else took particular interest or conducted a detailed review of that section of the briefing book, likely because it simply was not a significant issue at the time. I believe this is a critical factor in understanding why I did not focus on that section of the briefing book. It was not a case of negligence on my part.

In one section of your report you cite that "this memo bears the written initials 鮮JG' near Mr. Gallagher's name," not noting in the body that they were not written by me. This memo is significant because it was suggested in one briefing as proof that I in fact I knew of the existence of the January 1999 document. This section has a footnote (No. 5) which clarifies who actually authored those initials. On June 21, 2001, I asked that the above reference to my initials accurately indicate the full text of these initials including the slash and other initials indicating who actually approved the document. This would include that you now understand that these were not my initials and that the procedures used were consistent with the FBI policy of initialing for a superior. Also, I asked then and I repeat that you consider placing the details in Footnote 5 into the body of the communication as an affirmative statement that these were not my initials.

On Page 5 of the report, you cite my actions subsequent to my conversation with former Special Agent in Charge (SAC) David Kitchen. As I explained on June 21, 2001, upon being informed by SAC Kitchen in late June or early July, of the existence of the January 22, 1999, Electronic Communication (EC) I asked for and received a copy of this communication at FBI Headquarters. It was based upon my review of this communication that I asked SAC Kitchen to provide me a summary of the concerns with the DOE administrative inquiry (I did not ask for a summary of the Wen Ho Lee investigation). Your report correctly footnotes the statements by former SAC Kitchen. However, on June 21, 2001, we discussed and your investigators agreed, that he (Kitchen) went beyond the footnote and made statements to the effect that it was clear to him that I was unaware of the January 22, 1999, document that he was talking about. I ask that this statement be included in the footnote. Also I repeat my concern with your use of the term "conclusively" in determining if I "intentionally misled" Congress. These two issues (the initials on the memo cited above which you determined were not mine and the full statement of the former SAC about my apparent unfamiliarity with the January 1999 communication) argue for a more positive and direct statement as to my motivation.

I appreciate the opportunity to discuss this report and your consideration of my above concerns and recommend changes. During my testimony on the Wen Ho Lee matter and at no time during my 28-year career in the FBI have I ever misled or intentionally misinformed a member of Congress.

Sincerely yours,

Neil J. Gallagher
Assistant Director
National Security Division

Enclosures (2)

September 16, 1999

Fran:

RE: FBI-DOE NATIONAL LABORATORY ASSESSMENT

At the instruction of the Attorney General (AG) and pursuant to your request, I am providing the initial "draft" working copies of the FBI communication provided to the AG regarding the administrative inquiry (AI).

For clarification, in July, 1999, I was provided with the first "draft" copy of the document dated July 9, 1999 (copy attached). The purpose of this "draft," as expressed to me by SAC Albuquerque (AQ), was to further a discussion between he and I and to further a review of the AI. Upon my review, I recommended and instructed that AQ be given direct access to the *SENSITIVE* [word apparently deleted] document to enhance their analyses and suggested to SAC AQ that AQ interview the FBI agent who actually participated in the AI.

In late August, 1999, I was provided a second "draft" which contained the results of the above review and interview. In discussing this "draft" with SAC AQ, we both concluded that a more focused report would be of more value. We discussed and agreed restructuring this communication to focus on a technical review and distribution of information (as contained in the document provided to the AG). The remaining information that was in the second "draft" and not included in the final version were analytical and speculative without any substantiation. While in the end they may prove to be accurate, the SAC and I agreed that the best approach was to focus on the technical review and distribution. We also agreed that these other areas could be pursued and further analyzed once we actually engaged in a complete review of the AI, as proposed to the AG by the Director in our meeting on September 14, 1999. While this "draft" contained a recommendation that consideration be given to open certain preliminary inquiries (PI) this also was deleted. This was based on two facts: 1) this was a limited analysis which would be expanded upon by a more thorough review of the AI; 2) I was aware that at least one name (Slezak) was already the subject of a pending PI.

This final document (provided to the AG) was first shared with the U.S. Attorneys Office (USAO) to ensure that it did not contain Brady material, which might complicate the prosecution. With the USAO's concurrence it was finalized and submitted to FBIHQ through official channels. Once this document was approved by SAC AQ, it was not altered or changed in any manner.

Neil J. Gallagher

Enclosures (2)

U.S. Department of Justice
Federal Bureau of Investigation
Washington, DC 20535-0001

November 10, 1999

BY LIAISON

Honorable Fred Thompson
Chairman
Senate Governmental Affairs Committee
United States Senate
Washington, D.C.

Dear Mr. Chairman:

In my testimony before your Committee on June 9, 1999, I provided, on several occasions, my assessment of the Department of Energy (DOE) Administrative Inquiry (AI) that, in part, formed the bases upon which the FBI predicated its investigation of Wen Ho Lee. I understand that I stated at different times that:

1) I "had full credibility in the report";

2) I had "found nothing in DOE's AI, nor the conclusions drawn from it," to be erroneous; and

3) I stated there is a "compelling case made in the AI" to warrant focusing on Los Alamos.

At the time of my testimony, these statements were based on my personal review and understanding of the facts and the FBI evaluation of the AI. I believed then that these statements were accurate given that understanding.

I have, subsequent to that testimony, asked for and become aware of additional facts that I want to bring to your attention, in order to be certain that the record before your Committee is complete and accurate.

1) In November, 1998, and December, 1998, and again in January 1999, there were some written analyses by FBI Albuquerque (FBI AQ) which question the accuracy of certain representations and conclusions in the AI. Although these documents were sent to FBI Headquarters (FBIHQ), I was unaware of their existence before I testified in June.

Further, I have recently learned that the January, 1999, document was included in a briefing book provided to me, other Bureau Executives and Senior Department of Justice officials in May, 1999. It was included in a section about polygraph issues because that was the primary focus of the document. It transmitted the results of the DOE polygraph administered to Wen Ho Lee. I did not review that section of the briefing book to include the January, 1999, document at that time, inasmuch as I was familiar with the polygraph issue and I knew Wen Ho Lee had failed an FBI polygraph shortly after this document would have arrived at FBI Headquarters.

2) In July, 1999 I engaged in a dialogue with SAC AQ regarding this AI. We agreed that a draft document would be provided to me regarding FBI AQ's analysis of this AI. Upon receipt of this draft on or about July 9, 1999, and a subsequent conversation with the SAC, I then learned there was a document submitted to FBIHQ in January, 1999. I have since become aware of the two (2) previous documents (November, 1998, and December, 1998) which contain statements questioning the scope of the AI. I understand all of these documents have been provided to your Committee.

As a result of my dialogue with SAC AQ, we agreed that AQ would conduct a number of interviews in an attempt to further understand and expand upon the technical portions of the AI. On August 20, 1999, FBIHQ located and interviewed one of the scientists who participated in the technical portion of the AI. This scientist stated that he expressed a dissenting opinion with respect to the technical aspects of the AI. His statement is in direct conflict with the AI submitted to the FBI because the AI does not reflect any dissension by the "DOE Nuclear Weapons Experts."

Based upon a verbal briefing by FBI AQ of this August 20, 1999, interview, I requested that AQ submit to me a document establishing, for the record, FBI AQ's concerns with this AI. Upon receipt of this document, I shared it with the Director and it has since been shared with the Attorney General and the Secretary of Energy. Based upon this document and other factors, a review has been initiated by the FBI to re-evaluate the scope of the AI. I understand that you or your staff have received a briefing on the scope and direction of this new initiative and that it should not impact on any subsequent criminal investigation of Wen Ho Lee. The focus of this new initiative is to determine the full universe of both compromised restricted nuclear weapons information and who had access to that information in addition to anyone identified in the original AI.

On June 9, 1999, when I testified before you, I expressed opinions and provided complete and accurate facts as I understood them. The information I provided to your was in complete candor. Given the above information, if asked to describe the AI today, I would have a different response. While the FBI review is not complete, it appears that the technical and dissemination aspects of the AI, at a minimum, deserve to be questioned and that is what the FBI is now doing. As soon as we resolve this issue, we will provide you with those details.

I would be pleased to discuss this with you or your staff in any format you choose. By this letter, I am only intending to amplify and clarify my prior testimony relating to the AI. I am not intending to imply anything about the underlying case involving Wen Ho Lee, the FISA issue or any other issues that have been explored before your Committee. As you know, those issues depend on varying degrees of information that exists independent of the AI, e.g., information developed pre-1996 or as a result of the criminal aspects of the current investigation.

Again, thank you for this opportunity. I am available at your convenience.

Respectfully,

Neil J. Gallagher
Assistant Director
National Security Division

July 17, 2001

Robert H. Hast
Managing Director
Office of Special Investigations
General Accounting Office
441 G Street, NW
Rm 6K17S
Washington, DC 20548

Subject: GAO-01-896R FBI Official's Congressional Testimony Was Inaccurate

Dear Mr. Hast:

As the Director of Intelligence at DOE during the Kindred Spirit Administrative Inquiry, I read with great interest the subject report posted on your website. Regrettably, the report contains some factual errors that, if left uncorrected, perpetuate the web of deceit the FBI has spun to cover up its own mistakes and blunders in the Wen Ho Lee debacle.

The FBI's effort to cover up these blunders shifting blame elsewhere is a disgrace to the history and tradition of the Bureau.

In this light, I cannot allow recent comments by Assistant Director Neil Gallagher in response to your inquiry to pass unchallenged.

Paragraph 10 of the GAO report makes the following statement.

> Mr. Gallagher told us [the GAO] that in September 1999 after it became evident to him that there were problems with the Administrative Inquiry, he spoke to the FBI agent assigned to assist Energy in conducting the Administrative Inquiry. He said that the agent told him that **he made written changes to a draft of the Administrative Inquiry in 1996 and suggested a more aggressive investigation of the original information. Mr. Gallagher told us that as a result of this conversation he determined that the agent's suggestions were ignored. He also learned that the agent did not see the final version of the Administrative Inquiry because he was no longer involved with the case after his review of the draft**. [Emphasis added]

Once again, Gallagher is distorting the record and attempting to mislead both the GAO and the Congress. The facts of this matter are these.

The FBI agent that assisted Energy was provided a soft copy of the draft final Administrative Inquiry report through the FBI. The agent complimented the DOE investigator for the fine work done and made suggestions and offered some comments as to revisions to the report. Many of these were incorporated into the final report that was forwarded to the FBI. Thus, Gallagher's assertion that the suggestions were ignored is patently false.

Second, the DOE investigator, who was not interviewed by the GAO, states that the FBI agent's comments were also provided directly to the FBI under separate cover. The agent has confirmed this in court documents made available during the Wen Ho Lee case. So the FBI could have easily compared the agent's suggestions with the final report provided by DOE.

In short, if the agent's comments and suggestions were ignored, it was by the FBI. Gallagher implies that it was DOE that ignored them. That is categorically false. This is at least the second time that I am aware of Gallagher's false and misleading responses to congressional inquiries. He has consistently misrepresented both the content and scope of the DOE Administrative Inquiry. For example, his 1999 testimony led the Senate Governmental Affairs committee to believe that DOE had only visited Los Alamos and had focused on Wen Ho Lee in late 1995. In fact, DOE visited all three weapons lab locations and conducted records searches at two other DOE facilities. DOE and FBI investigators did not make these visits until January 1996 and, at least the DOE investigator had never heard of Dr. Lee until months after Gallagher claimed DOE had already selected Dr. Lee.

I too have had nearly three decades in the national security field and have compiled a distinguished career of accomplishments. Gallagher and the FBI, in efforts to shift the blame for their bungling of the Wen Ho Lee investigation have tried to smear my good name. I would be happy to discuss this information with you or your associates. When I was at DOE, we cooperated fully with the GAO on any number of important studies that helped shape the perceptions of an agency that had lost control over the national laboratories.

Thank you for your attention to this matter. I may be reached at 703.237.XXXX.

Sincerely

Notra Trulock, III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[filed June 6, 2001]

UNITED STATES OF AMERICA,
Plaintiff,

v. Case No. CR 99-1417 JP

WEN HO LEE,
Defendant.

MEMORANDUM BRIEF IN SUPPORT OF MOTION TO INTERVENE AND UNSEAL, OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS COMPELLING UNSEALING OF COURT RECORDS

[Table of Contents and Table of Authorities Deleted Here]

INTRODUCTION

This Court has apologized to Dr. Wen Ho Lee ("Lee") for the manner in which his rights were violated in the course of his prosecution. However, the American public's rights continue to be violated, as a host of documents apparently remain sealed in violation of the public's common law and constitutional rights of access to preetrial documents. The continued sealing of these documents serves only to deepen suspicion about "the real reasons why the executive branch has done all of this," Reporter's Transcript of Plea Proceedings, 58:13-14 ("RT"), and denies the public important information relating to Lee's possible selective prosecution on the basis of his race and national origin.

On behalf of the American public, which has a constitutional "right of access to criminal proceedings and documents filed therein," *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985), Chinese for Affirmative Action ("CAA") now moves to unseal these records. Its motion should be granted because the order sealing these records did not meet the procedural and substantive requirements for denying access. *Press-Enterprise Co. v. Superior Courts*, 464 U.S. 501 (1984) (*"Press Enterprise I"*) (vacating order closing pre-trial proceedings and sealing transcripts); *U.S. v. Galloway*, 937 F.2d 542 (10th Cir. 1991) (remanding where district court failed to adhere to mandatory sealing procedures); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143 (9th Cir. 1983) (reversing order sealing pretrial records). This motion also should be granted for the separate reason that the sealing orders violate the public's common law right to inspect judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Valley Broadcasting Co. v. U.S. Dist. Court*, 798 F.2d 1289 (9th Cir. 1986). These rights cannot be sacrificed by the stipulation of the parties, nor by the government's mere assertion that sealing is required to protect national security. "The District Court cannot abdicate its responsibility to ... determine whether filings should be made available to the public. It certainly should not turn this function over to the parties ..." *Procter & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). "[W]e are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present." *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) (vacating sealing order).

Accordingly, CAA respectfully requests that the Court immediately grant this motion, or, at a minimum, schedule a hearing on the important constitutional and common law issues presented here.

STANDING

CAA is an advocacy and service organization committed to the advancement of multiracial democracy in the United States and to the promotion of the civil and political rights of Asian Americans.[1] The possibility that Lee was the victim of selective prosecution is a matter of great concern to CAA, and to the American public, which has a right to information that may shed light on whether the country's tax-supported national laboratories are singling out researchers for suspicion and investigation because of their race.[2] Because CAA has learned that possibly exculpatory records concerning Lee's case remain under seal, and in light of

news reports suggesting Lee may be subject to more questioning,[3] CAA requests the immediate unsealing of all documents, or portions of documents, that do not truly threaten national security.

[1] CAA is a 32-year-old, member-supported civil rights organization based in the San Francisco Bay Area. CAA serves Asian Americans and immigrants seeking employment opportunities, provides language support to minority students and parents in the public schools, and engages in local, state and national policy advocacy to advance the civil and political rights of our community. CAA has advocated on behalf of individuals who have been targeted for unfair treatment in employment, education and other aspects of public life, based upon racial stereotypes. CAA carefully monitored Lee's investigation and prosecution for over two years and continues to monitor and advocate around allegations of racial profiling by the Department of Energy. CAA was one of several *amici curiae* that filed a brief in support of the Lee's Motion for Discovery of Materials Related to Selective Prosecution, which was accepted by this Court.

[2] In a recent episode that illustrates the continued urgency of this issue, the only Chinese-American member of Congress was recently denied entry to a Department of Energy facility by guards who stopped Congressman Wu to question him about his nationality, on his way to deliver remarks about the importance of Asian Pacific American Heritage Month. According to a DOE spokesperson, [they] were doing "'exactly what they are supposed to do'." McCall,*Chinese-American Rep Denied Entry*, The Washington Post, May 25, 2001, online edition (quoting Jeanne Lopatto).

[3] See Pincus, *Interrogation of Lee Raises New Questions, Sources Say*, The Washington Post, Feb. 4, 2001, at A2.

As the Supreme Court has held, all members of the public must be given a right to be heard on the question of their exclusion from court hearings and records, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982), and it is well-settled that non-party members of the public and press have standing to challenge the sealing of court hearings and records. *Daines v. Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993) (newspaper had standing to challenge sealing of settlement agreement); *U.S. v. McVeigh*, 918 F. Supp. 1452, 1456 (W.D. Okla. 1996) ("movants have standing to present these questions on behalf of themselves and the general public"); see also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988 (public advocacy group had standing to challenge protective order in tobacco litigation).

It also is well-settled that an interested third party may bring its motion to unseal after the underlying proceedings have ended. *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (third party intervened after judicially approved settlement in order to challenge sealing), *FDIC v. Ernst & Ernst*, 677 F.2d 230, 231-32 (2nd Cir. 1982) (third party intervened to challenge stipulated confidentiality order two years after settlement); *Mokhiber v. Davis*, 537 A.2d 1 100, 1104-06 (D.C. Cir. 1988) (reporter permitted to intervene four years after a judicially-approved consent decree in order to challenge a protective order); *Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000) (media intervened and compelled unsealing of records a year after settlement of a products liability case).

Accordingly, CAA has standing to bring this motion requesting that this Court vacate its sealing orders in this case.

STATEMENT OF FACTS

On December 10, 1999, the United States charged Lee with 59 counts of unlawfully gathering national defense information. The prosecution subsequently presented "information that was so extreme it convinced [the Court] that releasing [Lee], even under the most stringent of conditions, would be a danger to the safety of this nation." RT, 48:18-20. Then, on September 13, 2000, the prosecution suddenly dropped all but one minor count, which concerned the mishandling of computer data. As perplexed over the government's contradictory actions as the rest of the country, this Court made an apt observation: "I note that this has occurred shortly before the Executive Branch was to have produced, for my review in camera, a large volume of information that I previously ordered it to produce." RT, 50:7-10. The Court was referring to seven categories of documents relating to selective prosecution, including Department of Justice and Department of Energy memoranda discussing the targeting of Americans of Chinese ethnicity. Order of August 25, 2000.

The government may argue that there was no connection between its dropping of groundless charges and the deadline -- just two days away -- for disclosing these documents. However, this Court noted specifically that the documents likely would have supplied insight into the government's "real reasons" for bringing a

case that "embarrassed our entire nation and each of us who is a citizen of it." RT, 58:10-11. If nothing else, this stunning turn of events was powerful evidence of the importance of accessible information and an accountable government. Yet numerous documents in this case remain under seal upon stipulation of the parties, and apparently without satisfying the ***mandatory*** procedural and substantive requirements that must be met before public access to pretrial documents may be denied.

The docket sheet shows that the government's first motion for a protective order, filed on December 13, 1999, was granted, without a hearing, one day after it was docketed. A number of unidentified documents, orders and motions were sealed between December 13, 1999 and February 9, 2000 when the parties stipulated to a second protective order. This order delegated to a Court Security Officer the Court's authority to determine whether Lee's papers should be filed under seal. Stipulated Protective Order at 7-8 ("PO"). The Security Officer was not required to make any findings and was empowered to make sealing decisions "in consultation with representatives of the appropriate [government] agencies." *Id*. at 8. The protective order allowed the government to file under seal portions of papers containing classified information without any review or findings by the Court justifying sealing. *Id*.

As explained herein, these sealing orders patently violated the public's constitutional and common law rights of access.

I.

CAA AND THE PUBLIC HAVE A CONSTITUTIONAL AND COMMON LAW RIGHT OF ACCESS TO PRETRIAL DOCUMENTS FILED IN A CRIMINAL CASE

The First Amendment and the common law provide independent rights of access to the types of pretrial documents that remain under seal in this case. Each right is grounded in a different theory of access, but the purpose is the same: Public access promotes trustworthiness in the judicial process, helps curb abuses, and provides the public with a more complete understanding of the judicial system, including a better perception of its fairness. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 606. Public access is especially important here, where secrecy and unaccountability caused the Court itself to be "led astray" by the executive branch, and the American public was left with a tarnished view of the criminal process, RT, 55:4.

A. The First Amendment Provides A Right Of Access To Pretrial Documents

The Supreme Court has recognized that the public has a right of access to virtually all proceedings and records in a criminal case. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (criminal trials); *Press Enterprise I*, 464 U.S. at 511, 513 (voir dire and transcripts); *Waller v. Georgia*, 467 U.S. 39 (1984) (suppression hearings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise II*") (preliminary hearings).[4] The Tenth Circuit has assumed that a First Amendment right of access applies to pretrial documents filed in a criminal case, *U.S. v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1997); U.S. v. McVeigh, 119 F.3d 806, 812 (10th Cir. 1997), and district courts within the Tenth Circuit have applied a First Amendment analysis to pretrial docurnents filed in criminal cases. *See, e.g., U.S. v. McVeigh*, 918 F. Supp. 1452, 1464 (W.D. Okl. 1996). Indeed, there can be no doubt that the First Amendment right of access attaches to pretrial documents. As the vast majority of circuits explicitly have recognized, there can be no distinction, for public access purposes, between pretrial proceedings and the documents filed as part of those proceedings. In the words of then-Circuit Judge Anthony Kennedy, "the public and the press have a right of access to criminal proceedings and documents filed therein. The right of access is grounded in the First Amendment and in common law, and extends to documents filed in pretrial proceedings as well as in the trial itself." *CBS, Inc.*, 765 F.2d at 825 (citations omitted).[5]

[4] These cases reversed a prior decision of the Supreme Court, which had held that the public did not have a right of access to suppression hearings under the Sixth Amendment. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), "[A]lthough no single case has expressly done so, the combination of *Richmond Newspapers* and *Waller* ... effectively overruled *Gannett*." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1205 n.22 (1999).

[5] See also *In re Globe Newspaper Co.*, 729 F.2d 47,51,59(1st Cir. 1984) (the First Amendment right of access "has also been extended to documents filed in pretrial proceedings"); *U.S. v. Haller*, 837 F.2d 84, 87 (2nd Cir. 1988) ("right of access extends to plea hearings and thus to documents filed in connection with those hearings"); *U.S. v. Antar*, 38 F.3d 1348, 1361 (3rd Cir. 1994) (the "strong presumption of access to records, including transcripts, provides independent support for the

conclusion that the First Amendment right of access must extend equally to transcripts as to live proceedings"); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("the First Amendment right of access applies to documents filed in connection with plea hearings"); *U.S. v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) ("[w]e have recognized that this presumption is of constitutional magnitude through the first amendment"); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513,1516 (9th Cir 1988) ("the public and press have a right of access to criminal proceedings and documents"); *U.S. v. Ellis*, 90 F.3d 447 (11th Cir. 1996) (First Amendment right of access applies to transcripts of *in camera* hearings).

The courts routinely find a right of access to pretrial documents filed in criminal cases because these documents easily meet the Supreme Court's two-part test for recognizing a constitutional right of access: (1) "the document is one which has historically been open to inspection by the press and the public; and, (2) 'public access plays a significant positive role in the functioning of the particular process in question.'" *McVeigh*, 119 F.3d at 812 (quoting *Press-Enterprise II*, 478 U.S. at 8).

Although the docket sheet does not reveal the nature of all the sealed documents, it appears these documents fall squarely into categories to which the federal courts have acknowledged a right of access, such as motions, briefs, orders and transcripts from pretrial hearings. *See, e.g., In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (pretrial motions and briefs, including discovery-related motions); *U.S. v. Ellis*, 90 F.3d 447, 451 (11th Cir. 1996) (transcripts of *in camera* hearings once the case was concluded); *Associated Press*, 705 F.2d at 1145 (all pretrial documents); *Seattle Times Co. v. U.S. Dist. Court.* 845 F.2d 1513, 1517 (9th Cir. 1988) (pretrial release proceedings and documents filed therein); *In re Washington Post*, 807 F.2d 383, 390 (4th Cir. 1986) (plea and sentencing documents in espionage case). As for part two of the test, it is met where, inter alia, public access to the document "would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system." *In re Washington Post*, 807 F.2d at 389 (citing *Press-Enterprise II*, 478 U.S. at 8) (other citations omitted). That standard is easily met here. If access is warranted anywhere in order to curb prosecutorial misconduct -- or to provide the public with a better understanding of the judicial system[6] -- it is warranted in this case, where, as this Court observed, the prosecution "caused embarrassment by the way this case began and was handled." RT, 58:8-9, and the government's motives "ma[de] no sense," RT, 50:20-21.

[6] This is another factor satisfying the second prong of the access test. *See, e.g., Seattle Times*, 845 F.2d at 1517.

While both factors must be considered, the Supreme Court and other circuits have held that it is not mandatory that a document meet both prongs for the First Amendment right of access to attach. *Globe Newspaper Co.*, 457 U.S. at 605 n. 13 (recognizing right of access to testimony of minor sex crimes victim despite lack of history of access); *Seattle Times*, 845 F.2d at 1516 (same regarding bail proceedings); *U.S. v. Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) (same regarding suppression hearings). Especially in a criminal trial, a lack of a tradition of access to a particular document or proceeding cannot alone justify sealing. *Globe Newspaper Co.*, 457 U.S. at 605 n. 13 (the argument that a specific proceeding did not enjoy a tradition of public access was "unavailing" because "as a general matter criminal trials have long been presumptively open"). Rather, the Court must consider whether, in the context of our modern justice system, public access serves society's general interest in open trials and an accountable judiciary. *Brooklier*, 685 F.2d at 1170. Because "the first amendment is to be interpreted in light of current values and conditions," and in light of the "increasing importance of pretrial procedures in the modern era," a right of access attaches even to records not traditionally open where, as here, the value of access is apparent. *Id.* Thus, even if the Court finds that some documents under seal in this case do not have a long tradition of access, the First Amendment right would still attach because public access subjects the judiciary to "healthy public scrutiny," *Seattle Times*, 845 F.2d at 1516, and is crucial to a full understanding of the way in which "the judicial process and the government as a whole" are functioning. *Associated Press*, 705 F.2d at 1145.

B. <u>The Common Law Also Provides A Right of Access To Pretrial Documents</u>

In addition to a constitutional right of access, the public also has a common law right to inspect and copy public records and documents, including judicial records and documents. *U.S. v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985); *Nixon*, 435 U.S. at 598. Although they are related, the common law right of access is separate and independent from the constitutional right, and attaches, presumptively, to all documents filed in a criminal or civil case. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *see also Nixon*, 435 U.S. at 598 (a common law right of access has been acknowledged when the party seeking access has manifested a "desire to keep a watchful eye on the workings of public agencies"). This common

law right attaches even where the court does not reach the constitutional issue or does not find a constitutional right of access. *U.S. v. Schlette*, 842 F.2d 1574, 1582-83 (9th Cir. 1988); *Valley Broadcasting Co.*, 798 F.2d at 1293; *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63-64 (4th Cir. 1989).

To assert this common law right, CAA need only make a threshold showing of a legitimate need for disclosure. *U.S. v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998). This requirement is easily met here because unsealing will "serve the ends of justice" *id*., by "[m]aking the public aware of how the criminal justice functions," *Schlette*, 842 F.2d at 1583, and more specifically, will shed light on whether Lee was the victim of selective prosecution and whether the nation's tax-supported national laboratories are engaging in unconstitutional activities. The burden then shifts to government to articulate a "legitimate reason for preserving ... secrecy," *id*. at 1583, that would outweigh the public's "overriding concern with preserving the integrity of the law enforcement and judicial processes," *Hickey*, 767 F.2d at 708 (internal citations omitted). If the government cannot meet this burden, the documents must be unsealed. *Id.* The purported national security interests the government asserted in support of keeping Lee confined "under extraordinarily onerous conditions" turned out to be groundless, RT, 50:18,55: 14-17, and the government already has implicitly conceded this fact when it entered into the plea agreement with Lee. *Id.* Accordingly, the Court must closely scrutinize any further assertions of national security. Just as Lee was released from solitary confinement when the government finally admitted he was no threat to national security, this Court should also release the documents the government also mistakenly claimed were a threat to national security.

II.

THE DOCUMENTS MUST BE UNSEALED BECAUSE THE GOVERNMENT HAS NOT COMPLIED WITH THE SUPREME COURT'S PROCEDURAL REQUIREMENTS FOR SEALING PRETRIAL DOCUMENTS

As the Supreme Court and other courts have held, the public "must be given an opportunity to be heard on the question of [its] exclusion" from court hearings and records. *Globe Newspaper Co.*, 457 U.S. at 609 n.25. Closure motions must be (1) docketed reasonably in advance of their disposition so as to give the public an opportunity to present their objections to the court, (2) the court must provide interested persons an opportunity to object to the sealing before making its decision, and (3) if the court does close a hearing or seal records, it must state its reasons on the record, supported by specific findings. *In re Knight Publishing Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984); *accord, e.g.. In re Washington Post*, 807 F.2d at 390; *U.S. v. Criden*, 675 F.2d 550, 554 (3rd Cir. 1982). The Tenth Circuit has remanded cases in which the district court did not make specific, on-the-record findings. *U.S. v. Galloway*, 937 F.2d 542, 1551 (10th Cir. 1991); see also *McVeigh*, 119 F.3d at 814 (the court must make adequate findings to support its orders) (citing *Press-Enterprise II*, 478 U.S. at 13-14).

Moreover, a court cannot automatically cure a failure to comply with the procedural requirements by holding a belated hearing or making after-the-fact findings. *In re Washington Post*, 807 F.2d at 392 (a belated hearing on a motion to unseal "does not cure the lack of an opportunity for a hearing with respect to the original decision to seal them").

The docket sheet and stipulated protective order in this case show that the mandatory sealing procedures were not followed, as the public was denied an opportunity to object to the first sealing order and the Court failed to determine for itself whether sealing in fact was warranted. On this basis alone, the documents at issue must be unsealed. *In re Washington Post*, 807 F.2d at 393 (vacating district court's sealing order because the court "cannot uphold orders based on the use of impermissible procedures"); *Brooklier*, 685 F.2d at 1167-68 (order closing hearings and sealing records unconstitutional because "the court excluded the public and press without satisfying the procedural prerequisites to closure").[7]

[7] Of course, the Court may redact information that, in its own determination, truly implicates national security, as explained in Section III of this memorandum brief.

A. The Court Erred In Not Making Its Own Findings Before Sealing

As explained above, it is clear that parties to an action cannot stipulate away the public's right of access. *Procter & Gamble Co.*, 78 F.3d at 227 ("[t]he protective order in this case allows the parties to control public access to court papers, and it should be vacated or substantially changed"); *accord, e.g., Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983) (confidentiality agreement between the parties could not justify sealing of records to which public has a right of access because a court cannot blindly accept parties' agreements for secrecy "without seriously undermining the tradition of an

open judicial system"). Furthermore, even if the Classified Information Procedures Act, 18 U.S.C.A. App. §§ 1-16 ("CIPA"),[8] allowed the sealing of portions of documents that contained bona fide classified information, a court may not seal ***any*** documents, including those purported to contain classified information, without "making the appropriate constitutional inquiry." *In re Washington Post*, 807 F.2d at 393 (vacating order sealing plea and sentencing documents in case in which a foreign national was charged with espionage because the court, relying on CIPA, provided no opportunity for the public to be heard and failed to make specific findings). Indeed, all federal courts that have considered the issue have flatly rejected the government's contention that CIPA somehow relieves a court of its obligation to adhere to the mandatory First Amendment closure procedures in an espionage case: "[T]he procedural requirements ... are fully applicable in the context of closure motions based on threats to national security" and "[t]here is no reason to fear that these procedures would in themselves alert the public to the substance of the information sought to be kept secret." *Id.* at 391-92; *accord U.S. v. Poindexter*, 732 F. Supp. 165, 167 n. 9 (D. D.C. 1990) ("CIPA obviously cannot override a constitutional right of access"); *U.S. v. Pelton*, 696 F. Supp. 156, 157 (D. Md. 1986) ("[t]here is nothing in the legislative history [of CIPA] to suggest that the government may close all or part of a public trial").

[8] CIPA ailows preliminary evidentiary rulings where a defendant may reveal classified infonnation during trial or may request classified information in discovery. It was enacted to "minimize the problem of so-called graymail, a threat by the defendant to disclose classified information in the course of trial, by requiring a ruling on the admissibility of the classified information before trial." *In re Washington Post*, 807 F.2d at 383.

What these cases make clear is that the Court has an affirmative duty to determine if the executive branch's assertions regarding national security indeed warrant sealing. It is well-established that "important First Amendment values" cannot be overcome by "a mere assertion of 'national security.'" *Pelton*, 696 F. Supp. at 159, *accord In re Washington Post*, 807 F.2d at 391 (vacating district court's sealing orders where the district court simply "deferr[ed] to the executive branch"). Rather, the right of access may be denied only if the Court conducts "***its own*** analysis of the [classified information at issue] and finds that there are serious national security concerns").[9] *Pelton*, 696 F. Supp. at 159 (allowing closure only of approximately five minutes of a criminal espionage trial, but requiring the release of a redacted version of the transcripts). By contrast, in this case the stipulated protective order allowed sealing based solely on the government's "mere assertion of national security" when it delegated to a Security Officer the Court's duty to determine what documents filed by Lee contained classified information or implicated national security. The Security Officer was empowered to decide -- without making any findings and "in consultation with representatives of the appropriate [government] agencies" -- whether Lee's papers would be filed under seal. PO at 7-8.

[9] All emphases are added unless otherwise noted.

This procedure plainly violated both the constitutional and common law rights of access. Moreover, CIPA does not -- and could not -- authorize the Court Security Officer to assume the Court's duty to review whether sealing indeed was warranted. 18 U.S.C.A. App. §§ 1-16. Indeed, a review of protective orders in other cases implicating CIPA reveals that the Security Officer may only enforce the procedural mechanisms for the handling and storage of classified documents -- i.e., maintain secure areas for the viewing of documents and provide for the storage of classified documents. *See, e.g.*, Protective Order in *U.S. v. Poindexter*, 1988 WL 148597 *1 (1988) (the duties of the Court Security Officer are to "establish procedures" for the disclosure of classified documents to parties who have security clearance); Protective Order in *U.S. v. Weinberger* (filed as Defendant's Exhibit B in *Armstrong v. Executive Office of the President*, 830 F. Supp. 19, 24 (D.C. Cir. 1993)) (Security Officer was responsible for identifying people with security clearance and for "establish[ing] procedures" for the disclosure of classified information to the defendant); Protective Order in *U.S. v. Musa*, 833 F. Supp. 752, 757-78 (E.D. Mo. 1993) (role of the Security Officers was to provide a "secure room" for the viewing of documents and make the "security arrangements necessary to protect from unauthorized disclosure any classified information"). By contrast, the Security Officer in this case was allowed to make substantive sealing decisions that implicated -- indeed, violated -- the First Amendment and the public's right of access. Not only did the stipulated protective order impermissibly delegate Article III determinations to a Security Officer, the Security Officer appeared to allow the wholesale sealing of documents when even the protective order itself only allowed for the sealing of those limited ***portions*** of documents containing bona fide classified information. PO at 8.

Moreover, the stipulated protective order allowed the government to decide for itself which of its own papers would be filed under seal, without any judicial review whatsoever. PO at 8. This was manifestly improper and unconstitutional. The federal judiciary cannot allow the executive branch to dictate what

information implicates national security, and what should be sealed. As the Fourth Circuit explained in vacating sealing orders where, unlike here, the government claimed CIPA permitted sealing because access posed a threat to the lives of its agents:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post, 807 F.2d at 391-92.

In the landmark "Pentagon Papers" case, the Supreme Court also recognized that "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." *New York Times Co. v. U.S.*, 403 U.S. 713, 719(1971) (Black and Douglas, J.J., concurring).

Even if the government could argue that portions of certain documents were properly sealed pursuant to CIPA, many sealed records do not appear to directly implicate classified information, including memoranda responding to Lee's request for selective prosecution materials and Lee's reply brief in support of pretrial release. If these documents do contain information that truly implicates national security, it is difficult to imagine that they contain nothing but classified information, such that redaction would be impossible. In addition, it is impossible to determine whether other unidentified documents, marked on the docket sheet simply as "sealed," conceivably contain information that truly threatens national security.

B. Documents Were Sealed Before The Public Had An Opportunity To Object

While the utter absence of the requisite judicial findings is a sufficient basis, alone, to require unsealing, the public also was denied adequate notice and an opportunity to object. The docket sheet shows that the government's first motion for a protective order (filed on December 13, 1999) was granted, without a hearing, just one day after it was docketed, thereby denying the public a reasonable time in which to object. *See, e.g., U.S. v. Criden*, 675 F.2d 550, 559 (3rd Cir. 1982) ("some notice must be given that is calculated to inform the public that its constitutional rights may be implicated in a particular criminal proceeding"); *Phoenix Newspapers v. U.S. Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998) (public is entitled to a "meaningful opportunity to address sealing ... on the merits").

The government's December 22, 1999 motion for a protective order was properly docketed in advance of its disposition but was resolved by stipulation and without a hearing. Moreover, a number of motions, orders and documents -- described simply as "sealed" on the docket sheet -- were sealed between the first, improperly noticed protective order and the stipulated protective order. Thus, with regard to these documents, the "notice" and "opportunity to object" prongs of the mandatory sealing procedure also were not satisfied.

C. Because The Court Did Not Make Its Own Findings
And Because The Public Was Denied An Opportunity To Object,
The Documents Must Be Unsealed

As the foregoing discussion and authorities conclusively demonstrate, a case involving classified information does not excuse a court from its constitutional obligations to (1) conduct its own review of the documents, and make specific, on-the-record findings as to whether the government's national security assertions truly justified sealing, and (2) provide an opportunity for the public to object to the sealing. These procedural requirements were not met here. Because these shortcomings cannot be cured by subsequent proceedings, *In re Washington Post*, 807 F.2d at 392, the documents must be unsealed forthwith.[10]

> [10] Where the court determines, upon its own review of the sealed documents, that portions of such documents do in fact threaten national security, it may at that point redact those portions.

III.

THE SUBSTANTIVE REQUIREMENTS FOR SEALING PRETRIAL DOCUMENTS REQUIRE THAT THE COURT REVIEW ALL SEALED DOCUMENTS AND REDACT ONLY THE PORTIONS THAT IMPLICATE NATIONAL SECURITY

The Supreme Court and other courts also have established rigorous substantive limitations on the ability of courts to seal records filed in a criminal case. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press- Enterprise I*, 464 U.S. at 510; *Globe Newspaper Co.*, 457 U.S. at 606-07; *McVeigh*, 119 F.3d at 811. Thus, for a sealing order to survive, the specific, on-the-record findings the Court is required to make must satisfy the substantive test for closure and the record must support those findings. *Press-Enterprise II*, 478 U.S. at 13-15; *Oregonian Publishing Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990). More specifically, the Court must find, and the record must reflect, that (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest. *In re Washington Post*, 807 F.2d at 392; *Press-Enterprise I*, 464 U.S. at 510-11; *see also CBS. Inc.*, 765 F.2d at 826 ("excision from documents of names and transactions" is an alternative to sealing).

It is readily apparent that these substantive requirements were not satisfied and that "[t]he district court here failed to engage in the required three-part constitutional analysis." *In re Washington Post*, 807 F.2d at 393. Nor could this test be satisfied, at least as to the vast majority of material under seal. To begin with, mere reliance on CIPA or blanket assertions of national security does not even met the first and second parts of the test. Rather, the Court must find that there is a substantial probability that national security will in fact be banned absent sealing. *Id.; see also Phoenix Newspapers*, 156 F.3d at 949; *Seattle Times*, 845 F.2d at 1523.[11] Moreover, even if the record showed, and the Court could find, that some parts of some documents would in fact pose a threat to national security if unsealed, it is inconceivable that this interest supports the wholesale sealing of pretrial documents to which the federal courts have recognized a right of access, especially as the protective order itself says that on\y portions of these records may be sealed. [12]

[11] Of course, if any documents were sealed pursuant to a fear of pretrial prejudice, or other effects on the conduct or outcome of the trial, such concerns no longer justify sealing since there will be no trial. *Ellis*, 90 F.3d at 450 (even if proceedings were properly closed during trial, "transcripts of properly closed proceedings ***must*** be released when the danger of prejudice has passed") (emphasis added); *accord Seattle Times*, 845 F.2d 1522 (while sealing of certain documents was appropriate during trial, the "documents will be ordered unsealed, without a further motion or other proceedings, when the jury returns its verdict"); *Phoenix Newspapers*, 156 F.3d at 947 ("transcripts of public trial proceedings must be released when the factors militating in favor of closure no longer exist").

[12] It would be shocking indeed if the transcripts, minutes, court orders and memoranda sealed in *U.S. v. Wen Ho Lee* contained ***only*** classified information, such that redaction would be impossible. Even if CIPA authorized the closure of some evidentiary proceedings or documents related to those proceedings (assuming, of course, that the Court had undertaken the requisite constitutional analysis in closing the proceedings or sealing the documents), CIPA certainly could not authorize the sealing of documents that may simply embarrass the government.

At a minimum, the Court should review the sealed records and redact only those portions, if any, that, in its own determination, truly threaten national security and release the balance of the sealed records. *See, e.g. In re New York Times Co.*, 828 F.2d 110, 116 (2"d Cir. 1987) (trial judge should consider alternatives to "wholesale sealing of the papers" such as the "redaction of names and perhaps portions of the ... materials contained in the motion papers ...."); *Poindexter*, 732 F. Supp. at 169 (allowing the closure of President Reagan's deposition during trial of former National Security Advisor, but noting "[i]t is important to keep in mind that the issue here is not whether, but rather when, the press will have access to President Reagan's testimony" because after the deposition the court would "edit out of the videotape those portions which contain the sensitive material"); *Pelton*, 696 F. Supp. at 159 ("[i]n balancing the opposing interests of national security and the public's right of access to a public trial, the court finds ... that both interests can be reasonably well accommodated by making public a redacted version of the transcripts").[13]

[13] In addition, CIPA cannot prevent the post-trial disclosure of information acquired by the defendant prior to indictment. *U.S. v. Pappas*, 94 F.3d 795, 801 (2nd Cir. 1996) ("information acquired by the defendant prior to the criminal prosecution may be prohibited from disclosure only 'in connection with the trial' and not outside the trial" (quoting House Report 4736 sect. 109(a)). Thus, to the extent sealed records contain allegedly classified information that was in Lee's possession before trial, CIPA is not a justification for keeping such records sealed.

CONCLUSION

As shown, the sealing of documents in this case did not comport with the procedural and substantive tests mandated by the Supreme Court and other courts, and was unconstitutional.[14]

> [14] The sealing orders also violate the public's common law right to inspect judicial records and documents. To determine whether there are interests sufficient to outweigh the strong presumption of access to judicial documents, the burden is on the party seeking to keep the documents sealed to demonstrate that the factors opposing access outweigh those favoring it. *U.S. v. Smith*, 787 F.2d 111, 115 (1986). Even if the government could show that classified information warrants continued sealing of some documents, the required balancing of interests under the common law approach requires that the Court redact what is strictly classified, and then release the remainder of the documents. *Pelton*, 696 F. Supp. at 159.

At a minimum, this Court must review all sealed documents and unseal the portions of the documents that contain information that does not threaten national security. The documents, or portions of documents, should be immediately unsealed to prevent any further violation of the public's constitutional and common law rights:

> In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous.

Grove Fresh Distributors, 24 F.3d 893, 897 (7th Cir. 1994) (citations omitted).

Until the Court remedies the sealing orders in this case, the wrongs committed "by ... the Department of Justice, by [the] Federal Bureau of Investigation and by [the] United States attorney for the district of New Mexico" endure not just against Lee, but against the entire country. RT, 55:4-7. For all the foregoing reasons, CAA respectfully requests that this Court grant this motion and lift all sealing orders forthwith. In the absence of immediate unsealing, CAA requests a hearing on the important constitutional and common law rights at issue.

Respectfully Submitted,

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Transcription and HTML by FAS

POTUS REMARKS UPON DEPARTURE ON PATIENTS BILL OF RIGHTS

September 14, 2000

[...]

Q Mr. President, could you take a question? I was wondering, Mr. President, if you share the embarrassment that was expressed yesterday by the federal judge in New Mexico about the treatment of Wen Ho Lee during his year of confinement under federal authorities?

THE PRESIDENT: Well, I always had reservations about the claims that were being made denying him bail. And let me say -- I think I speak for everyone in the White House -- we took those claims on good faith by the people in the government that were making them, and a couple days after they made the claim that this man could not possibly be let out of jail on bail because he would be such a danger -- of flight, or such a danger to America's security -- all of a sudden they reach a plea agreement which will, if anything, make his alleged defense look modest compared to the claims that were made against him.

So the whole thing was quite troubling to me, and I think it's very difficult to reconcile the two positions, that one day he's a terrible risk to the national security, and the next day they're making a plea agreement for an offense far more modest than what had been alleged.

Now, I do hope that, as part of that plea agreement, he will help them to reconstitute the missing files, because that's what really important to our national security, and we will find out eventually what, if any, use was made of them by him or anybody else who got a hold of them.

But I think what should be disturbing to the American people -- we ought not to keep people in jail without bail, unless there's some real profound reason. And to keep someone in jail without bail, argue right up to the 11th hour that they're a terrible risk, and then turn around and make that sort of plea agreement -- it may be that the plea agreement is the right and just thing, and I have absolutely no doubt that the people who were investigating and pursuing this case believe they were doing the right thing for the nation's security -- but I don't think that you can justify, in retrospect, keeping a person in jail without bail when you're prepared to make that kind of agreement. It just can't be justified, and I don't believe it can be, and so I, too, am quite troubled by it.

Q -- clemency here? Are you thinking in terms of clemency for him, for Wen Ho Lee?

THE PRESIDENT: Well, I'd have to look at that. It depends on, if he's in fact -- he has said he's going to plead guilty to an offense which is not insubstantial, but it's certainly a bailable offense, and it means he spent a lot of time in prison that any ordinary American wouldn't have, and that bothers me.

[...]

THE WHITE HOUSE
Office of the Press Secretary

September 14, 2000

PRESS BRIEFING
BY
JOE LOCKHART

The James S. Brady Briefing Room

1:35 P.M. EDT

Q Joe, tell me about -- the President, was just talking about, about Wen Ho Lee. Has he registered these feelings to the Attorney General or just to Department lawyers?

MR. LOCKHART: I think you can assume by what he said there that is he is troubled by part of this, so I would expect that he will be looking for a more full explanation from them, have them look at this particular question that he raised and to report back.

Q But, Joe, he said he'd always been troubled by this, suggesting from the very outset. And, yet, he didn't express reservations to Justice -- thought it would have been improper or --

MR. LOCKHART: No. I think he said -- and I'm not going to try to decipher his words here, I thought he was very clear and I think no one could dispute that -- that there had been some questions, there was a rationale for holding someone without bail that seemed to disappear in a few day period. And I think his expression of trouble was in any case where people are held without bail. It's a basic tenet of our justice system and I think, as he said out there, he was troubled by the fact that this seemed to evaporate quickly.

Q Joe, just to follow up, if he was troubled by this from the outset and he felt an injustice was being done to this man, why didn't he step in sooner?

MR. LOCKHART: I would look at what he said --

Q He said, I always had trouble with this.

MR. LOCKHART: Josh, what he said when he was out there talking to you just a few moments ago was, there were a number of assurances that were made about the reasons for. And what he's troubled about here is that those seemed to evaporate between a hearing just a few days ago and the plea agreement that was announced yesterday.

Q Joe, he used the term "they," as in that he is not somehow part of federal law enforcement. Why would he do that?

MR. LOCKHART: Obviously, this case was prosecuted by the U.S. Attorney and those who are charged with that. The President is not charged with that.

Q Is anybody to be held accountable for conduct that the President says is very troubling?

MR. LOCKHART: I think as I said at the beginning here that he'll be looking for some answers to how this came about.

Q Well, I understand looking for answers, but my question is will anybody be held accountable?

MR. LOCKHART: Well, I think we tend to -- which is probably quite the opposite of what you tend to do -- is look for answers before we make judgments. You may want to make a judgment before you have the answers.

Q Was this criticism directed against the entire Justice Department, including Janet Reno, or just the prosecutors?

MR. LOCKHART: No, I think we'll look to have more information on this, but I wouldn't see it as a blanket criticism of anyone.

[...]

Q Joe, you said that you thought that the President's remarks about Wen Ho Lee shouldn't be seen as a blanket criticism of anyone. Does the President still think that Janet Reno and Bill Richardson are doing a good job and that they retain his confidence?

MR. LOCKHART: Yes. Susan?

[,,,]

Q Joe, the President has occasion from time to time, at official political events, to run into Asian American groups an Asian American activists. Have they raised the Wen Ho Lee case with him? And has he made any statements to them, similar to what you just made to us --

MR. LOCKHART: I'm not aware of any exchanges on that subject.

[...]

Q Joe, just to go back to Wen Ho Lee. If I understand you correctly, you're saying we should read the President's comments as to refer to what's happened in the last few weeks as this case has unwound, if you will. Would it be fair to assume that in the year or so before that, that Mr. Lee was in custody, the President didn't express any reservations to Justice?

MR. LOCKHART: Let me take another crack at this. The President expressed an unease with the concept of holding someone without bail. But what was troubling here was, after a series of assurances that this must be done because of the risk, that he thought that the timing of making that argument in a bail hearing and then just a few days later making a plea agreement that allowed him to go free raised some troubling questions. It seems to me that that's pretty straightforward.

Q And when you say the President expressed an unease, you mean he did that here in the Rose Garden or he's done that on previous occasions and, if so, where or when?

MR. LOCKHART: No. I think what he expressed here is that he has -- as a student of the law, that all Americans should have -- we should have a high threshold for the concept of holding someone without bail. But in this case, there were explicit assurances and reasons given, in this case.

And what's troubling is how quickly those seem to evaporate. And that's the point he was making. And it was limited to a very narrow piece to this, and I think it doesn't eliminate the crime that the gentleman pleaded guilty to and the important work that has been done on this. But there is a troubling aspect to this and he articulated what it was.

Q Has he, to your knowledge, expressed this unease prior to today? And, if so, when or where?

MR. LOCKHART: Not to me.

Q Does the President think he was deceived or misled or perhaps just not fully informed --

MR. LOCKHART: No. I think he said that the sequence of events raised some troubling questions. I think he certainly hopes that some answers are provided to ease that concern.

Q Does the President think Lee is deserved an apology?

MR. LOCKHART: I didn't ask him that question and I don't know the answer to it.

[...]

Q Joe, does the President believe that Asian Americans will express concern over the prosecution of Dr. Lee -- is there some questions about the role of race in this case --

MR. LOCKHART: I actually have never discussed that particular case. But I think the President has spoken clearly, in the aftermath of 1997 and some of the campaign finance investigations, that there are questions and that times in this country Asian Americans have been singled out unfairly. But in this particular case, he's never expressed that to me.

[...]

END 2:00 P.M. EDT

FW: 2000-9/15 POTUS and PM Vajpayee in photo op

September 15, 2000

[...]

Q Mr. President, if you always had doubts about whether Wen Ho Lee should be in jail, why didn't you share those with us until yesterday? And what do you say to Asian Americans who are concerned that his ethnicity may have played some role in the fact he was detained for so long?

THE PRESIDENT: First of all, I don't believe that. I don't think there's any evidence of that. Let's look at the facts here.

He has admitted to a very serious national security violation. And the most important thing now is that he keep his commitment to the government to work hard to figure out what happened to those tapes, what was on the tapes, to reconstitute all the information. That's very important.

In America, we have a pretty high standard, and we should, under our Constitution, against pre-trial detention. You have to meet a pretty high bar. I had no reason to believe that that bar had not been met. I think the fact that in such a short time frame there was an argument that he needed to stay in jail without bail, and then all of a sudden there was a plea agreement which was inconsistent with the claims being made, I thought -- that raises a question not just for Chinese Americans, but for all Americans, about whether we have been as careful as we ought to be about pre-trial detention.

And that's something that -- you know, in a government like ours, that was basically forged out of the concern for abusive executive authority, we sometimes make mistakes, but we normally make mistakes the other way, where we're bending over backwards. So that was my narrow question. Our staff has talked to the Justice Department about it. I'm sure I'll have a chance to talk to the Attorney General. It would have been completely inappropriate for me to intervene. And I don't believe she intervened. This was handled in the appropriate, normal way.

But I want you to understand, there was a serious violation here. He has acknowledged that. We have to get to the bottom of what was on all the tapes. But the narrow thing that I want to illustrate here is that when the United States, whenever we hold anybody in prison who can't get bail or who is interned for a long period of time before being charged and convicted and sentenced, we need to hit a very high threshold. That is the specific thing I wanted to focus on. And I think that there ought to be an analysis of whether or not that threshold was crossed, in light of the plea bargain.

But the American people shouldn't be confused here. That was a very serious offense and we've got to try to reconstitute what was on the tapes. That's the number one thing we have to do for the national security now.

[end]

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release September 15, 2000

PRESS BRIEFING
BY
JOE LOCKHART

The James S. Brady Briefing Room

1:00 P.M. EDT

[...]

Q Joe, does the White House take issue with the characterization of the President's remarks yesterday on the Wen Ho Lee case as a rebuke of the Attorney General, of the Justice Department, of federal investigators?

MR. LOCKHART: I think I said yesterday it was not a rebuke of any particular person. I think the President made clear today that it was not -- that he did not view his remarks as directed toward the Attorney General. The President believes very strongly in her, the job she's done and in her abilities.

There are questions, though, as he said, that should be answered, and we hope they will be.

[...]

Q Joe, on Wen Ho Lee, what sort of follow up review is the White House considering?

MR. LOCKHART: Well, there were some discussions yesterday between the White House staff and the Justice Department. I think as the President -- get it today, he will take an opportunity at some point to talk to the Attorney General. I don't know what form it will take, but I think we're looking for some sort of process that can look at the narrow question that the President posed about holding someone pretrial, you know, without the possibility of bail.

I think he put into perspective today many of the important issues about what is crucial here is finding out what happened to the tapes, looking at a very serious national security violation by the gentleman in question. But there are questions about the legal issues surrounding the pretrial bail, and the timing of the bail hearing versus the arguments made in the bail hearing and the arguments made subsequently in the plea bargain. That needs some examination. I think he was fairly clear on that.

Q Is he considering, though, appointing some sort of outside person?

MR. LOCKHART: The conversations haven't gone that far. I know that there was some very helpful advice provided on editorial pages about how we should do this -- the very same pages that provided exactly the opposite advice some months ago. But I think we'll ignore the editorials and rely on our own counsel.

Q Joe, do you think -- the President said he doesn't think racial bias was a factor here. Do you think that just an atmosphere of hysteria may have been a factor in --

MR. LOCKHART: I'll tell you, we take these kinds of issues very seriously. And I think when there are troubling questions, we think there should be answers. And I think the President was very clear on what the American people deserve. And it's certainly our hope, although it is not a hope that we genuinely believe anything will be done about, that others will take some time and do some examination.

I think there was a climate of -- a very difficult climate that was generated in this town when this story came out, a climate generated by some very explosive and near-hysterical investigative reporting, a climate that was fueled by explosive comments from political leaders, including members of Congress. And I hope everybody takes a moment, looks at how they handled this situation, and looks to see if in the future they can do better -- just as I think the executive branch will do.

Q Joe, do you believe that the media reporting and the explosive atmosphere that you've described affected the prosector's decisions on which charges to bring and how this case was --

MR. LOCKHART: That would be a question you would have to put to the prosecutors, and they will stand up, I'm certain, and answer their questions. It's certainly my hope that those who wrote the stories will also be willing to stand up and talk about their motivations and whether there is anything they can learn in the aftermath of their reporting.

Q What about the question of an apology? The judge raised the fact that he could not apologize for the executive branch, but he could apologize for what he thought had happened in his courtroom. Is there any thought being given to contacting Mr. Lee and making any kind of formal apology?

MR. LOCKHART: I think given the limited and the proper role, and hands-off role that was played here by the White House, there is no discussion of that.

I think the President's obligation, as he addressed directly yesterday and then again this morning, was when questions are raised, when they are legitimate questions, when people are troubled by things -- and he, indeed, is troubled, himself, by some of these questions --

we should look at it. We should look at it and see what it is we can learn from this experience and see if anything needs to be done to improve in the future.

Q So who should apologize in this case here? Is Mr. Lee due an apology?

MR. LOCKHART: I'm in no position to make a judgment on that.

Q Joe, can you clarify something I think you said this morning? The President, when he had the opportunity, I guess, to talk about this earlier but chose not to talk about it until yesterday, you suggested that the press would have jumped on him if he had made a statement earlier --

MR. LOCKHART: No. I think, quite rightly, the President -- again, we're looking at a very narrow band of issues here in this case, and we shouldn't loose sight of that. But there were -- he had an understanding of the reasons for holding this gentleman without bail, and within the last week or so -- and I think, as he said this morning, it is a very high standard in this country, as it should be. I think he said that we often lean in the other direction on this, for good reason.

The questions are generated, the specific questions are generated from the fact that between a bail hearing on one day and three or four days later, those reasons seem to have dissipated in a plea agreement, as far as the risk of -- posed by allowing the gentleman before a trial out of prison.

So I think he has a general, as I think most Americans do, high standard, and always a sense of unease when someone is being held without the possibility for bail. And in this question -- the questions are generated and derived from, just in the last week, you know, the difference between where they were from the bail hearing and where they were in the trial, or the plea agreement.

Q But it wasn't a fear of an adverse press reaction that kept him from speaking out earlier?

MR. LOCKHART: No, I think the -- I think what I was referring to yesterday, and I think he touched on a little bit this morning is, that there were certainly -- and the little that he knew about this -- there was a case made for why they had to go in this direction. And I think that you would all understand, and would have, I think, had a field day reporting, if somehow he tried to intervene in this case, as somehow being politically motivated.

Q Could the President -- does the President think he could have done anything to sort of calm the hysteria you described earlier?

MR. LOCKHART: Well, let me tell you something, because I happened to be around here during that period, and I think most of you who talked to me on a variety of bases, heard a pretty clear and consistent message, which is -- and particularly with some news organizations -- that we believe that you were out ahead of yourself. There were a lot of people jumping to a lot of conclusions, and we ought to sit back and make suer that we know all the facts.

So I don't think that in this particular case that, at least from this particular podium in this particular building, we'll take the blame for creating whatever sort of environment we were in, in this case. And I would suggest that those of you who didn't talk to me during that period talk to your colleagues who did.

[...]

END 1:25 P.M. EDT

U.S. Department of Justice
Attorney General Janet Reno's Weekly News Briefing

September 14, 2000

QUESTION: Ms. Reno, was Dr. Wen Ho Lee treated fairly, both during the investigation and the prosecution which led to this week's events?

RENO: I think on all the circumstances we tried to look at it very carefully. We went over the evidence, we looked at the law, we made the best decision we could based on the evidence and the law, and I feel very comfortable about that.

QUESTION: Ms. Reno, I'm going to pose a similar question, but actually in Judge Parker's words, because he asked the question I think that deserves to be answered, what I believe remains unanswered, is the question "What was the government's motive in insisting on your being jailed pre-trial under extraordinary onerous conditions of confinement until today when the executive branch agrees that you may be set free essentially unrestricted? That makes no sense to me," close quote.

I wonder if you could respond to the judge's question.

RENO: We had tried from the beginning to make sure that if he had something to say, if he could explain what he had done with the tapes, if he could tell us if had conveyed any information from the tapes, or who might have access to the computer, the unsecured computer, and would do that, subject to us being able to confirm his statements, that we would reconsider detention and that we would consider charging decisions.

We tried very hard. And in this instance, we now have what we sought then.

QUESTION: Ms. Reno, the judge apologize repeatedly in court to Mr. Lee. Do you think he deserves an apology from the Justice Department?

RENO: I think we have tried to do everything we could to address the issue based on the evidence and the law and the concern for national security. The judge recognized that Mr. Lee -- that Dr. Lee had violated the criminal law, had taken -- I mean, in this instance, evidence was taken off a secured computer, downloaded, put into an unsecured computer, which people could have access to. And there was no explanation for what the man did with the information that was so sensitive and subject to so many concerns.

And I think in that situation, you have to look at the consequences of doing that.

QUESTION: But in the end, though, I mean, as the judge said, do you feel like he's entitled to an apology, after all is said and done?

RENO: I think Dr. Lee had the opportunity from the beginning to resolve this matter, and he chose not to. And I think he must look to himself.

QUESTION: Ms. Reno, you say that an apology is out of the question here. But what regrets, if any, do you have about this case? And secondly, would you support any disciplinary action against the FBI agent who provided false testimony in the case?

RENO: I'm not aware, based on Judge Parker's comments, that there was any conclusion that testimony was false, in the terms of the law. With respect to issues of whether apologies are out of the question or what, who, what should have been done differently, I with all my heart and soul wish that Dr. Lee had come forward, said, "This is what I did with the information, this is what I did with the tapes. I made copies, I didn't make copies. And here, I'll sit down with you, and we'll work it out and I'll try to give you as much information as possible to permit you to confirm and corroborate it."

QUESTION: Directly that you could have...

(CROSSTALK)

RENO: What a minute, you all are getting too stereophonic.

(LAUGHTER)

QUESTION: Do we understand correctly that the plea bargain that was reached yesterday could in fact have been reached before Dr. Lee spent eight or nine months in confinement, that his attorneys were basically offering this deal last winter and the government turned it down? Is that your understanding?

RENO: No, my understanding is that the attorneys offered to make information available. And then, we were not able to carry through with it and did not have access to it. And in January, we were writing them again saying, if you will answer these questions and give us an opportunity to corroborate it, we will reconsider the pre-detention, the detention issues.

Again, you had significant information that related to this nation's national security. We went over the evidence carefully. The judge has his role as a trier and determiner of fact. We have our responsibilities, both to make sure that we feel like we have evidence sufficient under the law to charge, and then we do everything we can to protect the national security; i.e., to find out what happened to the information.

QUESTION: Ms. Reno...

(CROSSTALK)

QUESTION: ... their offer early on to do this. What was wrong with their offer to sit down?

RENO: I don't think there was ever the ultimate follow through, in terms of what we asked for and the subsequent letter that we wrote. We gave very specific questions that needed to be answered and, essentially, laid out what we now have.

[...]

QUESTION: I just wanted to go back to Wen Ho Lee for a moment. Is there any internal review underway about the department's conduct or the FBI's conduct, specifically the early questioning of him when he was questioned without an attorney present, and he, according to his lawyer, was threatened with electrocution if he didn't answer the questions. It seems to hark back to the days of Richard Jewell in the investigation of the -- the question wasn't handled properly.

RENO: I will review it and see if there is any basis for it.

[...]

QUESTION: Judge Parker in his comments yesterday said, and I quote, "I feel I was led astray last December by the executive branch of the government through the Department of Justice, through the FBI, and through the U.S. attorney for New Mexico." And then he went on to say that he was embarrassed for the whole country.

Are you, Ms. Reno, going to be able to respond to the judge's feeling he was led astray?

RENO: I feel great respect for Judge Parker. And I regret that he feels that way. I want to make sure that everybody understands we didn't try to lead anybody astray. We tried to do it based on the evidence and the law and our desire to protect national security.

Judge Parker, as the judiciary branch, has another role, and that is to make a determination based on the information before him.

We need to look at all of those issues. But we also have the responsibility to protect the national security, and we're going to try to do that, again, based on the evidence and the law. These are very difficult issues, and we need to work through them with a respect for each branch of government.

QUESTION: Are you quite sure that Mr. Wen Ho Lee going free is not going to be a security risk, that he is going to come forth, as he has promised?

RENO: I have decided that this is the best way I can find to try to get to the truth as to what happened to the tapes and the information.

QUESTION: Are there any indications that he's coming forth with that information?

RENO: I think we have already been able to obtain some information that was not previously available, and we're going to continue to try to pursue it, as we had tried early on, to make sure that we understand exactly what happened.

QUESTION: To follow on this same question about the embarrassment, the judge said that the top decision-makers in the executive branch, especially the Department of Justice -- and at one point he actually mentions you by name -- have embarrassed our entire nation and each of us who is a citizen in it. Would you respond to that?

RENO: As I said, I regret deeply that Judge Parker feels that way, but I know what I've had to do based on the evidence and the law; I know what I've had to do to address the national security issues and to address information that is of real concern to this nation and what we tried to do up front. I'm not embarrassed.

I will say that the issues before us are not easy issues, and it is one that I take to be one of my great responsibilities, to try to do it the right way; to try to determine how to charge, consistent with our constitutional principles; how to protect our national security; how to address constitutional issues of detention -- are all very difficult.

And I just trust that all the branches of government understand the role that each has to play.

QUESTION: Will you concede any missteps by the government, either from the U.S. attorney's office out there, from the FBI, from the Justice Department?

RENO: I would like to look at everything, and if there are missteps, then review them and consider them.

(CROSSTALK)

QUESTION: ... suggested that congressional pressure somehow influenced the department's decision to pursue the case?

RENO: I had been criticized by Congress on many occasions for not doing things. In this instance, people talked about congressional pressure, and I said, "This is one thing that is not going to sway me. I'm going to do it if I have evidence sufficient to charge, and I'm going to do it based on what I understand the law, as applied to these facts, will permit us to do. And if I can't charge, then I'm prepared to go back up to Congress and sit there and answer questions as to why I didn't charge." And I am equally prepared to go to Congress and answer questions as to why I did.

QUESTION: Ms. Reno, as you look back at the case in terms of, not evidence that he gave the information to anyone from the onset, and the fact that he initially still faced, in the 59-count indictment, charges that could have put him in jail for life, was there a disconnect between the level of what the government brought and what the government knew at the time that it decided to prosecute?

RENO: What the government knew was that he had intentionally downloaded very sensitive classified information concerning our nation's nuclear secrets.

He had not done that just accidentally or in a flash of a three-minute period; he had done it over time, taking some 40 hours to do it. He had made it available on an unsecured computer, subject to hackers and the like. He had, based on the information we had, done this carefully, deliberately, willfully.

He had no need for it in his work. He had no obvious need for it in this unsecure setting. There was no explanation for why somebody, who knew the sensitivity of this information, would remove it from a secure computer and make it accessible to intruders, hackers or other governments who could hack into that computer.

We offered him the opportunity to provide an explanation, not just yes or no or I destroyed it, but did you do anything with the information that you downloaded? Did you give it go anybody? What has been done with it? How did -- if you destroyed the tapes, how did you destroy the tapes? And we want time to be able to corroborate the information you provide us. He didn't do that.

The conclusion then was that he had willfully downloaded the computer, put the information out in an unsecure setting, retained it, without explanation. And we felt that there was evidence sufficient to charge.

Now, people may disagree with us, but this is what we tried to do.

And here you have extensive information, concerning the nation's nuclear secrets, out there available. What happened to it? That was what we needed to know.

QUESTION: Do you have any idea what, in fact, his motive may have been to do the downloading?

RENO: No, I don't.

[...]

QUESTION: Ms. Reno, all that started with the supposed loss of the W-88 information. I know you all began to reinvestigate that last year. Have you all come to any conclusion? Or can you give us any input as to whether you think someone actually did get information about the W- 88?

RENO: First of all, you say all of this started; that is an entirely separate issue from the issue before Judge Parker yesterday. Let me clarify that. And that matter is still pending, so I cannot comment on it.

QUESTION: The task force, I understand though, is still looking into the matter. Is that correct and if...

RENO: I cannot comment on it.

QUESTION: Is it in the best interest of Justice that the United States government, in this case with Wen Ho Lee, that he now should be protected? And conversely, that he should be discouraged from flight?

RENO: I think it's in the best of interest of everybody that we sit down, get the information that he has, follow up on it, corroborate it, and take appropriate action.

QUESTION: What do you think of all of the allegations that the government somehow had a racial bias in going after Dr. Lee?

RENO: I can be very clear to you that there was no racial bias in anything that we did with respect to Dr. Lee, in terms of my decision-making and in terms of what I was concerned about.

QUESTION: Ms. Reno, I'm curious, you said that one thing that you will need to know, that you want to know, is what happened to those tapes. How do you plan to prove the negative? I mean, he says he destroyed them.

RENO: I can't comment on the evidence that we have. And so, it would not be appropriate for me to comment while we are preparing for the briefing.

[...]

Statement by FBI Director Louis J. Freeh
Concerning Wen Ho Lee Case

In June of this year Judge Parker raised as a possibility the opportunity to engage in mediation in the Wen Ho Lee case. Ultimately the parties agreed to a protocol and four weeks ago, even prior to the most recent bail hearings, Dr. Lee's lawyers and the government began the plea bargain process in earnest. Our goal was to achieve what is being announced today. In return for a plea of guilty to one felony count, Dr. Lee and his lawyers agreed to a process we believe provides the opportunity to determine what in fact happened to the nuclear design and source codes that Dr. Lee unlawfully and criminally downloaded, copied, and removed from Los Alamos. In simple terms, the government accepted this plea in exchange for the full cooperation of Dr. Lee.

FBI investigation, with great assistance from the nuclear weapons experts at Los Alamos, determined that the rough equivalent of 400,000 pages of nuclear design and testing information was transferred out of the secure computers at Los Alamos and downloaded onto ten portable tapes. As the government has previously stated, this 806 megabytes of nuclear weapons data represents the fruits of 100s of billions of dollars of investment by the United States. While three of the tapes have been recovered, the others remained missing and unaccounted for.

Documents seized from Dr. Lee's possession during searches in the course of the investigation provided substantial evidence of his criminal conduct. Complex analysis of millions of computer records established with certainty that during nearly 40 hours of downloading over 70 different days Dr. Lee manipulated these enormous and often highly classified nuclear weapons data files in a way that defeated existing security and allowed them to be placed onto tapes in an unclassified setting. While some of the information was not classified, the government was prepared to prove that much of it was highly classified nuclear weapons information. The government was also prepared to prove that the tapes were unlawfully made and unlawfully removed from the possession of the United States. With today's plea agreement, there is no longer any doubt that it happened. Dr. Lee acknowledges that in his plea.

The government was prepared to prove that the weapons data was taken in this fashion and that numerous efforts were made both to conceal the unlawful download of classified information and to destroy the electronic footprints left by the transfer and downloading process. The government was prepared to prove that after the existence of the investigation became known, efforts were made by Dr. Lee to delete files that had been manipulated into unclassified systems. The government was prepared to prove that there were many attempts -- some in the middle of the night -- to regain access to the classified systems even after access had been formally revoked by Los Alamos.

As the government has previously represented to Dr. Lee and the court, determining what happened to the tapes has always been paramount to prosecution. On balance, from the moment it became clear that the nuclear weapons design and testing information was stolen, it is most important to the security of the nation to determine with certainty what Dr. Lee did with the tapes, if they were copied, and whether he gave them to another country. Success in the investigation and prosecution, while clearly an objective given the extraordinary sensitivity of what was removed from Los Alamos, does not in the end protect the nation to the degree that determining what happened to the tapes after he made them does. The safety of the nation demands we take this important step.

In this case, as has happened often in the past, national security and criminal justice needs intersect. In some instances, prosecution must be foregone in favor of national security interests. In this case, both are served.

As the government indicated previously, the indictment followed an extensive effort to locate any evidence that the missing tapes were in fact destroyed, and repeated requests to Dr. Lee for specific information and proof establishing what did or did not happen to the nuclear weapons data on the tapes. None was forthcoming. The indictment followed substantial evidence that the tapes were clandestinely made and removed from Los Alamos but no evidence or assistance that resolved the missing tape dilemma.

Some will undoubtedly question whether the penalty imposed by this guilty plea arrangement is commensurate with the theft and crimes that occurred. Dr. Lee was entrusted with some of the nation's

most vital and highly classified information. Were the location of the tapes not at issue, the answer in all likelihood would be no. But the location of the stolen data and who, if anybody, has had access to it, are at issue. These have been the central issues since we first asked Dr. Lee, prior to the indictment, what he did with the tapes and information. The obligation that rests on the government is first and foremost to determine where the classified nuclear weapons information went and if it was given to others or destroyed. This simple agreement, in the end, provides the opportunity of getting this information where otherwise none may exist.

Dr. Lee has pleaded to his crime. Now for the first time we have the opportunity for him to explain what happened and to provide the United States with the information necessary to give assurance that the nuclear weapons data has not been and cannot further be compromised. As is customary, the agreement is based on his truthfulness -- and the government will have ample opportunity to verify what we are told, to include, if necessary, use of the polygraph. As the Attorney General said, if we believe he is not being truthful and forthcoming, then we can move to void the agreement and prosecute on all counts in the indictment.

The FBI is grateful to the Attorney General and her staff for making this plea bargain possible. We are also grateful to U.S. Attorney Norman Bay, lead prosecutor George Stamboulidis, and all of the other prosecutors and FBI Agents who so meticulously constructed this case and who were prepared to go to trial. I want especially to thank the FBI's many computer experts who, along with John Browne and his staff at Los Alamos, were able to unravel this extraordinarily complex computer case.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs. NO. 99-1417-JC

WEN HO LEE,

Defendant.

TRANSCRIPT OF PROCEEDINGS
September 13, 2000

BEFORE: THE HONORABLE JAMES A. PARKER
United States Chief District Judge

A P P E A R A N C E S

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OFFICIAL COURT REPORTER

THE COURT: Court is now in session. Please have a seat. Let me ask counsel again to state their appearances in Number 99-1417, United States of America versus Wen Ho Lee.

MR. STAMBOULIDIS: Yes, Your Honor. George Stamboulidis; Norman Bay, United States Attorney; Michael Liebman, Trial Attorney from the Internal Security Section of the Department of Justice; Thomas Cooker, Special Agent in Charge of the FBI in New Mexico; First Assistant United States Attorney, Paula Burnett; Assistant United States Attorney, Laura Fashing; and Supervisory Special Agent, Robert Messemer

with the FBI. Good morning.

MR. CLINE: Good morning. John Cline, Mark Holscher, Nancy Hollander, Richard Myers, K.C. Maxwell, and Dr. Lee is here as well.

THE COURT: Okay. I understand the parties have finally reached a plea agreement satisfactory to everyone. I have reviewed the most recent signed version, and I gather you are now ready to proceed with a plea hearing and disposition. Is that correct?

MR. STAMBOULIDIS: That is correct.

MR. CLINE: Yes, Your Honor.

THE COURT: All right. What I will do is ask that Dr. Lee and his counsel come up to the microphone at this time.

At this time I will ask Mr. Jonathan Westen to

administer the oath to Dr. Lee.

(Whereupon, an oath to tell the truth was administered to the defendant to tell the truth.)

THE COURT: Dr. Lee, you are now under oath. If you give any false answers to questions that I ask you, your false answers could be used against you in a prosecution for perjury or false statements or obstruction of justice, all of which are separate crimes. Do you understand that, sir?

THE DEFENDANT: I understand.

THE COURT: Would you please state your full name?

THE DEFENDANT: Wen Ho Lee.

THE COURT: And how old are you, Dr. Lee?

THE DEFENDANT: I am 60.

THE COURT: I am aware of your education from having read a number of documents in the file, but again I will ask you to state on the record your education, please, sir.

THE DEFENDANT: I have a Ph.D. in Mechanical Engineering.

THE COURT: And that was from Texas A&M University?

THE DEFENDANT: Yes, from Texas A&M.

THE COURT: In the last 24 hours, have you used any alcohol or other drugs?

THE DEFENDANT: No.

THE COURT: Are you under a doctor's care?

THE DEFENDANT: No.

THE COURT: And are you taking any prescription medications?

THE DEFENDANT: No.

THE COURT: At this time, are you fully alert?

THE DEFENDANT: Yes.

THE COURT: If you do not understand any question I ask you this morning, would you please tell me?

THE DEFENDANT: I will.

THE COURT: Are you nervous at this time?

THE DEFENDANT: No.

THE COURT: May I see the original of the plea agreement, please?

MR. STAMBOULIDIS: Your Honor, I have just handed up a copy of the original plea agreement.

THE COURT: Would you hand this to Mr. Cline, please.

Dr. Lee, is that your signature on the original plea agreement?

THE DEFENDANT: Yes.

THE COURT: Now, I notice that you signed Wen Ho as a single name. Is that correct?

THE DEFENDANT: That is correct. That is the way I sign.

THE COURT: In all of the pleadings those names are shown separately, but your signature is the way you normally sign?

THE DEFENDANT: That is correct.
THE COURT: Let me ask counsel, is that your signature also on the plea agreement?
MR. CLINE: Yes, Your Honor.
MR. HOLSCHER: Yes, Your Honor.
THE COURT: Dr. Lee, did you read the plea agreement in its entirety before you signed it?
THE DEFENDANT: Yes.
THE COURT: And did you discuss it with your attorneys before you signed it?
THE DEFENDANT: Yes.
THE COURT: Did you fully understand all of the provisions of your plea agreement before you signed it?
THE DEFENDANT: Yes.
THE COURT: You are pleading guilty today to the charge in Count 57 of the indictment. Have you read the indictment?
THE DEFENDANT: Yes.
THE COURT: Have you discussed it with your attorneys?
THE DEFENDANT: Yes.
THE COURT: Do you understand all of the charges in the 59 counts of the indictment?
THE DEFENDANT: Yes, I understand.
THE COURT: Are you fully satisfied with all

explanations your attorneys have given you about these charges?
THE DEFENDANT: Yes.

THE COURT: Count 57 charges that on a date in 1994 up through the date of the indictment, within the District of New Mexico, you had unauthorized possession of and control over documents and writings relating to the national defense, which was restricted data that had been gathered onto Tape L and that you willfully retained and failed to deliver Tape L to an officer and an employee of the United States who was entitled to receive it.

Do you understand specifically this charge that is made against you?

THE DEFENDANT: I understand.

THE COURT: Do you understand, Dr. Lee, that Count 57 charges you with the commission of a felony crime?

THE DEFENDANT: I understand.

THE COURT: If I accept your plea of guilty to Count 57, it will be the same as though you have been convicted of that felony charge. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Are you fully satisfied with the way that you have been represented by your attorneys, Mr. Holscher, Mr. Cline and all of the other attorneys who have worked on you're behalf in this case?

THE DEFENDANT: Yes.

THE COURT: At this time, I need to review the plea agreement with you. Bear with me because I have before me three different iterations of the plea agreement, and I want to make sure that I cover everything in the final version.

First I am going to advise you of the rights of a defendant. Some of these are set forth in paragraph 2 of your plea agreement. Do you understand, Dr. Lee, that you have the right to plead not guilty to all of these charges and to have a trial before a jury on the charges?

THE DEFENDANT: Yes.

THE COURT: If you chose to have a trial, your lawyers would represent you in court. And they are excellent lawyers. They would cross-examine the government's witnesses, and you would have the right to face or confront the government's witnesses in court. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: If you chose to have a trial, it would be a trial before a jury of your peers. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: If you chose to have a trial, you would have the right to make witnesses come to court under subpoena to testify for you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you chose to have a trial, the government could not force you to testify at a trial.

THE DEFENDANT: Yes.

THE COURT: Whether you testify would be entirely your choice. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At this time, you are presumed under the law of the United States to be innocent of all the charges in the indictment. You could not be convicted of any of those charges unless the government proves your guilt beyond a reasonable doubt at a trial. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Now, by pleading guilty to Count 57, you will be giving up all of your rights of a trial and all of your rights associated with a trial. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Next I need to review with you the maximum penalties authorized by law that apply to the offense charged in Count 57. These are set forth in writing in paragraph 4 of the plea agreement.

The maximum period of imprisonment authorized by law is 10 years for this offense. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: The maximum fine is $250,000. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There is a mandatory term of supervised release of not more than three years that would have to follow any term of imprisonment. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There is a mandatory special penalty assessment of $100. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, let me ask counsel for the government, is there any prospect of restitution in this case; it's mentioned in paragraph 4(e)?

MR. STAMBOULIDIS: Not pursuant to the agreement, Your Honor.

THE COURT: Paragraph 5 of the plea agreement is the heart of the agreement. It provides that you, Dr. Lee, and the United States of America have made an agreement under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. That agreement specifies that the length of your sentence of incarceration should be 278 days. I gather today is the 278th day that he has been held in custody. Is that correct?

MR. STAMBOULIDIS: 279.

THE COURT: 279. I was reading from an earlier version I guess.

MR. HOLSCHER: No, Your Honor, you have it correct. We added 278, just to make sure he can leave before the end of the day today.

THE COURT: Do you agree with that, Mr. Stamboulidis?

MR. STAMBOULIDIS: Yes, I do.

THE COURT: Mr. Stamboulidis, this is the agreement of the government; is that correct?

MR. STAMBOULIDIS: Yes, it is, and that is my signature on the last page.

THE COURT: Dr. Lee, this also is your agreement?

THE DEFENDANT: Yes.

THE COURT: In addition, paragraph 5 provides that you will be given credit for all the time that you have served in custody since December 10, 1999. It's clear from statements of counsel that that means that today, upon completion of this hearing, you will be released.

Next paragraph 5 provides that under the agreement no fine will be accessed against you, and you will not be required to forfeit any of your property or assets nor will you be required to make restitution.

Is that the government's agreement, Mr. Stamboulidis?

MR. STAMBOULIDIS: Yes, it is, Your Honor.

THE COURT: Also the agreement provides that you are

not to have a period of probation or supervised release. Did the government also agree to that?

MR. STAMBOULIDIS: Correct.

THE COURT: The remainder of paragraph 5 provides that Dr. Lee must pay the mandatory $100 special penalty assessment required by 18 United States Code Section 3013(a)(2).

Have you agreed to do that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: I have been provided with a copy of a check that indicates this payment has already been made. Is that correct?

MR. CLINE: Yes, Your Honor, it has been.

THE COURT: The last part of paragraph 5 states that the parties agree that sentencing may take place today at the conclusion of the plea hearing without a presentence report. There was a skeletal presentence report prepared by the Probation Office.

Let me ask Dr. Lee, have you reviewed that?

MR. CLINE: Your Honor, I don't know that Dr. Lee has.

THE COURT: When we get to that stage of the proceeding, I think we will take a short break and permit that to be done.

MR. STAMBOULIDIS: Your Honor, I have also just

handed up a copy of the written executed waiver of a presentence report that was executed by the parties and would allow the Court to also make findings pursuant to Rule 32(b)(1)(A), the finding that is required there, as well as under (b)(1)(B), the explanation.

THE COURT: Thank you, Mr. Stamboulidis.

MR. STAMBOULIDIS: Certainly.

THE COURT: Paragraph 6 of the agreement provides that if I refuse to accept the agreement or if I decline to dismiss any of the other 58 counts of the indictment with

prejudice, then you, Dr. Lee, will be afforded an opportunity to withdraw your guilty plea. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Let me make certain I have the last version of the language of paragraph 7. Paragraph 7 relates to Dr. Lee's additional obligations. Seven (a) is a definitional section that states the following:

"'Tapes' is defined as the tapes at issue in the indictment, including any information on the tapes, as well as any copies, printouts, versions, variants or variations in any medium whatsoever."

Do you understand that definition of tapes?

THE DEFENDANT: Yes.

THE COURT: The second definition is of files. It's defined, "...as the files at issue in the indictment,

including any information in the files, as well as any copies, printouts, versions, variants or variations in any medium whatsoever."

Do you understand, sir, the definition of "files" as used in this agreement?

THE DEFENDANT: Yes.

THE COURT: Paragraph 7(b) states that you, Dr. Lee, before the entry of your plea, will make a truthful written declaration under penalty of perjury that, one, you never intended to pass, disclose or cause or allow to be disclosed to any unauthorized person or third person the tapes and never allowed any unauthorized person or third party access to those tapes.

Second, that you did not in the past and cannot in the future pass, disclose or cause or allow to be disclosed the tapes to any unauthorized person or third party.

Third, that you never intended to pass, disclose or cause or allow to be disclosed to any unauthorized person or

party -- should that say "third party"?

MR. CLINE: Your Honor, I think we all understand that it must mean third party.

THE COURT: -- the files and you never allowed any unauthorized person or third party access to those files.

And fourth, that you do not and did not in the past and cannot in the future disclose or cause or allow to be

disclosed the files to any unauthorized person or party.

My understanding is that you have already executed that declaration under oath. Is that correct?

THE DEFENDANT: Yes.

MR. CLINE: We have provided it to the government.

THE COURT: And the government has received it. Is that correct?

MR. STAMBOULIDIS: I received it approximately 10:55 today.

THE COURT: Next under paragraph 7(c), Dr. Lee has made in written form, by his signature on the plea agreement, a factual statement that supports his plea of guilty to Count 57. At this time, I will ask Dr. Lee to state that orally here in court.

THE DEFENDANT: On a date certain in 1994, I used an unsecure computer in T Division to download a document for writing relating to the national defense, file 14, on to Tape L.

I knew at the time that my position of Tape L, outside the X Division perimeter, was unauthorized and that under Los Alamos National Laboratory directives, I was not permitted to have Tape L outside the X Division perimeter.

I retained Tape L and did not deliver it to an officer or employee of the United States entitled to receive Tape L.

THE COURT: Let me ask Dr. Lee, did you do that willfully?

THE DEFENDANT: Yes.

THE COURT: Mr. Stamboulidis, let me ask you on behalf of the government if the government believes this is a sufficient factual basis for Dr. Lee's plea of guilty to Count 57.

MR. STAMBOULIDIS: We do.

THE COURT: If the matter were to proceed to trial --

MR. STAMBOULIDIS: Your Honor, may I interrupt? With the understanding that, of course, this happened in Los Alamos, in New Mexico.

THE COURT: If the matter were to proceed to trial, would the government be able to offer evidence to a jury in proof of this factual statement?

MR. STAMBOULIDIS: Definitely.

THE COURT: Let me ask Dr. Lee and his counsel, do you agree that the government could do that?

MR. CLINE: Yes.

MR. HOLSCHER: Yes, Your Honor.

THE COURT: Paragraph 7(d) provides that Dr. Lee will acknowledge that the United States had and has a legitimate national security interest in determining what occurred with respect to the files and tapes at issue.

Do you acknowledge that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: Paragraph 7(e) provides that after I accept your plea of guilty, if I decide to do so, and before

you are sentenced, you will provide to the United States a truthful written declaration under penalty of perjury, stating the manner in which you disposed of the seven tapes, as well as how, when and where copies of the tapes were made and the manner in which they were disposed.

Has that already been done?

MR. CLINE: Your Honor, it has not been done, but the declaration is prepared. As soon as the Court accepts Dr. Lee's plea, I will immediately provide that to Mr. Stamboulidis.

THE COURT: Has the declaration been executed by Dr. Lee?

MR. CLINE: Yes, it is.

THE COURT: Paragraph 7(f) provides that beginning September 26th, next week, or as soon after that date as the government requests, you, Dr. Lee, will answer under oath questions from representatives of the United States for a period of 10 days within a three-week period for a reasonable number of hours each day, which the parties understand will be six hours of questions and answers per day for each of those 10 days. Have you agreed to do that, sir?

THE DEFENDANT: Yes.

THE COURT: 7(f) further provides that to the extent the United States believes that it will need additional time to complete the questioning, it may ask the Court for a reasonable extension of this debriefing period.

Let me ask Dr. Lee and his counsel, have you agreed to that?

MR. CLINE: Yes.

THE COURT: The next sentence provides that to the extent counsel for Dr. Lee conclude at any time during that three-week period the questioning has become unreasonable,

they may apply to the Court for appropriate relief.

Now, let me ask Mr. Stamboulidis, has the government agreed to that?

MR. STAMBOULIDIS: Yes.

THE COURT: The next sentence of 7(f) states that during the three-week period, the defendant will identify any storage spaces other than his home, including, but not limited to, safety deposit boxes, computers and computer accounts under his control, and he will agree to allow the United States to search them.

Is that your agreement, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: Let me ask Dr. Lee's counsel if it requires also the consent of Mrs. Lee, will her consent be given as well?

MR. CLINE: We are confident that it will be, Your Honor.

THE COURT: Thank you, Mr. Cline.

Paragraph 7(g) provides that the parties recognize under the particular circumstances of this case that the reliability of any future polygraph examination may be subject to conflicting interpretations. (Based on what has transpired before in this case, I certainly agree with that statement.)

However, the United States reserves the right to have Dr. Lee undergo a polygraph examination administered by a mutually agreeable polygrapher, if the United States believes it becomes necessary for national security reasons or to verify Dr. Lee's declaration or sworn debriefing regarding the creation, disposition and whereabouts of the tapes and files.

The United States has made that reservation. Let me ask Dr. Lee and his counsel to state if you agreed to abide by that.

MR. CLINE: We have.

MR. HOLSCHER: We have, Your Honor, subject to the limitations on the use below in the paragraph.

THE COURT: The next sentence states that if the parties fail to agree on a polygrapher, then, after hearing from the parties, the Honorable Edward Leavy of the United States Court of Appeals for the Ninth Circuit, who has been the mediator judge, will select the polygrapher. If any such

polygraph examination occurs, it will be conducted after the Court accepts the defendant's plea and imposes sentence and after the debriefing that will take place under paragraph 7(f).

Has the defendant agreed to that?

MR. CLINE: Yes.

THE COURT: Has the government agreed to that?

MR. STAMBOULIDIS: Yes, Judge.

THE COURT: The last sentence of this paragraph states that the parties agree that the results of any polygraph examination will not be submitted to this or any other court in any manner, including, without limitation, in connection with any proceeding under paragraph 7(h), which we are about to review now.

Is that the agreement of both parties?

MR. STAMBOULIDIS: Yes.

MR. CLINE: Yes, Your Honor.

THE COURT: Paragraph 7(h) provides that this agreement, and any plea, sentence, or other action taken in accordance with this agreement, will become null and void if the Court determines, by a preponderance of the evidence admissible under the Federal Rules of Evidence as they would apply at a trial, that Dr. Lee knowingly provided false or misleading testimony concerning the disposition or creation of the files and tapes in the declarations that he is to make

under this agreement or during his debriefing.

Dr. Lee, have you agreed to that, sir?

THE DEFENDANT: Yes.

THE COURT: Let me ask his counsel to confirm that.

MR. CLINE: Yes.

THE COURT: Paragraph 7(i) provides that for a period of 12 months following imposition of sentence Dr. Lee must make himself available to respond to reasonable inquiries from the United States.

Dr. Lee, have you agreed to do that?

THE DEFENDANT: Yes.

THE COURT: Paragraph 7(j) provides that notwithstanding the other provisions of paragraph 7, any testimony given by Dr. Lee and his declaration made under this paragraph will be protected under Rule 11(e)(6) of the Federal Rules of Criminal Procedure.

Has the government agreed to that?

MR. STAMBOULIDIS: Yes, Your Honor.

THE COURT: Paragraph 7(k) states that no statements made or other information provided by Dr. Lee in connection with his obligations under paragraph 7 will be used directly against him in any criminal case brought by the United States except in the event of prosecution for false statement, obstruction of justice or perjury arising out of those statements or other information he provides or except for a

proceeding under paragraph 7(h), as further set forth in paragraph 13.

Has the government agreed to that?

MR. STAMBOULIDIS: Yes. 7(h) or as set forth in paragraph 13, but yes, we have agreed to that.

THE COURT: The next sentence states that the United States may make derivative use of and may pursue any investigative leads suggested by any statements made or other information provided by Dr. Lee.

Dr. Lee, have you and your counsel agreed to that?

THE DEFENDANT: Yes.

MR. CLINE: Yes.

THE COURT: The next sentence provides that if Dr. Lee later testifies at any trial or other judicial proceeding and offers testimony different from any statements made or information provided during the debriefing, the United States may cross-examine Dr. Lee about any statements made or other information provided by him during the debriefing.

Dr. Lee, have you agreed to that?

THE DEFENDANT: Yes.

THE COURT: In addition, the next sentence states that evidence about such statements by Dr. Lee may also be produced in the United States' rebuttal case in any such trial or judicial proceeding.

Dr. Lee, have you and your counsel agreed to that?

THE DEFENDANT: Yes.

MR. CLINE: Yes.

THE COURT: The last sentence of 7(k) provides that despite the provisions of Rule 410 of the Federal Rules of Evidence and Rule 11 of the Federal Rules of Criminal Procedure, Dr. Lee waives any objection to cross-examination and rebuttal as set forth above.

Have you agreed to that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: Let me ask his counsel to confirm that.

MR. CLINE: Yes.

THE COURT: Paragraph 7(i) provides that for a period of 12 months following the imposition of sentence, Dr. Lee will give reasonable written advance notice to the United States of any plans to travel outside the United States.

Have you agreed to do that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: It continues that if the United States has any objection to Dr. Lee's travel plans, the United States will bring its objection to Judge Leavy, the mediator judge, who will determine whether Dr. Lee should be able to travel outside the United States.

Have you agreed to that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: Mr. Stamboulidis, is that also the

government's agreement?

MR. STAMBOULIDIS: Yes, it is, Judge.

THE COURT: The last sentence of this subparagraph provides that it is implemented by a letter dated September 13th, 2000, signed and agreed to by the United States, the defendant and counsel for the defendant addressed and delivered to the mediator judge, Judge Leavy, which letter will be a part of this agreement.

I have read the letter of September 13th, 2000, and I will ask Dr. Lee to confirm that that is his signature that appears on the original of the letter.

THE DEFENDANT: Yes.

THE COURT: Mr. Stamboulidis, is that also your signature, on behalf of the government?

MR. STAMBOULIDIS: Yes, it is, Judge.

THE COURT: Mr. Holscher, is that your signature, as counsel for Dr. Lee?

MR. HOLSCHER: Yes, Your Honor.

MR. STAMBOULIDIS: Your Honor, I personally delivered the letter to Judge Leavy.

THE COURT: Paragraph 8 of the agreement relates to waivers of rights by Dr. Lee. Paragraph 8 provides that Dr. Lee is aware that his right to appeal the sentence that will be imposed and that, acknowledging that right, he knowingly waives his right to appeal any sentence that is

imposed in accordance with the parties' agreement.

Have you agreed to that, Dr. Lee?

THE DEFENDANT: Can I read it one more time?

THE COURT: Yes, sir. This says that you have agreed to waive your right to appeal the sentence that I will impose in accordance with the agreement between you and the government.

THE DEFENDANT: Yes.

THE COURT: Paragraph 8 also provides that you, Dr. Lee have waived your right to challenge your sentence in any manner by any collateral attack, including, but not limited to, a motion under 28 United States Code Section 2255 relating to petition for writ of habeas corpus.

Is it also your agreement not to attack your sentence that will be imposed in any collateral manner?

THE DEFENDANT: Yes.

THE COURT: Paragraph 9 provides that Dr. Lee waives any right to additional disclosure from the government in connection with the plea agreement.

Have you agreed to that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: Do you understand that at this time the government is under order of this Court to provide substantial additional information that could eventually result in a dismissal of all the charges in the indictment against you.

Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Has that been explained to you by your attorneys?

THE DEFENDANT: Yes.

THE COURT: Have you agreed to this provision of waiving any right to additional disclosure from the government, knowing that?

THE DEFENDANT: Can you repeat?

THE COURT: Yes, sir.

If this case proceeded and the government provided the information I have already ordered it to provide or additional information that I may require it to provide in the future, it's possible that would lead to a dismissal of all the charges against you. In view of that, do you agree at this time that you will not require the government to produce any additional information?

THE DEFENDANT: Let me talk to my lawyer.

THE COURT: Yes.

THE DEFENDANT: Yes, it's okay.

THE COURT: The next sentence in paragraph 9 states that you, Dr. Lee, agree --

MR. STAMBOULIDIS: Your Honor, your last question I think was fine, but I think it just should be made clear that paragraph 9, the first sentence, also includes that not only

will he not require, as you put it to him and he understood that, but he is waiving any right and cannot complain later about any lack of disclosure.

THE COURT: Do you agree with that refinement of my question, Dr. Lee?

THE DEFENDANT: Yes. Yes.

THE COURT: The last sentence of paragraph 9 states that Dr. Lee agrees, with respect to all charges in the indictment, that he is not a prevailing party within the meaning of the Hyde Amendment, which is Section 617 Public Law 105-119, which became effective November 26th, 1997.

The Hyde Amendment, Dr. Lee, gives persons charged with crimes by the United States government the opportunity to seek monetary reimbursement if it's determined that the charges were frivolous or not properly brought.

By this provision of the agreement, you are agreeing that you would not be considered a prevailing party on any of the counts, including the 58 counts that will be dismissed, in order to afford you rights under the Hyde Amendment.

Have you agreed to that, sir?

THE DEFENDANT: Excuse me. Can I talk to my lawyer, please?

THE COURT: Yes, you may.

THE DEFENDANT: Yes.

THE COURT: You have knowingly given up those rights

under the Hyde Amendment; is that correct, sir?

THE DEFENDANT: Yes, that is correct.

THE COURT: The next part of the plea agreement relates to the government's additional agreements.

Paragraph 10 provides that if Dr. Lee fulfills his obligations as set forth in this plea agreement, the United States at the time of sentencing will move to dismiss with prejudice all remaining counts of the indictment as to Dr. Lee.

Is that the government's agreement?

MR. STAMBOULIDIS: Yes, Your Honor.

THE COURT: Paragraph 11 provides that this agreement is limited to the United States Attorney's Office for the District of New Mexico and the United States Department of Justice and does not bind any other federal, state or local agencies or prosecuting authorities.

Do you understand that, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: And let me ask Dr. Lee's counsel, is it possible that any other authority would be in a position to prosecute Dr. Lee, as far as you're aware?

MR. CLINE: Not in our view.

THE COURT: Let me ask Mr. Stamboulidis, are you aware of any other governmental entity that would be able to prosecuted Dr. Lee?

MR. STAMBOULIDIS: Anything is possible, Judge, but the agreement is the agreement.

THE COURT: Are you satisfied with this? Let me ask counsel for Dr. Lee.

MR. CLINE: Yes, sir.

THE COURT: Mr. Holscher?

MR. HOLSCHER: Yes, Your Honor. We're satisfied, and we have absolute confidence that if something were to arise we would take care of it.

THE COURT: The last sentence of paragraph 11 states that this agreement may in no way be relied upon or cited as precedent by anyone not a party to this agreement.

Has the government agreed to that, Mr. Stamboulidis?

MR. STAMBOULIDIS: Yes, Judge.

THE COURT: As I understand this, it's not a matter of concern to Dr. Lee. Is that correct?

MR. CLINE: We don't care.

THE COURT: Paragraph 12 is entitled Voluntary Plea.

It states that Dr. Lee agrees and represents that this plea of guilty is freely and voluntarily made and not the result of force or threats or promises apart from those set forth in this plea agreement.

Is that the correct, Dr. Lee?

THE DEFENDANT: Yes.

THE COURT: I want to make certain that your plea is

truly voluntary and that you're not intending to plead guilty solely in an effort to get out of jail. I want to make certain that you're pleading guilty because you truly are representing that you are guilty of the offense charged in Count 57.

Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you or tried to force you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone made any promises to you that are different from the promises set forth in writing in your plea agreement?

THE DEFENDANT: The answer is no, nobody did.

THE COURT: Are you pleading guilty in any way because you feel that you are under duress?

THE DEFENDANT: No.

THE COURT: I need to explain further to you, because I don't think I did this fully, that I have reviewed a great deal of information that I required the government to provide to me in this case that has not been seen by you or by your lawyers.

Under the terms of this agreement, that information probably will never be made known to you or your lawyers. I want to make certain that you are agreeing to go forward with

this plea agreement, knowing that.

THE DEFENDANT: Yes.

THE COURT: I need to advise you, Dr. Lee, that citizens who are convicted of felony crimes lose rights of citizenship. Those include the right to hold public office, the right to serve on a jury, the right to possess a weapon and the right to vote. You will be giving up your right to cast a ballot that would express your opinion of what was done to you.

Do you understand that fully?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions you want to ask me about your loss of citizenship rights?

THE DEFENDANT: No.

THE COURT: I will be required to sentence you under the United States Sentencing Guidelines, even though this is a sentence that will be imposed in accordance with your agreement under Rule 11(e)(1)(C).

I will be required under this agreement to impose a sentence of 278 days. Is that correct?

MR. CLINE: Yes.

MR. HOLSCHER: Yes, sir.

THE COURT: I must also make a finding of guilt as to the felony crime charged in Count 57.

Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: In making a decision as to whether I should accept your plea of guilty, under the guidelines, I

must take into account all relevant information about you.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Dr. Lee, do you fully understand all of the consequences to you of pleading guilty to Count 57?

THE DEFENDANT: Yes.

THE COURT: Let me ask Mr. Holscher and Mr. Cline, do you believe it's in the best interest of your client, Dr. Lee, to plead guilty to the charge in Count 57 under the terms of this plea agreement?

MR. CLINE: Yes, Your Honor.

MR. HOLSCHER: We do, Your Honor. We believe that, given the opportunity to have a sentence of time served in exchange for an agreement as to what I believe the evidence shows that Dr. Lee did in terms of taking a file outside the X Division, is appropriate.

There are 39 counts in the indictment, Your Honor, that have a potential sentence of life in prison. We fully explained to Dr. Lee the jury process and the potential vagaries of such a process. We believe it is in Dr. Lee's best interest to accept this plea and disposition.

THE COURT: Both of you and the other attorneys on

Dr. Lee's team are outstanding trial lawyers. You turned a battleship in this case. I would think that at a trial, you would be extremely effective in his defense.

Knowing all that you know, it's still your considered judgment that it is in his best interest to proceed with a plea of guilty to the felony charge in Count 57. Is that correct?

MR. HOLSCHER: Yes, Your Honor. Under the guidelines, absent an agreement, the way the indictment is charged, there is a potential of a guideline sentence of eight

years if there were additional factors added. So in other words, if we were to go to trial and prevail on 58 of 59 counts and lose on the 57th, there is a possibility of a much longer sentence under the guidelines as they would apply to the way that the case was charged.

In addition, if we were to go forward, there is a likelihood of either Dr. Lee being in detention or under the 17 conditions of house arrest pending the completion of trial rather than the current conditions.

So our evaluation, Your Honor, is that there is a factual basis to Count 57 that Dr. Lee is agreeable and, under the proper conditions, has been agreeable to provide the information the government may seek and that this is in his best interest.

For us, as trial lawyers, to seek a trial and put at

risk Dr. Lee to any potential of what we would view as an unfair jury verdict on any of the counts is just not an acceptable risk for Dr. Lee. We don't believe that is in his interest.

THE COURT: Let me ask counsel for the government to explain why the government considers this plea agreement to be in the best interest of the people of this nation.

MR. STAMBOULIDIS: Yes, Your Honor. There are various critical components of this plea disposition and agreement. I will highlight two of them that bring home the point of why this disposition and agreement is in the best interest of our nation and the United States.

The plea and cooperation agreement gives us the best chance to find out with confidence precisely what happened to the classified materials and data that the defendant down-partitioned and downloaded on to unsecured tapes. As it has been clear throughout this prosecution, for national security reasons, the location and fate of the tapes was

always our transcending concern.

Moreover, this agreement allows us to fully explore with the defendant, through his cooperation as set forth in the agreement that you just reviewed with him, under oath, all national security concerns implicated by his conduct.

Had this case proceeded to trial and resulted in a conviction on all counts, the defendant might have faced many

years in prison, but we might never have learned exactly what happened to those tapes.

Whereas, under the terms of his cooperation agreement, at great consequence to the defendant should he be anything less than truthful, the government will have the means to test the veracity of the defendant's sworn assurances that he never in any way intended harm to our nation or in any way passed, disclosed or allowed access to the tapes and in fact destroyed them so that they could never compromise our national security.

Conviction after trial would, not alone, protect the nation to the degree that this disposition does here today, by putting us in the best possible position to determine the fate of the nuclear weapons classified restricted data that the defendant had mishandled unlawfully. This guilty plea disposition, under the strict terms of the cooperation agreement, puts us in that optimal position.

The second component is that this disposition is a series felony and in itself carries all that that implies, as a deterrent to others who are entrusted to work on our nuclear weapon design codes and to safeguard them in the process. It's a deterrent that they not violate that sacred oath and trust for any reason, as unfortunately happened here.

Finally this disposition avoids the public dissemination of certain nuclear secrets which would have

necessarily occurred on the way towards proceeding towards conviction in this case at trial. So for this and other reasons, this disposition is in our nation's best interest. Thank you.

THE COURT: Mr. Stamboulidis, it may be unfair of me to ask you this question. You were not in this case from the beginning, and I acknowledge that. But if you can answer it, I would like to know why the government argued so vehemently that Dr. Lee's release earlier would have been an extreme danger to the government when at this time he, under the agreement, will be released without any restrictions.

MR. STAMBOULIDIS: Your Honor, the answer is simple, and I can answer it no matter when I came into the case.

The circumstances are dramatically different as we stand here today than they were even as we were filing before the Tenth Circuit just a week or so ago. The circumstances here today we have already, through this cooperation process, received sworn assurances and other assurances from this defendant, as well as his counsel, and will continue to do so over the course of the next year throughout his cooperation.

Those assurances come, for the first time, at great risk and consequence to this defendant should they be anything less than truthful. He will be facing a whole world of problems a lot worse than just that indictment that he was facing should he be untruthful.

With those powerful incentives, he has come forward and, for the first time, given us these assurances that he never intended any harm to our nation by his mishandling these

materials in an unlawful way and that he never allowed them to fall into harm's way and compromise national security.

We stand by, as we always did and will, to the sensitivity, the great degree of sensitivity, of the materials that he down-partitioned and downloaded. And those materials alone, no matter who was standing in the defendant's position, having compromised them in the way he did, do threaten, as we have said in the past, millions of lives, if they fall into the wrong hands.

This defendant has proceeded, under oath, to give us assurances that that is not the case and has put us in the best possible position for the first time, unlike all the other times when we were addressing detention. So circumstances have dramatically changed, and that is a simple answer.

THE COURT: Throughout this case, the government has repeatedly questioned the veracity of Dr. Lee. You're saying now, simply because he has given a statement under oath, the government no longer believes he is a threat to national security?

MR. STAMBOULIDIS: Your Honor, what I said I can repeat, but what I said is it's not simply that, Judge. It's

not simply that he has given a statement under oath. It's that he has agreed to cooperate in ways that anyone who is in intent on lying to the government would do so at great personal risk and would be far worse off than he was under the existing indictment.

There are powerful incentives built into this cooperation agreement for him to be truthful. And like many cooperation agreements, whenever you have a cooperator, they have committed crimes. They have decided to try and get themselves on the right side of the law. They are

remorseful. They accepted the responsibility. You build in powerful incentives to the cooperation agreement such that they wouldn't dare lie to you, or if they did so, it would be with far greater consequences.

THE COURT: Thank you, Mr. Stamboulidis.

MR. STAMBOULIDIS: Sure, Your Honor.

THE COURT: At this time I will ask Dr. Lee, how do you plead, sir, to the charge in Count 57 of the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: It's my finding that the defendant, Dr. Wen Ho Lee, knowingly, voluntarily and intelligently entered a plea of guilty to the felony charge in Count 57 of the indictment.

At this time I will accept his plea of guilty under

the terms of his plea agreement. In doing so, I am bound by the agreement made between the United States and Dr. Lee to impose a sentence agreed to under Rule 11(e)(1)(C).

My understanding is that you wish to proceed to final disposition at this time. Is that correct?

MR. CLINE: Yes, Your Honor.

THE COURT: Do we need to take a break for Dr. Lee to provide the declaration to counsel for the government?

MR. CLINE: I will provide it right now.

MR. STAMBOULIDIS: Your Honor, I am going to read this declaration, but I also need to go across the hall for an unrelated reason.

THE COURT: I understand that. We will take a five-minute recess in just a second.

Let me ask first, do Dr. Lee and his counsel agree to waive the preparation of a full standard presentence report?

MR. CLINE: Yes, Your Honor. We have executed a written waiver.

MR. STAMBOULIDIS: We similarly waive, Your Honor, the execution of a full standard presentence report. We would ask again that you make the findings under Rule 32(b)(1)(A) with the explanation under (b)(1)(B).

THE COURT: Let me state that our outstanding Probation Department did prepare in this case what is called a Modified Guideline Presentence Report. During this short

break, I would appreciate counsel for Dr. Lee and Dr. Lee reviewing that. Has the government already reviewed it?

MR. STAMBOULIDIS: Yes, we have, Judge.

THE COURT: We will be in recess at this time for five minutes.

(Recess taken.)

THE COURT: Please have a seat. Let me ask first Mr. Stamboulidis, have you had an opportunity to review the declaration provided by Dr. Lee?

MR. STAMBOULIDIS: Yes, Your Honor. Thank you for both opportunities that you just gave me.

THE COURT: Are there any concerns about the declaration at this time?

MR. STAMBOULIDIS: No, Your Honor.

THE COURT: Next let me ask Dr. Lee, have you read the Modified Guideline Presentence Report?

THE DEFENDANT: Yes, I did.

THE COURT: Have you discussed it with your attorneys?

THE DEFENDANT: Yes.

THE COURT: Are all of the factual statements in the report correct?

THE DEFENDANT: Well, except my age. It says I'm 58. I am 60. But I like that number.

THE COURT: Well, I bet the probation officer, as I

do, think you look younger than 60. We will correct that on the first page to age 60.

Are there any other corrections to be made in the Modified Guideline Presentence Report?

THE DEFENDANT: No. Everything is correct.

THE COURT: Let me ask counsel for Dr. Lee, is there any need for an evidentiary hearing on any of the factual statements?

MR. HOLSCHER: No, Your Honor, We waive any such hearing.

THE COURT: At this time, I will adopt as factual findings of the Court all of the factual statements in Dr. Lee's Modified Guideline Presentence Report.

I have reviewed a number of written materials in this case, as you know. Are there any specific additional ones that I should review in connection with sentencing?

MR. CLINE: No, Your Honor.

THE COURT: The presentence report indicates that the total offense level computed under the United States Sentencing Guidelines Manual is 21. The criminal history category is one. The guideline imprisonment range would be 37 to 41 months for this offense before application of the Rule 11(e)(1)(C) agreement.

Are you in agreement with that?

MR. CLINE: Yes. Before application of the

agreement, yes, Your Honor.

THE COURT: Mr. Stamboulidis, do you agree with that computation?

MR. STAMBOULIDIS: I came in a little lower, but yeah, for our purposes, I think it's fine.

THE COURT: The presentence report indicates the subtraction of three offense levels for acceptance of responsibility, resulting in a total offense level of 21.

Is that agreeable to you?

MR. STAMBOULIDIS: May I have one moment, Judge?

THE COURT: Yes.

MR. STAMBOULIDIS: Yes, there are 21.

THE COURT: Let me ask at this time if counsel for Dr. Lee would like to make a statement on his behalf relating to sentencing?

MR. CLINE: Your Honor, I think we are prepared to go forward.

THE COURT: Dr. Lee, is there anything you would like to say at this time?

THE DEFENDANT: No.

THE COURT: Mr. Stamboulidis, is there anything you would like to say on behalf of the government?

MR. STAMBOULIDIS: No, Judge. Thank you for the opportunity.

THE COURT: I will state a proposed sentence, and you

may comment on this.

Now that Dr. Lee has entered a plea of guilty to Count 57 of the indictment and I have accepted his plea under the terms of his plea agreement, I will proceed to sentencing.

As the parties have agreed that I have extensive familiarity with the defendant's personal history and conduct, the preparation of a full presentence report is waived and unnecessary. A modified report was prepared for purposes of establishing a guideline range. The paries have no objection

to the report and the proposed guideline range.

The total offense level is 21. The criminal history category is one. The guideline imprisonment range under United States Sentencing Guidelines is 37 to 41 months; however, I have accepted the parties' agreement made under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure which includes a specific sentence of 278 days of incarceration, the time Dr. Lee has already served. I am satisfied that the agreed sentence departs for justifiable reasons.

It is the judgment of the Court as to Count 57 of the indictment and Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure that the defendant, Wen Ho Lee, is committed to the custody of the Bureau of Prisons to be imprisoned for a term of time served, 278 days.

It is further ordered that the defendant will be given credit for time spent in official detention in connection with this case in accordance with 18 United States Code Section 3585.

A term of supervised release will not be imposed. I will not impose a fine. I will not impose restitution. The defendant, however, must pay a special penalty assessment of $100, which he has already done.

Under the terms of the plea agreement, the defendant, Dr. Lee, knowingly waived his right to appeal the sentence I have imposed. He has also waived his right to challenge that sentence in a collateral manner.

Let me ask Mr. Stamboulidis, do you have any comments on that proposed sentence?

MR. STAMBOULIDIS: I am fine with it, Judge.

THE COURT: Mr. Cline and Mr. Holscher, do you have any comments on that proposed sentence?

MR. CLINE: Your Honor, I believe it confirms with

the agreement.

THE COURT: Is there any reason why the sentence as I just announced it should not be imposed at this time?

MR. CLINE: No, Your Honor.

MR. STAMBOULIDIS: No, Judge.

THE COURT: It's my order that the sentence as I stated it will be the sentence imposed in this case.

Mr. Stamboulidis, at this time do you want to make a motion?

MR. STAMBOULIDIS: I want to make a couple, Judge. First I would like to -- as we discussed earlier, in one of the earlier sessions here in open court, I, at this time, would move to withdraw all pending motions that we have, on behalf of the government.

THE COURT: That motion by the government will be granted. The order will be that all of the pending motions will be denied as moot.

Let me ask counsel for Dr. Lee, do you want to make a similar motion at this time?

MR. CLINE: Yes, Your Honor. We will move to withdraw all pending motions.

THE COURT: That motion will also be granted.

MR. STAMBOULIDIS: I have a second motion, Judge.

THE COURT: Go ahead.

MR. STAMBOULIDIS: Thank you. At this time we move to dismiss -- pursuant to the terms and conditions of the plea and disposition agreement between the United States and the defendant, Dr. Wen Ho Lee, to dismiss with prejudice Counts 1 through 56, 58 and 59 in the above-captioned indictment.

I have signed it. I have only one copy of it. I am serving it on counsel. I am going to hand it to you with an order of dismissal, a proposed order.

THE COURT: Let me ask counsel for Dr. Lee, is the form of the order of dismissal acceptable to you?

MR. CLINE: Your Honor, to tell you the truth, I didn't see the order itself. But if it dismisses with prejudice the counts, I think that's fine. Yes, Your Honor.

THE COURT: I have signed the order of dismissal of Counts 1 through 56, 58 and 59. At this time I will also sign the judgment which sets forth the sentence that was imposed. In addition, I will sign a minute order that orders that the defendant, Wen Ho Lee, be released from the custody of the United States Marshal Service forthwith.

MR. STAMBOULIDIS: Your Honor, to facilitate that as well, the United States has filed -- I have just signed and we will file a motion to dismiss our pending appeal and withdraw our notice of appeal. I have given a copy to Miss Hollander, who is going to fax it immediately to where it has got to be in the Tenth Circuit.

THE COURT: Thank for you clearing up that detail, Mr. Stamboulidis.

MR. STAMBOULIDIS: Certainly.

THE COURT: At this time I want to compliment Judge Edward Leavy, who was the mediator judge in this case and who has continuing potential obligations under the terms of the plea agreement. I have never personally met Judge Leavy. I recognize him in the audience, simply by having looked at a

photograph of his in the Almanac of Federal Judges.

Judge Leavy, would you mind standing so all will know who you are.

THE HONORABLE EDWARD LEAVY: Thank you very much.

THE COURT: Judge Leavy has worked extremely hard in this case. He has been very diligent in assisting the mediation efforts. I was informed that he flew back to Albuquerque from his home in Portland, Oregon yesterday, late yesterday, and then met late into the night with the lawyers and Dr. Lee in an effort to revive the plea agreement. We all owe him our gratitude. I want to say personally that I am both proud and honored to be his colleague in the Federal Judiciary.

I need to ask counsel if there are any other matters that they want to bring up before I make a statement?

MR. CLINE: No, Your Honor.

MR. STAMBOULIDIS: No, Judge. Thank you. We share your comments about Judge Leavy, as I am sure my colleagues do.

MR. HOLSCHER: We would like to, again, thank Judge Leavy, Your Honor. He was of tremendous help and had tremendous patience.

THE COURT: Dr. Lee, you have pled guilty to a serious crime. It's a felony offense. For that, you deserved to be punished. In my opinion, you have been punished

harshly, both by the severe conditions of pretrial confinement and by the fact that you have lost valuable rights as a citizen.

Under the laws of our country, a person charged in Federal Court with commission of a crime normally is entitled to be released from jail until that person is tried and convicted. Congress expressed in the Bail Reform Act its distinct preference for pretrial release from jail and prescribed that release on conditions be denied to a person charged with a crime only in exceptional circumstances.

The Executive Branch of the United States Government has until today actually, or just recently, vigorously opposed your release from jail, even under what I had previously described as Draconian conditions of release.

During December 1999, the then United States Attorney, who has since resigned, and his Assistants presented me, during the three-day hearing between Christmas and New Year's Day, with information that was so extreme it convinced me that releasing you, even under the most stringent of conditions, would be a danger to the safety of this nation. The then United States Attorney personally argued vehemently against your release and ultimately persuaded me not to release you.

In my opinion and order that was entered December 30, 1999, I stated the following: "With a great deal of concern

about the conditions under which Dr. Lee is presently being held in custody, which is in solitary confinement all but one hour of the week, when he is permitted to visited his family, the Court finds, based on the record before it, that the government has shown by clear and convincing evidence that there is no combination of conditions of release that would reasonably assure the safety of any other person and the community or the nation."

After stating that in the opinion, I made this request in the opinion right at the end: "Although the Court concludes that Dr. Lee must remain in custody, the Court urges the government attorneys to explore ways to lessen the severe restrictions currently imposed upon Dr. Lee while preserving the security of sensitive information."

I was very disappointed that my request was not promptly heeded by the government attorneys.

After December, your lawyers developed information

that was not available to you or them during December. And I ordered the Executive Branch of the government to provide additional information that I reviewed, a lot of which you and your attorneys have not seen.

With more complete, balanced information before me, I felt the picture had changed significantly from that painted by the government during the December hearing. Hence, after the August hearing, I ordered your release despite the

continued argument by the Executive Branch, through its government attorneys, that your release still presented an unacceptable extreme danger.

I find it most perplexing, although appropriate, that the Executive Branch today has suddenly agreed to your release without any significant conditions or restrictions whatsoever on your activities. I note that this has occurred shortly before the Executive Branch was to have produced, for my review in camera, a large volume of information that I previously ordered it to produce.

From the beginning, the focus of this case was on your motive or intent in taking the information from the secure computers and eventually downloading it on to tapes. There was never really any dispute about your having done that, only about why you did it.

What I believe remains unanswered is the question: What was the government's motive in insisting on your being jailed pretrial under extraordinarily onerous conditions of confinement until today, when the Executive Branch agrees that you may be set free essentially unrestricted? This makes no sense to me.

A corollary question I guess is: Why were you charged with the many Atomic Energy Act counts for which the penalty is life imprisonment, all of which the Executive Branch has now moved to dismiss and which I just dismissed?

During the proceedings in this case, I was told two things: first, the decision to prosecute you was made at the highest levels of the Executive Branch of the United States Government in Washington, D.C.

With respect to that, I quote from a transcript of the August 15, 2000 hearing, where I asked this question. This was asked of Dr. Lee's lawyers.

"Who do you contend made the decision to prosecute?"

Mr. Holscher responded, "We know that the decision was made at the highest levels in Washington. We know that there was a meeting at the White House the Saturday before the indictment, which was attended by the heads of a number of agencies. I believe the number two and number three persons in the Department of Justice were present. I don't know if the Attorney General herself was present. It was actually held at the White House rather than the Department of Justice, which is, in our view, unusual circumstances for a meeting."

That statement by Mr. Holscher was not challenged.

The second thing that I was told was that the decision to prosecute you on the 39 Atomic Energy Act, each of which had life imprisonment as a penalty, was made personally by the President's Attorney General. In that respect, I will quote one of the Assistant U.S. Attorney's, a very fine attorney in this case -- this was also at the August 15th

hearing.

This is talking about materials that I ordered to be

produced in connection with Dr. Lee's motion relating to selective prosecution. The first category of materials involved the January 2000 report by the Department of Energy Task Force on racial profiling.

"How would that in any way disclose prosecutorial strategy?"

Miss Fashing responded, "That I think falls more into the category of being burdensome on the government. I mean if the government -- if we step back for just a second -- I mean the prosecution decision and the investigation in this case, the investigation was conducted by the FBI, referred to the United States Attorney's Office, and then the United States Attorney's Office, in conjunction with -- well, actually the Attorney General, Janet Reno, made the ultimate decision on the Atomic Energy Act counts."

Dr. Lee, you're a citizen of the United States and so am I, but there is a difference between us. You had to study the Constitution of the United States to become a citizen. Most of us are citizens by reason of the simple serendipitous fact of our birth here. So what I am now about to explain to you, you probably already know from having studied it, but I will explain it anyway.

Under the Constitution of the United States, there

are three branches of government. There is the Executive Branch, of which the President of the United States is the head. Next to him is the Vice-president of the United States. The President operates the Executive Branch with his cabinet, which is composed of secretaries or heads of the different departments of the Executive Branch. The Vice-president participates in cabinet meetings.

In this prosecution, the more important members of the President's cabinet were the Attorney General and the Secretary of the Department of Energy, both of whom were

appointed to their positions by the President.

The Attorney General is the head of the United States Department of Justice, which despite its title, is a part of the Executive Branch, not a part of the Judicial Branch of our government.

The United States Marshal Service, which was charged with overseeing your pretrial detention, also is a part of the Executive Branch, not the Judicial Branch.

The Executive Branch has enormous power, the abuse of which can be devastating to our citizens.

The second branch of our national government is the Legislative Branch, our Congress. Congress promulgated the laws under which you were prosecuted, the criminal statutes. And it also promulgated the Bail Reform Act, under which in hindsight you should not have been held in custody.

The Judicial Branch of government, of which I am a member, is called the Third Branch of government because it's described in Article III of our Constitution.

Judges must interpret the laws and must preside over criminal prosecutions brought by the Executive Branch. Since I am not a member of the Executive Branch, I cannot speak on behalf of the President of the United States, the Vice-president of the United States, their Attorney General, their Secretary of the Department of Energy or their former United States Attorney in this District, who vigorously insisted that you had to be kept in jail under extreme restrictions because your release pretrial would pose a grave threat to our nation's security.

I want everyone to know that I agree, based on the information that so far has been made available to me, that you, Dr. Lee, faced some risk of conviction by a jury if you were to have proceeded to trial. Because of that, I decided

to accept the agreement you made with the United States Executive Branch under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

Further, I feel that the 278 days of confinement for your offense is not unjust; however, I believe you were terribly wronged by being held in custody pretrial in the Santa Fe County Detention Center under demeaning, unnecessarily punitive conditions. I am truly sorry that I

was led by our Executive Branch of government to order your detention last December.

Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the Executive Branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States Attorney for the District of New Mexico, who held the office at that time.

I am sad for you and your family because of the way in which you were kept in custody while you were presumed under the law to be innocent of the charges the Executive Branch brought against you.

I am sad that I was induced in December to order your detention, since by the terms of the plea agreement that frees you today without conditions, it becomes clear that the Executive Branch now concedes, or should concede, that it was not necessary to confine you last December or at any time before your trial.

I am sad because the resolution of this case drug on unnecessarily long. Before the Executive Branch obtained your indictment on the 59 charges last December, your attorney, Mr. Holscher, made a written offer to the Office of the United States Attorney to have you explain the missing tapes under polygraph examination.

I'll read from that letter of December 10, 1999.

I quote from that letter: "Dear United States

Attorney Kelly and First Assistant Gorence,

"I write to accept Mr. Kelly's request that we provide them with additional credible and verifiable information which will prove that Dr. Lee is innocent.

"On the afternoon of Wednesday, December 8th, Mr. Kelly informed me that it was very likely that Dr. Lee will be indicted within the next three to four business days. In our phone conversation, Mr. Kelly told me that the only way that we could prevent this indictment would be to provide a credible and verifiable explanation of what he described as missing tapes.

"We will immediately provide this credible and verifiable explanation. Specifically we are prepared to make Dr. Lee immediately available to a mutually agreeable polygraph examiner to verify our repeated written representations that at no time did he mishandle those tapes in question and to confirm that he did not provide the tapes to any third party.

"As a sign of our good faith, we will agree to submit Dr. Lee to the type of polygraph examination procedure that has recently been instituted at the Los Alamos Laboratory to question scientists. It is our understanding that the government has reaffirmed that this new polygraph procedure is the best and most accurate way to verify that scientists are properly handling classified information."

At the inception of the December hearing, I asked the parties to pursue that offer made by Mr. Holscher on behalf of

Dr. Lee, but that was to no avail.

MR. STAMBOULIDIS: Your Honor, most respectfully I take issue with that. There has been a full record of letters that were sent back and forth to you, and Mr. Holscher withdrew that offer.

THE COURT: Nothing came of it, and I was saddened by the fact that nothing came of it. I did read the letters that were sent and exchanged. I think I commented one time that I think both sides prepared their letters primarily for use by the media and not by me. Notwithstanding that, I thought my request was not taken seriously into consideration.

Let me turn for the moment to something else. Although I have indicated that I am sorry that I was led by the Executive Branch to order your detention last December, I want to make a clarification here. In fairness, I must note that virtually all of the lawyers who work for the Department of Justice are honest, honorable, dedicated people, who exemplify the best of those who represent our Federal Government.

Your attorney, Mr. Holscher, formerly was an Assistant United States Attorney. The new United States Attorney for the District of New Mexico, Mr. Norman Bay, and the many Assistant United States Attorneys here in New Mexico

-- and I include in this Mr. Stamboulidis and Mr. Liebman, who are present here today -- have toiled long hours on this case in opposition to you. They are all outstanding members of the Bar, and I have the highest regard for all of them.

It is only the top decision makers in the Executive Branch, especially the Department of Justice and the Department of Energy and locally, during December, who have caused embarrassment by the way this case began and was handled. They did not embarrass me alone. They have embarrassed our entire nation and each of us who is a citizen

of it.

I might say that I am also sad and troubled because I do not know the real reasons why the Executive Branch has done all of this. We will not learn why because the plea agreement shields the Executive Branch from disclosing a lot of information that it was under order to produce that might have supplied the answer.

Although, as I indicated, I have no authority to speak on behalf of the Executive Branch, the President, the Vice-president, the Attorney General, or the Secretary of the Department of Energy, as a member of the Third Branch of the United States Government, the Judiciary, the United States Courts, I sincerely apologize to you, Dr. Lee, for the unfair manner you were held in custody by the Executive Branch.

Court will be in recess.

PAUL BACA
OFFICIAL COURT REPORTER

REPORTER'S CERTIFICATE

I, PAUL BACA, a court reporter for the United States, do hereby certify that I reported the foregoing case in stenographic shorthand and transcribed, or had the same transcribed under my supervision and direction, the foregoing matter and that the same is a true and correct record of the proceedings had at the time and place.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this 13th day of September, 2000.

Official Court Reporter

PAUL BACA
OFFICIAL COURT REPORTER

FAS Note: The following text was released by attorneys for Wen Ho Lee on September 11, 2000.

Factual Basis for Plea of Dr. Wen Ho Lee

On a date certain in 1994, I used an unsecure computer in T-Division to download a document or writing relating to the national defense (File 14) onto Tape L. I knew at the time that my possession of Tape L outside the X-Division perimeter was unauthorized and that, under Los Alamos National Laboratory directives, I was not permitted to have Tape L outside the X-Division perimeter. I retained Tape L and did not deliver it to an officer or employee of the United States entitled to receive Tape L.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

[date stamped August 31, 2000]

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR 99-1417 JP

WEN HO LEE,
Defendant.

MEMORANDUM OPINION

On July 21, 2000 Defendant, Dr. Wen Ho Lee, filed his "Renewed Motion of Dr. Wen Ho Lee for Pretrial Release," (Doc. No. 114). After conducting a three-day evidentiary hearing and carefully reviewing the total available information and the applicable law, I concluded in an Order filed August 24, 2000 that Dr. Lee's motion should be granted.

I. Background

On December 10, 1999 the United States filed a 59 count indictment charging Defendant Dr. Wen Ho Lee with violating part of the Espionage Act, 18 U.S.C. § 793, and two provisions of the Atomic Energy Act, 42 U.S.C. §§ 2275 and 2276. The government immediately arrested Dr. Lee and held him in custody. Three days later on December 13, 1999, during Dr. Lee's first appearance in court, United States Magistrate Judge Don J. Svet ordered pretrial detention. On December 17, 1999 Dr. Lee moved under 18 U.S.C. §3145(b) for the revocation of Magistrate Judge Svet's detention order. On December 30, 1999, following a three-day evidentiary hearing, I filed a Memorandum Opinion and Order denying Dr. Lee's motion to revoke Judge Svet's Order of detention. I denied Dr. Lee's motion on the ground that the government had presented clear and convincing evidence that there was no combination of conditions of release that would reasonably assure the safety of any other person and the community or the nation. See United States v. Lee, 79 F.Supp.2d 1280, 1289 (D.N.M. 1999). Dr. Lee appealed. On February 29, 2000 the Tenth Circuit Court of Appeals affirmed the denial of Dr. Lee's motion. See United States v. Lee, No. 00-2002, 2000 WL 228263, **1 (10th Cir. Feb. 29, 2000).

Because the detention hearing before Judge Svet and the hearing on Dr. Lee's motion to revoke Judge Svet's order occurred at a very early stage of this prosecution, Dr. Lee and his attorneys did not have information, now available to them, that would have helped them counter the government attorney's presentations at the December 1999 hearings. The United States Attorney, who argued passionately and persuasively for Dr. Lee's detention and who since has resigned, and his assistants, painted an extremely dark picture of Dr. Lee and his actions that Dr. Lee and his attorneys were unable to challenge effectively. During the passage of the seven months before Dr. Lee filed his renewed motion for release there had been disclosure of considerable additional information, both voluntarily by the government and also in response to court orders, plus independent development of other information by Dr. Lee and his attorneys that has bolstered Dr. Lee's position. In addition, since this case was reassigned to me two months ago, I have read voluminous files and documents, many *in camera*, that have bearing on Dr. Lee's motion. The totality of the information of which I now have knowledge presents a tableau different from that described by the government last December. Instead of being confined, as it was then, to an umbral area of pitch-black darkness, the relevant information has shifted to a penumbral region that is a somewhat mottled shade of gray. Nonetheless, I found the issue before me to be one that was most difficult to decide and one that could have been resolved differently.

II. Discussion

A. **Reopening a detention hearing**

A detention hearing may be reopened "if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. §3142(f). Some courts have read into the statute a requirement that the movant could not have known, at the time of the prior hearing, of the new information. See, e.g., United States v. Dillon, 938 F.2d 1412, 1415 (1st Cir. 1991); United States v. Ward, 63 F.Supp. 2d 1203, 1206-7 (C.D. Cal. 1999), United States v. Flores, 856 F. Supp. 1400, 1405-07 (E.D. Cal. 1994). But See Hon. John L. Weinberg, Federal Bail and Detention Handbook, §7.09 (1997).

Dr. Lee presented the following evidence which, he claims, warrants reopening his pretrial detention hearing: (1) declaration testimony from Dr. Harold Agnew[1], a former director of Los Alamos National Laboratory ("LANL") and from Dr. Walter Goad, a Fellow Emeritus of LANL, plus testimony in person by Dr. John Richter, who has worked at LANL for 40 years as a weapons designer, all of which tends to show that the information Dr. Lee took is less valuable than the government had led the Court to believe it was and is less sensitive than previously described to the Court; (2) declaration testimony from Robert Vrooman, former head of counterintelligence at LANL who has known Dr. Lee a long time, that Dr. Lee did not intend to harm the United States, is not a danger to United States' security, and will not turn over tapes to a foreign power; and (3) evidence that F.B.I. Agent Robert Messemer testified falsely or inaccurately in December 1999 when he said that Dr. Lee (a) told Dr. Kuok-Mee Ling that Dr. Lee wanted to use Dr. Lings's computer to download a "resume" and (b) sent overseas various letters concerning Dr. Lee's work at LANL.

> [1] Dr. Agnew's first "declaration" is an unsworn statement. (See Def's Memo. Ex. A.) Dr. Agnew in his second declaration swears under penalty of perjury that his first statement is true and correct to the best of his knowledge. (See Def's Reply Ex. A.)

In addition, Dr. Lee makes new arguments that (1) the government's theory, stated in the Bill of Particulars, that Dr. Lee may have taken the information to enhance his employment prospects abroad is different from and less serious than the government's theory presented at the December 1999 hearing, (2) the material which Dr. Lee placed onto tapes was not classified at the time it was taken and is not now classified at the highest level, "Top Secret Restricted Data," and (3) the length and conditions of Dr. Lee's present and anticipated pretrial confinement amount to a constitutional violation.

Since Dr. Lee's argument concerning the classification level of the information he took could have been made at the December hearing, it is not a basis for reopening the detention hearing. This argument will be considered in connection with Dr. Lee's Motion to Strike from the Indictment References to the Alleged Classification Level of the Computer Files at Issue (Doc. No. 128), filed August 7, 2000, which is not yet fully briefed.

As to Dr. Lee's constitutional argument, I decline to reach it since "narrower grounds for a decision exist." See United States v. Gonzales, 150 F.3d 1246, 1254 (10th Cir. 1998) (declining to resolve constitutional question).[2]

> [2] Although I have not addressed the question of whether there has been a constitutional due process violation based on the length or conditions of Dr. Lee's pretrial detention, I feel compelled to observe that the government, for reasons I believe not yet adequately explained, seems to have procrastinated in removing unduly onerous conditions of confinement. In my Memorandum Opinion and Order of December 30, 1999 I noted that it was filed "[w]ith a great deal of concern about the conditions under which Dr. Lee is presently held in custody, which is in solitary confinement all but one hour a week when he is permitted to visit his family." Lee, 79 F. Supp. 2d at 1289. In addition, I stated in the Memorandum Opinion and Order, "Although the Court concludes that Dr. Lee must remain in custody, the Court urges the Government attorneys to explore ways to loosen the severe restrictions currently imposed upon Dr. Lee while preserving the security of sensitive information." Id. At 1289-90. According to a government attorney, who did not become involved with the case until this year, the severe restrictions began to soften, somewhat, around April, 2000, four months after my pointed request. At that time, the government began transporting Dr. Lee from his jail cell to the United States Courthouse in Albuquerque and/or LANL, usually four days per week, to review information and to confer with his attorneys about his defense. While in the highly secured rooms at the courthouse, Dr. Lee has been required to wear ankle chains, although he has not been encumbered with other body restraints. He has been present in the courtroom without any restraints at all hearings that have been open to the public. Dr. Lee has been provided magazines, newspapers, and a radio in his jail cell. Family visits in person remain restricted to one hour per week; however, Dr. Lee may

> speak to family members and his attorneys by telephone more frequently. In July 2000, only one month ago, Dr. Lee finally was permitted to exercise, unshackled, one hour each weekday. Much more recently, Dr. Lee has been, for the first time, allowed to exercise one hour on each weekend day, as well. Despite the amelioration of the severe restrictions that existed as of December 30, 1999, I have been and remain concerned about the slow response of the government to my December 30, 1999 urging, which, in hindsight, probably should have been phrased in more goading language, and about some of the continued demeaning limitations, one of which is having to wear leg chains in the special, secured courthouse rooms while Dr. Lee is in the company of his attorneys. For the peace of mind of the parties, their attorneys, and the judges on the Court of Appeals, I will assure them that my exasperation over this has not influenced my decision to order the release of Dr. Lee, on tight conditions; that decision was based solely on the information provided during the December 1999 hearing, the hearing on August 16, 17, and 18, 2000, and some of the information I have reviewed *in camera* and otherwise since the case was reassigned from Chief Judge Conway to me on June 5, 2000.

However, Dr. Lee has come forward with information that was not known to him at the time of the December hearing and that is material to the release issues. He also submits a new contention that could not have been made in December. First, Dr. Lee has presented testimony from Drs. Agnew, Goad, and Richter that bears on the nature and circumstances of this case, the weight of the evidence, and the nature and seriousness of danger to the community. It appears that Dr. Lee could not have martialed this evidence in the brief time between his indictment on December 10, 1999 and the hearing before me which began on December 27, 1999. Second, Robert Vrooman's declaration, executed the final day of the latest hearing, has a material bearing on Dr. Lee's character and dangerousness. Third, Dr. Lee could not have known in December 1999 of Agent Messemer's incorrect testimony, which was relevant to all the statutory factors, about Dr. Lee downloading a resume and sending letters to foreign nations. Fourth, Dr. Lee was also unaware in December 1999 of the government's alternative theory that Dr. Lee may have merely been seeking to enhance his employment opportunities; this too materially affects the factors to be considered.

B. Pretrial release

As noted in the December 30, 1999, Memorandum Opinion and Order, the statutory scheme of 18 U.S.C. §3142 generally favors pretrial release. See Lee, 79 F. Supp. 2d at 1283. A judge can only order a defendant detained if there is "no condition or combination of conditions [that] will reasonably assure the appearance of the person and the safety of any other person and the community." 18 U.S.C. §3142(e). A finding against pretrial release must be supported by "clear and convincing evidence." 18 U.S.C. §3142(f).

Congress has instructed judicial officers that

> in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, [a judge must] take into account the available information concerning--
>
> (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including--
>
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
>
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law;
>
> and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C §3142(g). I now address each of these §3142(g) factors in the light of all currently available information, including Dr. Lee's new evidence and arguments.[3]

> [3] As noted in the December 30, 1999 Memorandum Opinion and Order, the §3142(g) statutory factors overlap one another. See Lee, 79 F. Supp.2d at 1286. In the interest of brevity, I will discuss each new piece of evidence only in connection with one §3142(g) factor. However, many of the facts influencing my decision support more than the single §3142(g) factor under which they are

individually discussed. Furthermore, I incorporate into this Memorandum Opinion my findings and analyses set forth in the December 30, 1999 Memorandum Opinion and Order to the extent they are not specifically mentioned herein and are not inconsistent with the findings and analyses expressed in the Memorandum Opinion.

1. Nature and circumstances of the charged offense

This first factor which a court must take into account is the "nature and circumstances" of the offenses charged. In my December 1999 opinion, I described the nature of the offenses as "quite serious" and "of grave concern to national security." See Lee, 79 F. Supp. 2d at 1285. I also felt the circumstances under which Dr. Lee acted were "deeply troubling." Id. While the nature of the offenses is still serious and of grave concern, new light has been cast on the circumstances under which Dr. Lee took the information, making them seem somewhat less troubling than they appeared to be in December. It remains undisputed that Dr. Lee's actions were certainly deliberate and not "the result of a simple mistake." Lee, 79 F. Supp. 2d at 1286. However, a distinguished nuclear weapons scientist, Dr. Richter, has offered an opinion, under oath, that calls into question the finding that Dr. Lee's conduct can only be described as "devious." Lee, 79 F. Supp. 2d at 1285. In expressing his personal version of an adage, Dr. Richter cautioned, "Never attribute to malice what can be adequately explained by stupidity." (Tr. Aug. 16, 2000 at 76.) Dr. Richter followed that with this testimony: "I really think it was something pretty dumb to do, and that is my feeling. I have no other explanation for that. There has been a great effort to find an espionage connection and that hasn't been found. And so what is left? Stupidity is the best I can come up with." (Id.)[4]

[4] On the other side of the fence, Dr. Paul Robinson, also a highly regarded physicist, recast Dr. Richter's aphorism as "Never assume malevolence when mere incompetency will suffice." (Tr. Aug. 17, 2000 at 30.) Adhering to his position at the December 1999 hearing, Dr. Robinson on August 17, 2000 explained his starkly conflicting view of Dr. Lee's conduct thusly:

> I have tried to see if I could figure out that this was a stupid act, as it was characterized by Dr. Richter. It is a very carefully planned and calculated act. When you look at the listings that are on the tapes and the enormous care that had to be taken to assemble each of the tapes, it was clear that the aim was to establish a complete portfolio of how to design nuclear weapons and how the U.S. has in fact designed its current weapons. Now, for the life of me, I have not been able to figure out why one would take that time, use all that energy, use these methods to do something that they would take out of the protected storage, the careful custody that all the other workers at Los Alamos and at the laboratories take with such information. I just haven't been able to come up with a single excuse.... I conclude it was a malevolent act, yes, sir.

(Tr. Aug. 17, 2000 at 30-31.)

In addition to the opinion of Dr. Richter on this point, Dr. Lee's attorneys note certain things about the method Dr. Lee used to downpartition and download the files in question. After placing the files on the green, unsecured partition, Dr. Lee apparently gave them rather obvious filenames. (Id. at 176.) For example, Dr. Lee named the file containing the [**words deleted**] (Id. 181-83.) He left this and other indiscreetly named files on the open system until 1999. (Id. at 178.) Then, when Dr. Lee decided to erase the files from the open partition, he did so with the assistance of the LANL computing help desk. (Id. at 178; Reply Ex. F.) At all times, Dr. Lee apparently knew that LANL's automated computer anomaly detection system, "NADER," was in operation. (Tr. Aug. 17, 2000 at 177.) This suggests that Dr. Lee's actions may not have been as surreptitious, clandestine, and secretive as the government originally indicated.

Although Dr. Lee may not have been fully forthcoming as to his intentions when he told Dr. Ling that he intended to download "some files," (Tr. Aug. 17, 2000 at 39), it has become quite clear that Dr. Lee never told Dr. Ling that he intended to download only a "resume" (id. at 41.)

2. Weight of the Evidence

As I stated in the December opinion, the government has never presented direct evidence that Dr. Lee intended to harm the United States or to secure an advantage for a foreign nation, which are elements of the charged offenses. See Lee, 79 F. Supp. 2d at 1286-87. Now, the strong circumstantial evidence of wrongful intent announced by the government in December has been tempered.

Through the declarations of Drs. Agnew and Goad, the attorneys for Dr. Lee have presented evidence that what may be on the seven missing tapes is in large part available in the "open" literature in the public

domain and that many of the individual files Dr. Lee took are unclassified. (See Def's Memo. Exs. A and F; Ex. B at Aug 16-18, 2000 hearing.) This tends to raise some doubt as to the culpable nature of Dr. Lee's intent in gathering the information and the danger its disclosure might pose.

There now also is a question as to whether the missing tapes contain "all the information needed to build a functional thermonuclear weapon." Lee, 79 F. Supp. 2d at 1285. Dr. Robinson emphatically reiterated that they do. (Tr. Aug. 16, 2000 at 124.) Recent testimony from others on this point was generally less clear. However, Dr. Robinson now agrees that building a nuclear bomb is not an easy task, even for one in possession of a bomb blueprint. (Tr. Aug. 17, 2000 at 7.)

Since the hearings in December 1999, the government has imputed to Dr. Lee an alternative motive for his conduct. This is that Dr. Lee took the information to improve his prospects for employment abroad. See Bill of Particulars, filed July 5, 2000. Enhancing one's resume is less sinister than the treacherous motive the government, at least by implication, ascribed to Dr. Lee at the end of last year. Furthermore, contrary to Agent Messemer's December testimony, he now admits there is no evidence that Dr. Lee actually mailed or otherwise sent any letters expressing interest in foreign employment.

Also in the December opinion, I observed that the government had produced "information about various suspicious contacts or meetings between Dr. Lee and nuclear weapons scientists and officials from the People's Republic of China that occurred both within the United States and in China," Lee, 79 F. Supp. 2d at 1287. At the hearing on the present motion there was much discussion about certain contacts that occurred during 1982, 1986, and 1988. The more significant information that is new and most favorable to Dr. Lee on this subject is that Dr. Lee did in fact disclose, in his written post-1988 trip report, contact in the People's Republic of China with Dr. Zheng Shao Tong.[5]

[5] This name has been Romanized in more than one way. (Tr. Aug. 18, 2000 at 170-71.)

(Tr. Aug. 18, 2000 at 180; Ex. L at Aug. 16-18 hearing.) I should also note, however, that Dr. Lee did not specifically report the clandestine circumstances of his meeting in a Beijing hotel room with Dr. Zheng Shao-Tong or the fact that another high-ranking Chinese nuclear scientist was present.

3. History and characteristics of the person

In addition to the evidence detailed above that tends to show circumstantially that Dr. Lee may not have been quite as deceptive as the government originally portrayed him to be, new direct evidence suggests that Dr. Lee is simply "naive." (Declaration of Robert Vrooman, Ex. I at the Aug. 16-18, 2000 hearing.) Mr. Vrooman was at all relevant times the head of counterintelligence at LANL, and, in Mr. Vrooman's opinion, Dr. Lee "did not understand the ruthlessness of intelligence agencies." Id. Because of this perceived naiveté, and not because he believed Dr. Lee was disloyal, Mr. Vrooman recommended in 1999 that Dr. Lee not travel again to the People's Republic of China. See id.

Also, as was true in December 1999, it appears that many family members and friends have attended the hearings to show their support for Dr. Lee. New, however, is a dramatic demonstration of their trust in Dr. Lee by pledging over two million dollars in assets which they are willing to forfeit upon Dr. Lee's non-appearance or violation of any other condition of release. (See Ex. J at Aug. 16-18, 2000 hearing.)

I remain seriously concerned about evidence of several deceptions as to which innocuous explanations have not yet been provided. In the December 30, 1999 Memorandum Opinion and Order, I acknowledged that a defendant in a criminal case faces significant risks in testifying pretrial. Dr. Lee has not testified at any of the three hearings regarding release. It may be that he will take the stand at trial and explain the government's evidence of his deceptive conduct.

The more troublesome incidents began in 1982 when Dr. Lee made an unsolicited telephone call to a scientist in California who, unbeknownst to Dr. Lee, was under investigation by the F.B.I. and whose phone was tapped. When an F.B.I. agent inquired of Dr. Lee about the California scientist, Dr. Lee at first denied knowing the person or talking to him. After being confronted with the recording of his conversation, Dr. Lee recanted. Dr. Lee then agreed to assist the F.B.I. in relation to its investigation of the California scientist. Later, in connection with that, the F.B.I. administered a polygraph exam on Dr. Lee. The F.B.I. interpreted as deceptive Dr. Lee's initial response to a question about improperly passing certain information. Dr. Lee then disclosed that, in violation of rules, he had mailed some unclassified information to a representative of Taiwan at an address in the United States. After making this disclosure, Dr. Lee was questioned again and then passed the polygraph examination.

During a LANL authorized trip to the People's Republic of China in mid-1988 with other LANL representatives, Dr. Lee met alone in a Beijing hotel room with two of the highest ranking PRC nuclear weapons scientists. They asked about classified material. Dr. Lee apparently did not give them classified information. After his return to the United States, Dr. Lee did not disclose on his required LANL trip report the extremely unusual secret meeting with the PRC scientists or that one of them was Hu Side, who at the time was Associate Director of the Chinese Academy of Engineering Physics. It was not until over ten years later, during or after a polygraph examination, that Dr. Lee first described the 1988 Beijing hotel room encounter.

Also, after being informed that he had answered deceptively during a February 1999 F.B.I. polygraph examination, Dr. Lee met with and said to Dr. Richard Krajcik, Deputy Director of LANL's X Division, that he may have "inadvertently" disclosed classified information. Dr. Krajcik testified that he instructed Dr. Lee to report this right away to Ken Schiffer, Director of Internal Security at LANL. Dr. Krajcik further testified that he later learned that although Dr. Lee met with Mr. Schiffer, as Dr. Krajcik had told him to do, Dr. Lee never mentioned the inadvertent disclosure of classified information to Mr. Schiffer. Dr. Lee's attorneys did raise questions about the reliability of this testimony by Dr. Krajcik, but since Dr. Lee has not testified, Dr. Krajcik's testimony has not been directly refuted.

On the other hand, the most startling incident of deception described by the government (the one specifically referenced in the December 30, 1999 Memorandum Opinion and Order, see Lee, 79 F. Supp. 2d at 1286), has now been shown to be groundless. During his recent testimony, Agent Messemer admitted that he incorrectly testified earlier that Dr. Lee had hoodwinked a colleague by saying he wanted to use the colleague's computer to download a "resume."

4. Nature and seriousness of danger to the community

The primary concern about "the danger to any person or the community that would be posed by the person's release," 18 U.S.C. §3142(g)(4), stems from the missing tapes. Dr. Agnew testified that what he understands to be on the missing tapes "would be of very limited use to the People's Republic of China or any other foreign country with a nuclear arsenal." (See Def's Memo. Ex. A.) Dr. Agnew takes this view because of his belief that nations with nuclear weapons already have, and would prefer, their own test and design codes. Dr. Richter, an experienced bomb designer who later worked in the Office of Energy Intelligence, testified that the material on the tapes would not change the global strategic balance of power, (Tr. Aug. 16, 2000 at 6, 8, 84, 92) (see also Def's Reply Ex. D.), but in the wrong hands could shift a regional balance of power. (Tr. Aug. 16, 2000 at 93.) However, Dr. Richter believed that no nation would actually use the information on the tapes to build a bomb, because, at least in part, of the economic and technological hurdles posed in actually building a nuclear weapon. (Id. at 49.) Dr. Goad testified that "[o]nly a group already deeply engaged in the design of nuclear weapons could profit from" the tapes, and then only marginally. (Def's Memo. Ex. D at 4.)

With respect to another aspect of possible danger, Agent Messemer testified in December 1999 that he anticipated "a marked increase in hostile intelligence service activities... in an effort to locate the tapes." (Tr. Dec. 29, 1999 at 68.) Agent Messemer in his recent testimony conceded that concern has not materialized over the last eight months as he had expected it would. (See Tr. Aug. 18, 2000 at 130-31.)

Under the totality of the information that is now before the court, what the government described in December 1999 as the "crown jewels," Lee, 79 F. Supp. 2d at 1281, of the United States nuclear weapons program, no longer is so clearly deserving of that label. (See Def's Memo. Ex. A.) Dr. Goad characterized the "crown jewels" description as a paranoiac "unbridled exaggeration." (Def's Memo. Ex. F.)

In sum, I am at this time confronted with radically divergent opinions expressed by several very distinguished United States nuclear weapons scientists who are on opposite sides of the issue of the importance of the information Dr. Lee took.[6] The net effect is to cast the nature of the danger posed by the information on these tapes in a light different from that in which this case was viewed in December. Because of their basic differing philosophical beliefs, deeply and sincerely held, the respected nuclear weapons scientists have presented what is now a confused picture of the significance of the information Dr. Lee downloaded onto the tapes. It is no longer indisputable, as the government made it appear in December 1999, that the missing tapes contain crown jewel information about the nation's nuclear weapons program.

[6] All of the scientists seemed credible. They simply have honest and powerfully conflicting beliefs.

I turn then to the two possible factual scenarios, involving the missing tapes, that concern the government if Dr. Lee is released. The first assumes Dr. Lee still constructively possesses the missing tapes, has not

made copies, and has not transferred the originals or copies. Under this hypothetical, Dr. Lee's pretrial release might enable him to convey the missing tapes, or cause them to be passed. It now appears that Dr. Lee's continued pretrial detention will not significantly affect this concern. First, while his conditions of confinement have been quite restrictive, they have not been so air-tight as to prevent Dr. Lee from surreptitiously sending a signal which could have resulted in the missing tapes being located and obtained by another. More importantly, given the government's new proposition that Dr. Lee may have been using the tapes to help get a job, it simply does not appear that Dr. Lee will attempt to transfer the tapes on his own or through someone else for that purpose while awaiting trial. Moreover, as earlier noted, Robert Vrooman, who over a long period served as the head of counterintelligence at LANL and knew Dr. Lee well, unequivocally opined, based on his experience with Dr. Lee, that Dr. Lee is not a danger to the United States and will not turn over the tapes, if he has them, to a foreign power. Dr. Lee's attorneys have also recently pointed out that an effort by Dr. Lee to pass classified information could expose him, and possibly his family members if he were to involve them, to the death penalty, which cannot be imposed on the indicted charges. Common sense dictates that Dr. Lee would not assume that risk of an ultimate penalty for himself or his family.

Under the government's second scenario, Dr. Lee's pretrial release will permit him to assist a current, unauthorized possessor of the missing tapes in utilizing the information on them. However, there was new testimony at the hearing on the present motion that at least some of the taped information is of a nature that the tapes in which it is contained would "stand by themselves." (Tr. Aug. 16, 2000 at 141.) If these tapes are already in the possession of another, releasing Dr. Lee until his trial would make little difference as to that secret information, which the possessor can use without Dr. Lee's help. Additionally, I have complete confidence that the various agencies that have thoroughly investigated Dr. Lee's conduct, and that kept him under constant surveillance for months before his indictment and arrest, will satisfactorily monitor Dr. Lee as they will be permitted to do under the conditions of release. Further, the Draconian conditions of release I have ordered [7] will virtually eliminate any risk that Dr. Lee might on his own accord, or even against his will, communicate with supposed possessors of the tapes.

[7] These conditions of release are modeled on proposals discussed during the December 1999 hearing to which Dr. Lee and his attorneys agreed, but which the United States Attorney and his assistants adamantly opposed. In fashioning these final conditions of release Dr. Lee and his attorneys have been extraordinarily accommodating of the government's demands.

III. Conclusion

The evidence which Dr. Lee has presented and the new arguments his attorneys have made lead me to conclude that the government has failed, at this time, to meet its burden of proving by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community and the nation. Hence, as required by the Bail Reform Act of 1984, Dr. Lee must be released from custody under the extreme restrictions imposed in the Order Setting Conditions of Release.

[signed: James A. Parker]
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

[date stamped August 25, 2000]

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR 99-1417 JP

WEN HO LEE,
Defendant.

ORDER

On August 15, 2000 a hearing was held on Defendant's "Motion for Discovery of Materials Related to Selective Prosecution," (Doc. No. 87). George Stamboulidis, Laura Fashing, Michael Liebman, and Paula Burnett represented the government; Mark Holscher and John Cline represented Defendant, who was present. Having carefully reviewed the briefs, the evidence, and the applicable law, I find that *in camera* review of certain evidence that Defendant seeks is appropriate and would be helpful to me before I make a final ruling on the motion.

Defendant seeks six categories of materials, including:

> (1) the reports and memoranda supporting the findings of the DOE's Task Force on Racial Profiling's January 2000 report, (2) the Defensive Information to Counter Espionage videotapes [1] that were created by DOE counterintelligence and show to DOE employees until last year... (3) DOE or DOJ memoranda and reports confirming that the FBI targets Americans of Chinese ethnicity for potential criminal espionage involving the PRC; (4) the DOJ's and DOE's responses to the numerous Congressional inquiries related to the justification for and details of the investigation of Dr. Lee; (5) the classified September 1999 State Department report by Jacqueline Williams-Bridger... and (6) information concerning specific cases in which the government declined to prosecute under circumstances similar to, or more egregious than, this case.
>
> [1] Mr. Holscher represented at the hearing that there is only one videotape.

(Memo. in Supp. at 4) This list is based on a letter from Mr. Holscher to the government dated May 1, 2000. (See id. Ex. A.) The May 1, 2000 letter lists thirty-two somewhat more specific items that Defendant contends would support a claim of selective prosecution. (Id.) The government refuses to disclose the requested materials on the grounds that (1) the decision to prosecute is ill-suited to judicial review, (2) law enforcement would be chilled by subjecting the prosecutor's decisions to outside inquiry; (3) discovery would reveal the government's enforcement policy, (4) discovery would reveal the government's strategy, and (5) discovery would divert prosecutorial resources. (See Resp. at 4, Tr. at 40-43)

The government's first concern is premature given that the only question before the Court at this point is whether discovery is warranted. The same is true for the government's second ground for not disclosing the requested information. There is also no evidence, or reason to believe, that law enforcement would in any way be chilled by an *in camera* review of certain of the materials Defendant requests. Similarly, the government's enforcement policy will not suffer from an *in camera* review of certain materials. Also, an *in camera* review will not reveal to Defendant any of the government's prosecution strategy. Further, it is highly unlikely that the materials ordered produced for *in camera* review will reflect any prosecutorial strategy.

What remains is the government's concern, identified in United States v. Armstrong, 517 U.S. 456, 468 (1996), with expending prosecutorial resources. As the government candidly admitted, it can with little effort procure certain of the items described below. (See Tr. at 42.) Certain other categories of materials will require more work to compile. However, any diversion of prosecutorial resources will be minimal given that (1) much of the information for which some research will be required is in the apparent control

of, and can be gathered by, individuals/agencies other than the U.S. Attorneys prosecuting this case, and (2) monitoring compliance with this order will impose a burden that is so slight as to be quite easily performed by persons within the vast array of prosecutorial resources the government has already deployed in this case.

IT IS THEREFORE ORDERED THAT the government must produce, by September 15, 2000, the following materials for *in camera* review:

(1) The DOE's Task Force on Racial Profiling January 2000 report and any interview memoranda on which it is based, including all memoranda of the site visit to Los Alamos National Laboratory in June 1999;

(2) the entire, unredacted DOE counterintelligence Defensive Information to Counter Espionage videotape;

(3) DOE and DOJ records of statements by Notra Trulock discussing that any investigation should focus on ethnic Chinese;

(4) the list of suspects created by Notra Trulock's team as part of the Kindred Spirit investigation;

(5) the full, classified transcript of any testimony given by the Attorney General and any other DOJ (including FBI) and DOE officials before any congressional committee with respect to Defendant and the investigations in this case;

(6) FBI 302s dated November 29, 1998; January 22, 1999; February 26, 1999; and September 3, 1999 which relate the number of individuals who had access to W-88 information;

(7) the classified September 1999 State Department Report by Jacqueline Williams-Bridger; and

(8) the final reports of all administrative inquiries conducted by DOE of LANL employees regarding improper handling of restricted data from the beginning of 1987 to the present.

[signed: James A. Parker]
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

[order issued August 24, 2000]

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR 99-1417 JP

WEN HO LEE,
Defendant.

ORDER

On July 21, 2000, Defendant filed "Renewed Motion of Dr. Wen Ho Lee For Pretrial Release" (Doc. No. 114). On August 4, 2000, the Government filed a response opposing Defendant's motion. At the request of the attorneys, a hearing was scheduled for one-half day on the morning of Wednesday, August 16, 2000, the earliest date that the lawyers and witnesses were available and there was an open morning on the court calendar. The parties took considerably longer than anticipated to present their information to the Court and the hearing lasted three full days, Wednesday, August 16 through Friday, August 18, 2000. This has delayed completion of the transcript of the hearing which must be prepared under secured conditions at the United States Courthouse on weekends and evenings. Likewise, I must read the transcript of the hearing only in secured conditions at the United States Courthouse. Consequently, it has not been possible to prepare a Memorandum Opinion, which must be filed with the filing of an Order Setting Conditions of Release. However, enough of the transcript of the most recent hearing has been prepared and reviewed by me to permit the announcement of a ruling at this time, prior to completion and the filing of a Memorandum Opinion and final form of Order Setting Conditions of Release.

I have concluded that the totality of relevant information made available to me at the three-day hearing during December, 1999, and subsequently in documents relating to the case that I have reviewed *in camera* and otherwise, and at the three-day hearing of August 16-18, 2000, no longer has the requisite clarity and persuasive character necessary to overcome the statutory bias that distinctly favors pretrial release on conditions. I conclude that there now is a combination of conditions that will reasonably assure the appearance of Dr. Lee as required and the safety of the community and the nation.

Highly restrictive conditions of release, like those set forth in the attached draft of an Order Setting Conditions of Release, will satisfy the statutory requirement. A hearing will be scheduled on August 29, 2000 at which the parties may discuss the conditions of release proposed in the draft Order Setting Conditions of Release and at which they may suggest alternative or additional conditions.

IT IS ORDERED THAT:

1. The "Renewed Motion of Dr. Wen Ho Lee for Pretrial Release" (Doc. No. 114) is granted;

2. A hearing on conditions of release is scheduled at 9:30 a.m. on Tuesday, August 29, 2000.

[signed: James A. Parker]
UNITED STATES DISTRICT JUDGE

DRAFT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. No. CR 99-1417 JP

WEN HO LEE,
Defendant.

ORDER SETTING CONDITIONS OF RELEASE

On August 24, 2000, the Court entered an Order that granted the Renewed Motion of Dr. Wen Ho Lee for Pretrial Release and scheduled a hearing on conditions of release. On August 29, 2000, the Court held a hearing on conditions of release.

The Court finds that the following conditions of release should be imposed:

1. Don and Jean Marshall, whose residence is next door to that of Dr. Lee in White Rock, New Mexico, must serve as third-party custodians of Dr. Lee during pretrial release. Either or both of them may enter Dr. Lee's residence to perform their responsibilities as custodians.

2. Dr. Lee must be in home detention at his residence, 80 Barcelona Avenue, White Rock, New Mexico at all times, with electronic monitoring by United States Pretrial Services, with the following exceptions:

(a) Dr. Lee may leave his home in the company of at least one of his attorneys to travel to the United States Courthouse or to Los Alamos National Laboratories to work on the preparation of Dr. Lee's defense in designated secured areas at those places. Before leaving his home in the company of an attorney and upon returning to his home in the company of an attorney, Dr. Lee must notify Pretrial Services of his departure and return. At all times while away from his residence under this exception, Dr. Lee must be in the company of at least one of his attorneys.

(b) Dr. Lee may be taken by one or both of the third-party custodians to a medical facility in Los Alamos, New Mexico for emergency medical treatment, should that become necessary.

3. Only Dr. Lee's wife, Sylvia Lee, may reside with Dr. Lee at his residence, 80 Barcelona Avenue, White Rock, New Mexico.

4. Dr. Lee's children may visit their parents at the residence, 80 Barcelona Avenue, White Rock, New Mexico, during daytime, but only after the visits are prearranged with Pretrial Services and federal law enforcement agencies, who may have a representative present during the visits.

5. Mrs. Sylvia Lee may leave the residence at 80 Barcelona Avenue, White Rock, New Mexico only after notifying United States Pretrial Services and designated federal law enforcement agencies advising them of the time of departure and anticipated time of return, destination, and purpose of her trip. A representative of the law enforcement agencies may search Mrs. Lee upon her departure and return.

6. Prior to Dr. Lee being released to his residence, federal law enforcement agencies may thoroughly search the premises at 80 Barcelona Avenue, White Rock, New Mexico.

7. Computers, cellular telephones, and all other electronic means of communication, with the sole exception of a single telephone which can be used for electronic monitoring, must be removed from the residence before Dr. Lee is released to reside there and those items must be kept out of the residence.

8. Telephone calls initiated from the sole telephone that will be permitted at 80 Barcelona Avenue, White Rock, New Mexico will be restricted to calls to United States Pretrial Services, to attorneys for Dr. Lee, or to report an emergency.

9. Dr. Lee in the presence of one of the third-party custodians must report daily by telephone to the United States Pretrial Services Office between 8:00 and 9:00 a.m. and 7:00 and 8:00 p.m.

10. Federal law enforcement agencies may, if they choose, monitor twenty-four hours a day the telephone communications over the single telephone that will be permitted in the residence at 80 Barcelona Avenue, White Rock, New Mexico, and may immediately electronically block any

communications that appear to involve the missing information that Dr. Lee downloaded onto tapes or other sensitive scientific information.

11. All mail received at 80 Barcelona Avenue, White Rock, New Mexico, and all mail sent by Dr. Lee or Mrs. Sylvia Lee may be inspected by federal law enforcement agencies.

12. Dr. Lee may be released to his residence at 80 Barcelona Avenue, White Rock, New Mexico only after posting a bond in the amount of One Million Dollars ($1,000,000.00) secured by the assets of Dr. and Sylvia Lee, Don and Jean Marshall, and Lucky and Patty Lee pledged as shown on Exhibit J to the August 16-18, 2000 hearing. The owners of the property given as security for the bond must agree, in writing, to forfeiture of the property if Dr. Lee fails to appear at any court proceeding, as required, or violates any other condition of his release.

_____
UNITED STATES DISTRICT JUDGE

DRAFT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417

WEN HO LEE,
Defendant.

DECLARATION OF HAROLD AGNEW

I, Harold M. Agnew, do hereby state:

1. I have spoken with lawyers for Dr. Lee, who tell me that Dr. Paul Robinson testified today, in substance, (1) that he told me when he called that he intended to repeat my comments in court; (2) that I told him that I had no idea what was on the tapes; (3) that I had a narrow view of the global strategic balance based on the notion that no matter what other countries developed in the way of nuclear weapons, the global balance would not be altered; (4) that, because I left LANL in 1979, I am not familiar with the two-dimensionsl codes in use during the 1993 through 1997 period, and (5) that Dr. Robinson implied that I had backed away from my earlier conclusions.

2. What Paul said is a bunch of bull. First, although it doesn't matter to me, he didn't tell me he was calling for the purpose of repeating what I said in court. He told me that he wanted to "understand my position" and that he had some lawyers on the phone with him. Second, I assumed when I signed the declaration that the codes in question were our U.S. nuclear weapon design codes. I told Paul that I don't know which specific codes are at issue, but I am fully aware that Paul and others believe that the tapes contain our principal two-dimensional design codes. Third, I do not take the narrow view of the global strategic balance that Dr. Robinson attributed to me, although I do believe that the U.S. nuclear superiority is one of the factors to be considered regarding the balance. Fourth, while I was at LANL, I along with many other scientists oversaw the basis for the design of the W-88. I had extensive experience with two dimensional codes and remain familiar with their uses and characteristics. Since I left LANL I have remained involved in the field, and my work has included advising the United States Congress and was a member of President Reagan's and Bush's scientific advisory panel.

3. Finally, I have not backed away from the conclusions stated in my May 27, 2000 declaration. I re-signed my original declaration with my opinions under penalty of perjury, and the declaration I signed contained my views.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2000.

[signed]
Harold M. Agnew

DECLARATION OF CHARLES E. WASHINGTON

I, Charles E. Washington, do hereby declare and state:

1. I am the former Acting Director of Counterintelligence at the U.S. Department of Energy. I have worked at the Department of Energy since 1991. Before becoming the Acting Director of Counterintelligence, I also held the positions of counterintelligence analyst, program manager and division director. I received the highest annual evaluation of "outstanding performance" as acting director and for every year preceding that since 1992. While I was acting director, I worked directly with Mr. Notra Trulock.

2. Before joining the Department of Energy, my work experience included the following: I am an honorably discharged and decorated, Viet Nam era veteran, and I was a federal criminal investigator for the Air Force Office of Special Investigations (OSI) from 1978- 1991. While employed at the OSI, I investigated a variety of criminal activity, and specialized in counterintelligence. From 1984-1990, I worked counterintelligence exclusively, serving as an analyst, branch chief, and division chief for the OSI regional headquarters in Ankara, Turkey. As the OSI Regional Counterintelligence Division Director, I was employed at the regional headquarters in Ankara, Turkey, and I had counterintelligence responsibility for more than 20 Army and Air Force installations in Turkey alone, and for 22 on-call countries in the Middle East and Africa.

3. I have read the Washington Post article of August 24, 1999, which was submitted by Dr. Wen Ho Lee's counsel in this case. The statements attributed to me are accurate, except that my problems with Mr. Trulock were exacerbated by the Administrative Inquiry, and not due exclusively to it.

4. I have read Mr. Bob Vrooman's declaration, including the portions of his declaration regarding statements and actions of Mr. Notra Trulock. As Acting Director of Counterintelligence, I worked directly with Mr. Trulock. While I was Acting Director, I read the Administrative Inquiry that was prepared concerning Dr. Lee. I also participated in discussions regarding the defects and inadequacies of the Administrative Inquiry. Based on my experience and my personal knowledge, I believe that Mr. Trulock improperly targeted Dr. Lee due to Dr. Lee's race and national origin.

5. My reaction upon reading the Administrative Inquiry was that the inquiry was wholly lacking in any support to identify Dr. Lee as a suspect. Upon reading the AI, I also concluded that the investigation was a fishing expedition. As stated in the Washington Post article, I wrote to Mr. Trulock, and I also talked with him. I recommended among other things, that the AI be closed due to a complete lack of evidence.

6. Based upon my personal experience with Mr. Trulock, I strongly believe that he acts vindictively and opportunistically; that he improperly uses security issues to punish and discredit others, and that he has racist views towards minority groups. I am a black man of African-American origin, and I personally experienced his misconduct, and I know of other minorities who were victimized by Mr. Trulock. At one point I was forced to call outside police officers due to Mr. Trulock's abusive behavior, and I brought a lawsuit against the Department of Energy based on that incident, as well as other improper conduct by Mr. Trulock. That case was settled favorably to me by the Department of Energy this year with a pay raise, a cash award, restoration of leave, and other incentives.

7. I have been informed of the section of FBI Special Agent Messemer's declaration which states that a "completely new" investigation was initiated against Dr. Lee in March, 1999, after certain files were found on the open computer and certain documents in his office were found to not have appropriate markings. While I do not know the specifics of these alleged infractions, based upon my experience at the Department of Energy, I know that there were instances where DOE employees compromised classified or other sensitive information, where computers were improperly used, and where files were inappropriately marked, but criminal investigations were not opened.

8. Based upon my experience in counterintelligence and my personal experience with the AI and Notra Trulock, I have concluded that if Dr. Lee had not been initially targeted based on his race (Taiwanese-Chinese), with the resulting wide press disclosures that he had purportedly [words deleted] and the politicizing of the situation, he may very well have been treated administratively like others who had allegedly mishandled classified information.

9. In the counterintelligence training I have received and in my counterintelligence experience, I am unaware of any empirical data that would support a claim that Chinese- Americans are more likely to commit espionage than other Americans. Further, I know of no analysis whatsoever that has been done as to whether American citizens born in Taiwan would be more likely to commit espionage for the People's Republic of China.

10. I am aware of Department of Energy employees who were not imprisoned or prosecuted for committing offenses that are much more serious than the "security infractions" alleged to have been committed by Dr. Lee. I am personally aware of a DOE employee who committed a most egregious case of espionage that cost our nation billions of dollars and drastically impacted our national defense. That DOE employee was not prosecuted.

11. I was informed of the government's claim that no other individuals have committed similar offenses to Dr. Lee and avoided prosecution. Although I do not currently have access to Department of Energy and FBI files regarding investigations of other DOE employees, I am certain that DOE files contain information that would prove that this claim is false. There is a big difference between a security infraction and espionage; security infractions are less serious. Security infractions within DOE are not unusual, and as long as one is in good favor, security infractions generally do not result in harsh discipline, much less criminal prosecution and pre-trial confinement. Many security infractions involving classified information simply result in a form being completed that indicates the violator was verbally counseled, even though these counselings frequently did not occur. I do not believe that prior to the AI involving Dr. Lee, that other DOE employees who were in good favor underwent this type of extreme scrutiny and criminal prosecution, when they committed security infractions.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on August 11, 2000 in Greenbelt Maryland.

[signed]
Charles Washington

DECLARATION OF ROBERT VROOMAN

I, Robert Vrooman, do hereby declare and state:

1. I have reviewed the government's response to Wen Ho Lee's Motion for Discovery of Materials Related to Selective Prosecution, including the attached Declaration of Special Agent Robert Messemer. As set out below, Agent Messemer's declaration contains numerous false statements. Based on my experiences with Agent Messemer and the information I have received from other FBI agents, I believe that he regularly distorts information.

2. I did not tell Agent Messemer that Lee probably assisted the Chinese by helping fix Chinese hydrocodes during his travel in 1986 and 1988. His allegation that I did so is false. Our April 28, 1999 meeting focused on [approx. one line deleted] and Agent Messemer's theory that there was something inappropriate going on [words deleted]. I attended that interview solely as a favor to John Browne, the director of Los Alamos National Laboratory. When it was over, I told Browne that I considered the interview strange, because it had nothing to do with the Lee case. I later learned from officials at the CIA that Agent Messemer was falsely informing CIA officials that I had been critical [word(s) deleted]. At the time, Agent Messemer was attempting to shift blame to the CIA for possible fallout [words deleted]. I sought to obtain a copy of Agent Messemer's memoranda of my interview and to have it corrected. See Attachment one. The FBI refused to provide me a copy of this memorandum, which I expect contains false information.

3. Agent Messemer's statement that the individuals selected for investigation were chosen because they fit a "matrix" based on access to W-88 information and travel to the PRC is false. Dozens of individuals who share those characteristics were not chosen for investigation. As I explained in my prior declaration, it is my firm belief that the actual reason Dr. Lee was selected for investigation was because he made a call to another person who was under investigation in spite of the fact that he assisted the FBI in this case. It is my opinion that the failure to look at the rest of the population is because Lee is ethnic Chinese.

4. Mr. Moore's contention that the Chinese target ethnically Chinese individuals to the exclusion of others, therefore making it rational to focus investigations on such individuals was not borne out by our experience at Los Alamos, which was the critical context for this investigation. It was our experience that Chinese intelligence officials contacted everyone from the laboratories with a nuclear weapons background who visited China for information, regardless of their ethnicity. I am unaware of any empirical data that would support any inference that an American citizen born in Taiwan would be more likely than any other American citizen [deletion].

5. Of the twelve people ultimately chosen for the short list on which the investigation focused, some had no access at all to W-88 information, and one did not have a security clearance, but this individual is ethnically Chinese. I do not believe this was a coincidence. Further, this ethnically Chinese individual did not fall within the "matrix" which Agent Messemer claims was used by the DOE and FBI. In addition, although there were other names on the AI list, Mr. Trulock made clear that Dr. Lee was his primary suspect.

6. Agent Messemer deliberately mischaracterizes the nature of my comments to him regarding my concerns about Dr. Lee's travel to the PRC. I did consider it unusual that Dr. Lee had not reported any contact by Chinese agents when I debriefed him following his return from the PRC. I did not believe then and I do not believe now that Dr. Lee engaged in espionage, and I made no such intimation to Agent Messemer. Dr. Lee and his wife Sylvia were both cooperating with FBI investigations, and I considered them loyal Americans. Nonetheless, I considered Dr. Lee naive, and therefore a potential security risk. It was to keep Dr. Lee out of harm's way, not because I had any fear that he might knowingly engage in improper conduct, that I recommended against further unescorted trips out of the country for Dr. Lee.

7. My concerns about the real motivation behind the investigation were exacerbated when I received a classified intelligence briefing from Dr. Thomas Cook, an intelligence analyst at LANL, in September 1999. This briefing put to rest any concerns that I may have had that Dr. Lee helped the Chinese in any substantial manner.

8. In my capacity as a counterintelligence investigator at LANL, I was briefed on the existence of an investigation code-named "Buffalo Slaughter" some time in the late 1980s involving a non-Chinese individual working at a DOE laboratory who transferred classified information to a foreign country. That

individual was granted full immunity in return for agreeing to a full debriefing on the information that he passed. [Approx. six lines deleted].

9. The statements contained in my Declaration dated June 22, 2000 are true and correct and I so attest.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed on August 10, 2000, at Gallatin Gateway, Montana.

[signed]
Robert Vrooman

[Attachment one]

September 17, 1999
Robert S. Vrooman
P.O. Box 348
Gallatin Gateway, MT 59730

David V. Kitchen
Special Agent in Charge
FBI 415 Silver SW
Albuquerque, NM 87102

Dear Mr. Kitchen:

I would like to have a copy of the 302 prepared by SA Robert Messemer as a result of his interview with me on April 28, 1999. Several members of the CIA's IG office have read me portions [of] Messemer's report, and it is clear to me that SA Messemer attributed his opinions to me. During the interview, I told SA Messemer that I did not know [deletion] well enough to have an opinion [deletion]. He then provided me with the details and asked me to speculate on the implications. I find this interview technique objectionable.

On the other hand, SA Messemer did provide me with a lot of details regarding Dr. Lee that I did not know. This helped to solidify my opinions on the case and to have the confidence to go public. I learned during the meeting with SA Messemer that Dr. Lee [Approx. one line deleted]. SA Messemer was particularly helpful to us when he provided us a copy of Mr. Bruno's April 15, 1997 memorandum to Notra Trulock thus allowing us to defend our decision to keep Dr. Lee in his job. For this I am grateful to SA Messemer, but I still object to his using me to promote his opinions.

I am planning to write a book on my experiences and would like to have the 302 as soon as possible.

Sincerely yours,

[signed]
Robert S. Vrooman

FAS Note: To fully understand the Court's determinations presented below, it is helpful to refer to the Defendant's April 24 Memorandum concerning information requested under the Classified Information Procedures Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[order issued August 1, 2000]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

**COURT DETERMINATIONS AND ORDER ON
FIRST NOTICE OF DR. WEN HO LEE UNDER SECTION 5
OF THE CLASSIFIED INFORMATION PROCEDURES ACT**

The First Notice of Dr. Wen Ho Lee Under Section 5 of the Classified Information Procedures Act (CIPA) was filed on April 24, 2000 (Doc. No. 56). On July 12, 2000, the Court held a closed hearing on this First §5 Notice in accordance with §6(a) of CIPA. At that time, the Court ordered the Government to file and serve a written statement as to which information identified in Defendant's CIPA §5 Notice the Government agrees meets the use, relevance and admissibihty standard of CIPA §6(a). The Defendant was allowed to file and serve a written response to the Government's statement, if the Government took the position that some of the information identified by the Defendant does not meet the use, relevance and admissibility standard of CIPA §6(a). In fact, the Government fied on July 21, 2000 its Supplemental Filing Concerning Use, Relevance and Admissibility of Classified Information Covered by Defendant's First Notice Under Section 5 of the Classified Information Procedures Act (Doc. No. 116) and the Defendant filed his Response of Dr. Wen Ho Lee to Government's Supplemental Filing Concerning Use, Relevance, and Admissibility of the Information Covered by the First CIPA §5 Notice (Doc. No. 117) on July 25, 2000.

In his First CIPA §5 Notice, the Defendant argues that he is entitled to the disclosure of classified information found in Files 1 through 19 and Tape N because of its relevance to his defense.

The Court hereby makes the following use, relevance and admissibility determinations with respect to the Defendant's First CIPA §5 Notice as required by §6(a) of CIPA. [1]

[1] The Court notes that the Defendant's response was limited to the question of relevance based on the Defendant's observation that "the prosecution does not appear to dispute either the ‘use' or the ‘admissibility' of the information...." Defendant's Response, filed July 25, 2000, n.1. These Determinations address only the relevance issues presented in the Defendant's First CIPA §5 Notice. Issues regarding admissibility, including cumulative evidence and Fed.R.Evid. 403 questions, may still arise and, if they do, will be addressed in a later order. Moreover, the Court hopes that the parties will engage in pretrial discovery methods and procedures recently recommended by the Court in order to limit and manage the volume of evidence which could be produced in a case like this.

A. Prior Publications-Public Domain Material

1. The parties agree that prior publications are relevant to the issue of Defendant's intent as follows:

a. For Files 2, 3, 5, 6, 7, 8, 9, 11, 13, 14, 15, 16, and 17 and Tape N, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before December 10, 1999.

b. For Files 4, 12, 18 and 19, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before March 31,1999.

c. For File 1, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before the date certain referenced in the Indictment.

d. For File 10, all information in the public domain or approved for release into the public domain of which the Defendant had knowledge on or before the date certain referenced in the Indictment.

2. The parties agree that prior publications are also relevant to the "national defense" element of the offenses charged in Counts 40 through 59 of the Indictment as violations of the Espionage Act (18 U.S.C. §§793(c) and (e)) subject to the above time limitations and only if the publication bears the imprimatur of the United States government or the national laboratories.

3. The Court finds that prior publications, subject to the above time limitations, are necessary for the Defendant to be able to cross-examine witnesses or rebut testimony regarding the "restricted data" element of the Atomic Energy Act (42 U.S.C. §§2275 and 2276). These prior publications are also relevant to the Defendant's intent regarding "restricted data." In addition, the Court finds that prior publications made at any time may be relevant evidence for use in the Defendant's cross-examination of witnesses or in the Defendant's rebuttal of Government witnesses' testimony concerning the alleged sensitivity of Files 1 through 19 and Tape N.

B. Flaws In the Codes

Although the parties dispute the existence or magnitude of any "flaws" or imperfections in the various codes at issue, the Court nonetheless finds that evidence of those alleged flaws or imperfections is relevant to the Defendant's intent to secure an advantage to a foreign nation or to injure the United States. Evidence of these alleged flaws and imperfections is also relevant for use in the Defendant's cross-examination of witnesses and in the Defendant's rebuttal of Government witnesses' testimony on the issue of the sensitive nature of these codes.

C. [sic]

D. User Manuals and Material Identification of Documents

The parties appear to agree that the user manuals (with the exception of the user manuals pertaining to Codes B and I) and material identification documents are relevant to the Defendant's intent and to the cross-examination of witnesses who will testify about the alleged "readability" of the files as well as to rebut the Government's evidence that may be presented on the issue of "readability."

E. Comparison of Input Decks and Nuclear Weapons Blueprints

The Court finds that evidence making a comparison of the input decks of Files 1 through 19 and Tape N to a nuclear weapons blueprint is relevant to the Defendant's intent. In addition, this evidentiary comparison is relevant to the cross-examination of witnesses and to the Defendant's rebuttal of Government witnesses' testimony on the Government's assertion that the input decks constitute an electronic blueprint of a nuclear weapon.

F. Nevada Test Site Data/Benchmarking

The Court finds that the information on Nevada test site data is relevant to the Defendant's intent in that he asserts the Nevada test site information found in the codes is widely published with sufficient accuracy to design thermonuclear weapons. This information is likewise relevant evidence to be used in the cross-examination of witnesses who will testify as to the significance of that information and to the Defendant's rebuttal of the Government's evidence on that issue. The parties agree that the benchmarking process is evidence relevant to the Defendant's defense.

G. Work Related Information

The parties agree that Files 1 through 19 and Tape N are relevant to the issue of whether the information contained in them relates to the Defendant's official duties at LANL, the Defendant's intent, the cross-examination of witnesses, and the Defendant's rebuttal of Government witnesses' testimony regarding whether those files related to the Defendant's work.

Having made these CIPA §6(a) determinations,

IT IS ORDERED that:

1. The Government must file and serve a motion for substitution and its proposed substitutions in accordance with CIPA §6(c)(1) by August 14, 2000;

2. The Defendant may file and serve a response to the Government's proposed substitutions by August 21, 2000; and

3. If the parties do not agree to the Government's proposed substitutions, the Court will hold a hearing on the Government's motion on August 31, 2000 at 9:00 a.m. in the Rio Grande Courtroom on the third floor at the United States Courthouse in Albuquerque, New Mexico.

[signed: James A. Parker]
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

April 24, 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JC

WEN HO LEE,
Defendant.

MEMORANDUM CONCERNING THE USE, RELEVANCE, AND ADMISSIBILITY OF THE INFORMATION LISTED IN DR. WEN HO LEE'S FIRST NOTICE UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

Dr. Wen Ho Lee submits this memorandum to outline in general, unclassified terms the significance to his defense of the information set forth in his first CIPA § 5 Notice. That information consists of the contents of Files 1 through 19 and Tape N. At a CIPA § 6 hearing, we will present a more detailed explanation of the "use, relevance, [and] admissibility" of the information at issue. CIPA § 6(a).

I. THE RELEVANT LEGAL FRAMEWORK.

The legal framework involves two key points. First, as this Court has already recognized, "[w]hen determining the use, relevance and admissibility of the proposed evidence, the court may not take into account that the evidence is classified; relevance of classified information in a given case is governed solely by the standards set forth in the Federal Rules of Evidence." Order of March 29, 2000, at 2 n.2 (citing United States V. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994)); see, e.g., United States v. Ivy, 1993 U.S. Dist. LEXIS 13572, *4 (E.D. Pa. Aug. 13, 1993) (same); United States v. North, 698 F. Supp. 316, 318 (D.D.C.1988) (same).

Second, the statutes under which Dr. Lee has been charged--42 U.S.C. §§ 2275 and 2276 and 18 U.S.C. §§ 793(c) and(e)--have stringent intent elements. Sections 2275 and 2276 require proof of an "intent to injure the United States" or to "secure an advantage to any foreign nation." 42 U.S.C. §§ 2275,2276. Sections 793(e) and (c) require proof that the defendant acted "willfully." 18 U.S.C. § 793(e).[1] An act is done "willfully" for purposes of these statutes "if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law." United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988). These broad standards are significant because much of the evidence that Dr. Lee seeks to introduce bears directly on the intent with which he acted. As the Tenth Circuit has observed, "[T]he accused as part of his defense is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent." United States v. Brown, 411 F.2d 1134, 1137 (10th Cir. 1969).

[1] Section 793(c) punishes certain conduct concerning materials "connected with the national defense," where the defendant "know[s] or ha[s] reason to believe, at the time he receives or obtains or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter." 18 U.S.C. § 793(c) (emphasis added). The § 793(c) counts here--Counts 40-49--allege that Dr. Lee knew or had reason to believe that the materials at issue (tapes containing certain computer files) would be retained in violation of § 793(e). Thus, those counts appear to incorporate the "willfulness" element of § 793(e).

II. IT IS CRITICAL TO DR. LEE'S DEFENSE THAT HE PRESENT EVIDENCE CONCERNING THE CONTENTS OF FILES I THROUGH 19 AND TAPE N.

The contents of Files 1 through 19 and Tape N are critical to Dr. Lee's defense--and particularly to the intent with which he acted--for several reasons.

First, Dr. Lee intends to demonstrate that, at relevant times, virtually all of the information at issue was either available in the open literature or could be readily derived from the open literature. He also intends to prove that any isolated bits of information that could not have been found in or derived from the open literature would have had minimal significance for a foreign nation or potential proliferant. This evidence--which will be elicited on cross-examination and in the defense case-in-chief--will rebut prosecution claims that the information amounts to the extraordinarily sensitive "crown jewels" of this country's nuclear design capability and impeach prosecution witnesses who provide such testimony.[2] It will also tend to negate any inference of criminal intent that might be drawn from the assertedly secret nature of the information. See, e.g., Gorin v. United States, 312 U.S. 19, 28 (1941) ("Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government."); United States v. Enger, 472 F. Supp. 490,508 (D.N.J. 1978) (same).

[2] See, e.g., T. 12/13/99 at 38 (files capable of altering the"global strategic balance") (prosecution witness Dr. Stephen Younger); T. 12/27/99 at 179 (information in files constitutes "crown jewels") (Dr. Richard Krajcik); id. at 186 (same); T. 12/28/99 at 213 ("very, very sensitive information") (Krajcik);T. 12/28/99 at 367 (information at issue poses a "truly . . .devastating" risk to national security) (prosecution witness Dr. Paul Robinson); id. at 369 (tapes "could truly change the world's strategic balance").

Second, evidence of prior, open publication of virtually all of the information contained in the files at issue will tend to negate any prosecution claim that the information relates to the "national defense," an element of the offenses charged under 793(c) and (e). See, e.g., Morison, 844 F.2d at 1071-72 (to establish that items relate to the national defense, the government must prove (among other things) that they "have not been made public and are not available to the general public"); United States v. Truong, 629 F.2d 908, 918 n.9 (4th Cir. 1980) (same).

Third, Dr. Lee intends to demonstrate that some of the files contain flaws that would tend to reduce their usefulness. This evidence will rebut the prosecution's "crown jewels" claim and impeach any prosecution witness who offers such testimony. The evidence also will serve to negate any inference of criminal intent that might be drawn from the asserted value of the files to a foreign nation or potential proliferant.

Fourth, Dr. Lee intends to demonstrate that the allegedly sensitive contents of the files at issue cannot be readily interpreted or understood without the proper user manuals or similar documents. No user manuals are included in Files 1 through 19 and Tape N. This evidence will rebut the prosecution's claim that the files written in high level computer language can be read "like a book" and impeach prosecution witnesses who provide such testimony. T. 12/13/99 at 69 (Dr. Stephen Younger); see, e.g., T. 12/27/99 at 181 (Dr. Richard Krajcik testifies that the codes written in high level language are "readable" to a physicist trained in computer language); T. 12/28/99 at 218-19 (Krajcik testifies that a physicist from another country could understand the files as they were allegedly downloaded). And the evidence will tend to negate any inference of criminal intent that might be drawn from the asserted "readability" of the files.

Fifth, Dr. Lee intends to demonstrate that the input decks contained in Files 1 through 19 and Tape N omit many details essential to the design and manufacture of nuclear weapons. Dr. Lee will show that weapons blueprints contain far more critical details than the input decks; that the blueprints are maintained in the X Division weapons vault and in an on-line vault accessible to X Division scientists; and that Dr. Lee never copied or removed any blueprints from these vaults. This evidence will tend to rebut anticipated prosecution testimony that the input decks amount to an "electronic blueprint' and impeach prosecution witnesses who provide such testimony. E.g., T. 12/27/99 at 189 (Krajcik). The evidence also will tend to rebut any inference of criminal intent that might be drawn from the assertedly detailed nature of the input decks.

Sixth, Dr. Lee intends to demonstrate that all of the information in Files 1 through 19 and Tape N relates directly to his work at LANL. This evidence will establish that Dr. Lee's access to the downloaded material was "necessary to the performance of his official duties," thus negating the element under §§ 793(c)and (e) that his "possession of, access to, or control over" the material was "unauthorized." Truong, 629 F.2d at 919 n.10. The evidence also will rebut anticipated prosecution testimony (1) that certain portions of the files did not relate directly to Dr. Lee's work, see, e.g., T. 12/27/99 at 198 (Krajcik testifies that some of the downloaded material "didn't seem to fit" with Dr. Lee's area of expertise); id. at 201 (Krajcik characterizes downloaded files as "chilling" because the information "was not germane to [Dr. Lee's] particular specialty"), and (2) that he had no need to work with the codes in their entirety, see, e.g., T. 12/28/99 at 196-98 (Krajcik finds it "highly unusual" for Dr. Lee to work with the codes in their entirety). And the

evidence will tend to negate any inference of criminal intent that might be drawn from the asserted lack of connection between the information at issue and Dr. Lee's duties at LANL.

Several of the grounds set forth above for admitting the contents of Files 1 through 19 and Tape N rest upon sharply divergent claims concerning the significance and sensitivity of the information at issue. It is particularly important that Dr. Lee be given latitude to contest this critical point in light of the apparently undisputed fact that the files at issue were protected at the "Protect as Restricted Data" (PARD) level at the time of the events at issue, rather than classified at the higher "Secret Restricted Data" (SRD) or "Confidential Restricted Data" (CRD) levels as alleged in the indictment. The DOE glossary defines PARD as "[a] handling method for computer-generated numerical data or related information, which is not readily recognized as classified or unclassified because of the high volume of output and low density of potentially classified data." U.S. Department of Energy, Office of Security Affairs, Office of Safeguards and Security, Safeguards and Security--Glossary of Terms at 111 (Dec. 18, 1995) (emphasis added) (relevant pages attached as Exhibit 1). A note adds that "[t]his information is designated as Protect As Restricted Data because it has not had a classification review and must be protected under a different set of security rules." Id. (emphasis added). A LANL publication declares that "[t]he hierarchical security classification labels on the worker machines at LANL are: Secret > Confidential > PARD > Unclassified." Computing at LANL at 3 (June 3, 1996) (attached as Exhibit 2). The document notes that on the LANL secure partition, SRD is assigned the numerical value 9; CRD the value 6; PARD the value 5; and unclassified the value 3. See id.

The fact that the information at issue was considered PARD--and thus, by definition, "not readily recognized as classified or unclassified" and containing "a low density of potentially classified data"--at all times during the relevant period casts significant doubt on the government's "crown jewels" claim. That claim appears to rest at least in part on the SRD and CRD classification levels assigned to the files after Dr. Lee's firing. But at the time of the events at issue--and, indeed, at all times before LANL fired Dr. Lee--the files were protected at the PARD level, which falls below both SRD and CRD in the LANL security hierarchy. Although the prosecution undoubtedly will present government officials at trial to claim that the information is more sensitive than the PARD category suggests, Dr. Lee should be permitted to test that claim through vigorous cross-examination and the presentation of contrary evidence, including evidence drawn from the contents of the computer files themselves.

This point may be illustrated by a simple example. Suppose this were a case about alleged mishandling of the contents of a box. The prosecution claimed that the box contained a chunk of gold that had to be handled with extreme care. The defense contended that the box contained a chunk of lead that did not require such careful handling. To permit the jury to decide what the box contained--and thus the degree of care necessary in its handling--the defendant could insist, as a matter of constitutional right, on opening the box and showing the jury the contents. And to the extent prosecution witnesses testified about the nature of the chunk--its color, weight, and molecular properties, for example--the defense would have the right to cross-examine by showing the witnesses the chunk and pointing out aspects of it that contradicted their testimony.

Files 1 through 19 and Tape N are the box in this case. The contents of the box are the codes, data files, and input decks that the files contain. The government claims that the codes and other files are pure gold--indeed, the "crown jewels," capable of changing the "global strategic balance"--and thus should have been handled with extraordinary care. It will ask the jury to infer that Dr. Lee acted with criminal intent in light of his alleged mishandling of such assertedly sensitive files. The defense, on the other hand, will demonstrate that the files are mere lead; that Dr. Lee protected them adequately in light of their limited significance; and that no inference of criminal intent can be drawn from Dr. Lee's conduct. Dr. Lee will establish that the information the files contain can, with few (if any) exceptions, be found in or derived from the open literature. He will show that the files are difficult to interpret without user manuals and similar documents, none of which were copied. He will prove that some of the files contain flaws that would tend to diminish their usefulness. And he will make the other points set out above.

The jury must decide whether Files 1 through 19 and Tape N contain gold, as the prosecution claims, or lead, as the defense contends. To demonstrate his innocence, Dr. Lee must be permitted to open the box--the files--and show the jury the contents. He cannot be required to take the word of the prosecution witnesses that the box contains gold or to content himself with vague generalities about what the box holds. "Although CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim of innocence." United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990). Dr. Lee's "presentation of his claim of innocence" requires that he introduce evidence concerning the contents of Files 1 through 19 and Tape N.

Respectfully submitted,

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JUL 21 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

RENEWED MOTION OF DR. WEN HO LEE FOR PRETRIAL RELEASE

Dr. Wen Ho Lee, through undersigned counsel, renews his motion for pretrial release under 18 U.S.C. § 3142 and the Due Process Clause of the Fifth Amendment. The grounds for this motion are set forth in the accompanying memorandum. Dr. Lee requests an evidentiary hearing on this motion.

Respectfully submitted,

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2000, a copy of the foregoing was sent by hand delivery to:

George A. Stamboulidis
Assistant United States Attorney
United States Attorney's Office
P.O. Box 607
Albuquerque, NM 87103

[signed]
John D. Cline

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JUL 21 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

MEMORANDUM IN SUPPORT OF RENEWED MOTION OF DR. WEN HO LEE FOR PRETRIAL RELEASE

Dr. Wen Ho Lee has been imprisoned since December 10, 1999. This court jailed Dr. Lee on three principal grounds: (1) the asserted sensitivity of the information at issue-- particularly the information on the allegedly "missing" (and in fact destroyed) tapes; (2) the prosecution's claim that, if released, Dr. Lee would attempt to communicate the information at issue to the People's Republic of China ("PRC") or another hostile foreign power; and (3) Dr. Lee's alleged "secretive and deceptive" conduct--in particular, an alleged representation to a T Division colleague that Dr. Lee wanted to use his computer to download "a resume" onto tape.

In this memorandum, we present compelling new information that addresses each of these key points. First, we submit declarations from Dr. Harold Agnew (former Director of LANL) and Dr. Walter Goad (a Fellow Emeritus at LANL), both of whom debunk the prosecution's claim that the computer files at issue represent this country's nuclear "crown jewels" that would change the "global strategic balance" if they fell into the wrong hands. Dr. Agnew concludes that "[i]f the People's Republic of China had already obtained these codes, or were to obtain these codes, it would have little or no effect whatsoever on today's nuclear balance." Dr. Goad declares that the prosecution's "crown jewels" and "you bet your country" testimony "represent[s] unbridled exaggeration" and an "incitement of apprehension, even paranoia, that can override fairness and justice." Both Dr. Agnew and Dr. Goad note that the wide publication of the scientific knowledge and computational expertise required for nuclear weapon design reduces the significance of the files. The post-hearing revelation that the files had not even been formally classified at the time of the alleged events--but instead were protected at the PARD level--further undermines the "crown jewels" claim.

Second, the prosecution's recent Bill of Particulars marks the collapse of its theory that Dr. Lee served or intends to serve as a spy for the PRC or some other foreign nation.[1] The prosecution argued at the December hearing that, if released (even on stringent conditions amounting to house arrest), Dr. Lee would convey the contents of the files to another country, perhaps through a pre-arranged signal such as "Uncle Wen says hello." The Bill of Particulars substitutes an entirely new theory for the "Chinese spy" theory; the prosecution now claims that Dr. Lee sought to use the files to enhance his employment prospects in countries such as Singapore, Australia, Switzerland, France, Germany, and Hong Kong, as well as to somehow benefit historical antagonists PRC and Taiwan. Dr. Lee the alleged job-seeker cuts a far less threatening figure than Dr. Lee the alleged spy. The prosecution's shift in theory highlights the utter implausibility of most serious claim at the December detention hearing that, if released, Dr. Lee might be kidnapped from White Rock by armed foreign intelligence officers, who would land a plane or helicopter near his home.

[1] The prosecution foreshadowed this retreat by its agreement not to argue or suggest in any manner that Dr. Lee conveyed or sought to convey W-88 information to the PRC.

Third, documents produced to the defense months after the December detention hearing demonstrate that the prosecution either presented false testimony concerning what Dr. Lee told the T Division employee about the use of his computer or, at a minimum, failed to disclose to the Court that in sworn grand jury testimony and in repeated interviews with the FBI the employee provided a strikingly different description of events. At both detention hearings, FBI Agent Robert Messemer testified that Dr. Lee obtained use of the T Division employee's computer by telling the employee that he wanted to download a "resume." The Court specifically cited this testimony in its decision to detain Dr. Lee. But before the grand jury and in FBI interviews--including interviews with Agent Messemer himself--the employee repeatedly stated that

Dr. Lee asked to use his computer to download "some files"; as far as the discovery reveals, the employee never stated that Dr. Lee told him he wanted to download "a resume."

In addition to these critical points, the length of Dr. Lee's incarceration to date--more than eight months by the time this motion is heard--and the months of additional imprisonment he faces before this matter is resolved violate his right to Due Process. The violation is particularly clear in light of the extraordinarily harsh conditions of Dr. Lee's confinement, the government's responsibility for a significant portion of the delay in bringing this matter to trial, and the weakness of the evidence of Dr. Lee's alleged dangerousness.

The Court should free Dr. Lee on bail pending trial. Dr. Lee will submit to a third party custodian whom the government agrees is a trustworthy person. He will submit to home detention, with noticed trips to see counsel, doctors, and other trips approved by Dr. Lee's pre-trial services officer in consultation with the Court and the government. Dr. Lee will consent to monitoring of his home telephone by any means the government deems appropriate. He will consent to a search of his home before he returns to it. He will post collateral from friends and family well in excess of the $100,000 proposed in the recommendation for release issued by pre-trial services in this matter. And he remains prepared to sign a waiver of his rights to oppose extradition.[2]

[2] The court has urged the parties to attempt to reach agreement on conditions of release for Dr. Lee. Although we have had some informal discussions with the prosecution and will continue to do so (in the context of mediation and otherwise), no agreement has been reached or appears likely.

ARGUMENT

I. THE LEGAL STANDARD

The court may reopen a detention hearing at any time "if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing an the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C.§ 3142(f). As summarized above, Dr. Lee has obtained substantial new information, which warrant both reopening the bail hearing and releasing him.

The burden remains on the prosecution to prove by clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the safety of the community, or to prove by a preponderance of the evidence that no condition or combination of conditions of release will reasonably assure Dr. Lee's attendance at trial. 18 U.S.C. § 3142(e), (f); see, e.g., United States v. Xulam, 84 F.3rd 441, 442 (D.C. Cir. 1996) ; United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985) (en banc). The Court must consider the factors set out in 18 U.S.C. § 3142(g), including the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the history and characteristics of the defendant; and the nature and seriousness of the danger to any person or the community that would be posed by the person's release. See, e.g., Xulam, 84 F.3d at 442. Dr. Lee's new evidence will affect this Court's assessment of three of the § 3142(g) factors: the circumstances of the offense charged, the weight of the evidence, and the lack of any danger to the community that would be posed by Dr. Lee's release.[3]

[3] To the extent we do not address factors under § 3142(g) here, we rely upon and incorporate our previous briefs on the detention issue. We note that the court appeared to base its previous decision to jail Dr. Lee in part on the ground that he had declined to provide more detailed information about the destruction of the allegedly "missing" tapes. Any such inference violates Dr. Lee's Fifth Amendment right to remain silent without suffering any penalty. Such an inference would be especially inappropriate in light of the government's abusive treatment of Dr. Lee in the months preceding his firing from LANL, including an interrogation on March, 7, 1999 in which the FBI agents lied to Dr. Lee, threatened to arrest him for espionage and throw him in jail, told him that his wife, daughter, and son would be humiliated by the attendant publicity, compared Dr. Lee repeatedly to the Rosenbergs, and noted that the Rosenbergs had been electrocuted. Under these circumstances, we request that the Court give no consideration to Dr. Lee's exercise of his constitutional rights in determining whether to continue his imprisonment.

II. TWO OF THE NATION'S PREEMINENT NUCLEAR SCIENTISTS AGREE THAT THE FILES AND TAPES AT ISSUE WOULD BE OF LIMITED VALUE TO ANY FOREIGN POWER

At the December detention hearing, the prosecution presented apocalyptic testimony about the significance of the files and tapes and the consequences of any failure to imprison Dr. Lee. Drs. Stephen Younger, Paul Robinson, and Richard Krajcik described the files as the "crown jewels" of this country's nuclear design

capability, the loss of which could change "the global strategic balance."[4] Dr. Robinson told the court that it faced a "you bet your country" decision in determining whether to jail Dr. Lee. T. 12/28/99 at 371. The prosecution witnesses sought to foster the belief that the files and tapes amount to a turn-key design capability for nuclear weapons that would immediately place millions of lives in the United States at risk should they fall into the wrong hands. See, e.g., T. 12/13/99 at 33 (Younger); T. 12/27/99 at 189-90 (Krajcik); T. 12/28/99 (Robinson). The Court relied heavily an this testimony to imprison Dr. Lee. See, e.g., Memorandum Opinion and Order, Dec. 30, 1999 ["Order"], at 14 ("The Government has presented credible evidence showing that possession of information by other nations or by organizations or individuals could result in devastating consequences to the United States' nuclear weapon program and anti-ballistic missile nuclear defense system.").

[4] See, e.g., T. 12/13/99 at 38 (files capable of altering the "global strategic balance") (Younger); T. 12/27/99 at 179 (information in files constitutes "crown jewels") (Krajcik), id. at 186 (same); T. 12/28/99 at 213 ("very, very sensitive information") (Krajcik); T. 12/28/99 at 367 (information at issue poses a "truly . . . devastating" risk to national security) (Robinson): id. at 369 (tapes "could truly change the world's strategic balance").

The declarations of Drs. Harold M. Agnew, former director of LANL, and Walter Goad, Fellow Emeritus at LANL, refute the prosecution's inflated claims concerning the significance of the files and tapes. Dr. Agnew has been an advisor to five Presidents on matters of nuclear security. He is as qualified as anyone in the country to evaluate the prosecution's claims. It is Dr. Agnew's "firm conclusion" that no nation would rely on the information that might be found in the files. As Dr. Agnew states in his declaration, he "disagree[s] with the statement that it the People's Republic of China ('PRC') or some other nuclear power obtained the codes at issue here, it 'would change the global strategic balance, and would jeopardize the security of American citizens." Agnew Dec. ¶ 4 [5] To the contrary, Dr. Agnew declares that "[i]f the People's Republic of China had already obtained these codes, or were to obtain these codes, it would have little or no effect whatsoever on today's nuclear balance." Id. ¶ 5. Dr. Agnew also points out that "the present value to a foreign power of any code for U.S. nuclear weapons design was long ago diminished by the wide distribution of the underlying science and engineering of the United States' and other nations' nuclear design codes. This information has been widely available in the open literature." Id. ¶ 9. [6]

[5] Dr. Agnew's declaration is attached as Exhibit A. The May 17, 1999 letter to the Wall Street Journal, to which Dr. Agnew refers in the declaration, is attached as Exhibit B.

[6] Dr. Agnew made much the same point in a recent interview on National Pubic Radio. Addressing the hard drives that were then lost at LANL, Dr. Agnew stated, "Well I think the thing is, that there really aren't any secrets. To me there are no scientific secrets. The only secrets, if you want to call them that, are how you do things. Manufacturing, how you, how you put things together. You know, if a nation has a megaton bomb or what, there really isn't--and a way of delivering it--it really doesn't matter if it is a different color, or a little bit larger, or a little bit smaller. It doesn't matter." Exhibit C at 2. At the recent CIPA hearing, we proffered evidence., including a number of specific examples, that the contents of the files at issue have been published in the open literature.

Dr. Goad also finds that the prosecution grossly distorted the level of risk to the United states, even assuming that the so-called "missing" tapes were given to a foreign nuclear power. He concludes that the value of the tapes would be incremental at most, and then only to an extremely sophisticated organization seeking to better understand this country's designs. "Only a group already deeply engaged in the design of nuclear weapons could profit from the Lee tapes (if they still exist). At most, the U.S. codes and data could augment, not revolutionize, their efforts." Goad Dec. at 4. [7]

[7] The Goad declaration is attached as Exhibit D.

[**three lines deleted**] Id. at 10. Dr. Goad, like Dr. Agnew, observes that "the scientific knowledge and computational expertise required for nuclear weapons desiqn is now widely dispersed." Id. As Dr. Goad explains in more detail:

> The biggest secret, that it was possible, was broken to the world by the detonation at Hiroshima and Nagasaki. In the years since, the technology of nuclear weapons has been widely publicized in magazine articles and books, and now on the Internet.

> Now, 55 years after Hiroshima, the fundamental data and the computational methods needed by nuclear weapons designers have been brought to a high state of development by the worldwide scientific community pursuing not weapons design but fundamental scientific questions. There has been much work on the structure and behavior of stars and astronomical objects of all kinds. Scientists have pursued the behavior of extreme states of matter in these and all kinds of other cosmic and terrestrial contexts, including nuclear and thermonuclear reactors. There has been much work in computational physics of the atmosphere and the coupled ocean dynamics. These represent systems at least as complex, in many ways more complex, than nuclear weapons. The basic problems and techniques of computation and physical analysis extend seamlessly over all these fields.

Id. at 6-7.

Dr. Goad squarely rejects the testimony on which this Court relied to jail Dr. Lee:

> Summing up, Drs. Younger and Robinson assert that in foreign hands the Lee tapes could reorder the world strategic balance, that their possible existence poses a danger equivalent to "betting the country" or leaving the "crown jewels" open to theft. From the perspective of my experience and expertise, these assertions represent unbridled exaggeration. The result is not a measured judgment of risk, but incitement of apprehension, even paranoia, that can override fairness and justice.

Id. at 5.

[**Ten lines deleted.**]

III. THE FACT THAT THE FILES WERE PROTECT AT THE "PARD" LEVEL, RATHER THAN AT THE TSRD LEVEL, UNDERMINES THE PROSECUTION'S "CROWN JEWELS" CLAIM.

Apart from the Agnew and Goad declarations, another point demonstrates that the computer files have far less significance than the prosecution's "crown jewels" rhetoric would suggest. At the time of Dr. Lee's alleged conduct, the files had not even been formally classified. Instead, they were assigned the security level Protect as Restricted Data ("PARD") which ranks between Unclassified and Confidential Restricted Data ("CRD") on the LANL security hierarchy. And even the classification levels that DOE assigned to the files after Dr. Lee's firing belie the prosecution's "crown jewels" claim. DOE did not classify a single one of the files at the Top Secret Restricted Data ("TSRD") level, as one would expect for the "crown jewels." Instead, it classified the information at the lesser Secret Restricted Data ("SRD") and CRD levels. By definition, SRD material does "not reveal[] critical features" of designs for specific weapons components, and CRD material has even less sensitivity.

A. PARD.

Upon close Inspection, a prosecution exhibit establishes that all of the files at issue were PARD at the time of the alleged conduct. See GX 8, Analysis of Actions on Charged Files (Nov. 8, 1999) (listing the "[c]lassification" of Files 1 through 19 as "PARD" before Dr. Lee allegedly down-partitioned them).[8] The DOE glossary defines PARD as "[a] handling method for computer-generated numerical data or related information, which is not readily recognized as classified or unclassified because of the high volume of output and low density of potentially classified data." U.S. Department of Energy, Office of Security Affairs, Office of Safeguards and Security, Safeguards and Security--Glossary of Terms at 111 (Dec.18, 1995) (emphasis added) (relevant pages attached as Exhibit E). A note adds that "[t]his information is designated as Protect As Restricted Data because it has not had a classification review and must be protected under a different set of security rules." Id. (emphasis added). A LANL publication declares that "[t]he hierarchical security classification labels on the worker machines at L&NL are: Secret > Confidential > PARD > Unclassified." Computing at LANL at 3 (June 3, 1996) (attached as Exhibit F) . The document notes that on the LANL secure partition, SRD is assigned the numerical value 9; CRD the value 6; PARD the value 5; and unclassified the value 3. See id.

> [8] Other docUments, produced in discovery, confirm that the files were PARD at the time of Dr. Lee's alleged conduct.

The fact that the information at issue was considered PARD--and thus, by definition, "not readily recognized as classified or unclassified" and containing "a low density of potentially classified data"--at all times during the relevant period casts grave doubt on the prosecution's "crown jewels" claim. One can

reasonably assume that the "crown jewels" -- actual weapons blueprints, for example -- would be immediately recognized as classified and would contain a high density of potentially classified data.

B. The After-the-Fact Classification Levels.

Even the government's after-the-fact classification of Files 1 through 19 and Tape N belies its "crown jewels" claim. Under DOE regulations, Restricted Data ("RD") has three possible levels of classification: Top Secret, Secret, and Confidential. RD is "Top Secret" if it is "vital to the national security and it its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security." 10 C.F.R. Sec. 1045.17(a)(1). Such information "include[s] detailed technical descriptions of critical features of a nuclear explosive design that would enable a proliferant or nuclear power to build or substantially improve a nuclear weapon . . . or information revealing catastrophic failure or operational vulnerability in a U.S. nuclear weapon." Id. RD is "Secret" "its unauthorized disclosure could reasonably be expected to cause serious damage to the national security, but the RD information is not sufficiently comprehensive to warrant designation as Top Secret." Id. § 1045-17 (a) (2) (emphasis added). Such information "include[s] designs for specific weapons components (not revealing critical features) ... or specifications of weapon materials." Id. (emphasis added). RD is "Confidential" if it is "deemed to be of signifIcant use to a potential adversary or nuclear proliferant and its unauthorized disclosure could reasonably be expected to cause undue risk to the common defense and security." Id. § 1045.17(a)(3). Such information includes "the amount of high explosives used in nuclear weapons, gaseous diffusion design information, and design informauion for Naval reactors." Id.

Computer files that contain a "portfolio of information that would allow one to develop a simple, easily manufacturable weapon such as a terrorist weapon all the way up to the very best that the United States is capable of designing," T. 12/28/99 at 370 (Robinson), that "represent the complete nuclear weapons design capability of Los Alamos at that time," T. 12/13/99 at 33 (Younger), and that provide "an immeidiate capability to design a credible nuclear explosjve," id. at 36 (Younger), necessarily would be classified at the TSRD level. Such files plainly would include "detailed technical descriptions of critical features of a nuclear explosive design that would enable a proliferant or nuclear power to build or substantially improve a nuclear weapon,"--the definition of TSRD. Id. § 1045-17(a)(1). The files would be "vital to the national security," and their "unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security." Id.

If the claims of the prosecution witnesses could be taken at face value, therefore, most, if not all, of the computer files at issue would be classified TSRD. But of the nineteen computer files and Tape N, not a single one is classified Top Secret. Tape N and fifteen of the files are classified SRD, and four of the files are classified CRD. Thus, the DOE's own classification decisions--made after Dr. Lee's termination--confirm that the information at issue is not "vital to the national security"; if it were, the information necessarily would have been classified TSRD under 10 C.F.R. § 1045. 17 (a) (1). And those classification decisions also confirm that even the files at the highest classification level DOE chose to assign--SRD--do not "reveal[] critical features" of the "designs for specific weapons components." Id. § 1045.17(a)(2).

IV. THE PROSECUTION APPARENTLY NO LONGER CLAIMS THAT DR. LEE IS A SPY FOR THE PRC.

The prosecution has radically shifted its theory of the case. Instead of implying that Dr. Lee is an agent of the PRC, as it did at the December bond hearings, see, e.g., T. 12/28/99 at 413, the prosecution now claims that he intended to provide the tapes to aid Australia (a firmly non-nuclear nation), Singapore (which has no known nuclear ambitions or capability), France (an ally) , Germany (another ally) , Hong Kong (then controlled by Great Britain, another ally), or Switzerland (non-nuclear and neutral), in addition to one or the other of two historically antagonistic nations, Taiwan and the PRC. See Bill of Particulars, July 5, 2000, at 2. The prosecution also concedes that Dr. Lee may have had no nation in mind when he allegedly created the tapes, intending instead to wait for some future date to determine if and when he would use them. See id. at 1. And the prosecution reserves the ability to abandon the "foreign nation" prong of the Atomic Energy Act entirely. See id.

The Bill of Particulars represents a clear concession that Dr. Lee poses far less of a danger to the community than the prosecution previously argued to the Court. Even under the prosecution's theory, an employee seeking work presents a much different (and less sinister) picture than a spy looking ro pass nuclear secrets to a potential adversary, as the prosecution insinuated at the December hearing.

The dramatic deflation of the prosecution's theory undermines the bizarre scenario that the prosecution presented at the bond hearing of foreign agents in helicopters snatching their alleged operative (Dr. Lee)

and jeopardizing the safety of federal agents assigned to surveil him. The prosecution's new theory also highlights the lack of evidence that Dr. Lee intended to injure the United States or to secure an advantage to a foreign nation. This weakness directly affects this Court's assessment of the weight of the evidence under 18 U.S.C. § 3142(g)(2) and provides an independent basis for reconsidering its earlier decision to imprison Dr. Lee.

V. THE PROSECUTION FALSELY REPRESENTED AT THE DETENTION HEARING THAT DR. LEE TOLD A T DIVISION EMPLOYEE THAT HE INTENDED TO DOWNLOAD HIS RESUME.

At the first detention hearing, the prosecution presented apparently damaging testimony from FBI Agent Robert Messemer that Dr. Lee had told a T Division employee that he wanted to use the employee's computer workstation to download a"resume" onto tape. According to the prosecution, Dr. Lee actually used the workstation to download some of the charged computer files. The prosecution elicited the "resume" testimony again from Agent Messemer at the hearing before this court. The Court relied explicitly on this testimony in its decision to jail Dr. Lee.

Documents provided to the defense months after the detention hearing reveal that the "resume" testimony was false. The T Division employee--Dr. Kuok-Mee Ling--testified under oath before the grand jury that Dr. Lee asked to use his computer to"download some files." Dr. Ling made similar statements in interviews with the FBI. The discovery does not disclose <u>any</u> occasion when he told the prosecution that Dr. Lee asked to download a resume.

At the detention hearing before Magistrate Judge Svet on December 13, 1999, the prosecution elicited the following testimony from Agent Messemer concerning Dr. Lee's use of Dr. Ling's computer:

> Q. Now, you said this individual [Dr. Ling) has been interviewed; what were the representations made by Dr. Lee as to use of this T Division employee's work station?
>
> A. <u>Dr. Lee represented to the T-15 employee that he wished to download a resume</u> from the open Rho system from Dr. Lee's directory on that open Rho system onto the hard drive of the T-15 computer, and from there he would download it onto the tape drive and be able to retain it for future use, ostensibly for future use.

T. 12/13/99 at 99 (emphasis added).

The prosecution relied on this testimony in its pre-hearing brief to this court. It declared that "Dr. Lee lied to a T Division colleague by representing to the T Division colleague that Lee wanted to ‘download a resume' from the open computing system to a portable tape." Response to Defendant Wen Ho Lee's Motion to Revoke Judge Svet's Order of Detention 8 (filed Dec.23, 1999). At the hearing, the prosecution again elicited the "resume" testimony from Agent Messemer:

> Q. For the record, would you address again what it is that Dr. Lee told to a T Division employee to use the computer in that trailer?
>
> A. Dr. Lee told a T15 employee that he wanted to use that employee's computer <u>in order to download a resume</u>.
>
> . . .
>
> Q. All right. Do we know that Dr. Lee did more than <u>download a resume</u> within that trailer?
>
> A. Yes, we do.

T. 12/28/99 at 406-07 (emphasis added). [9]

> [9] The fact that Agent Messemer repeated this testimony twice, under oath, in separate hearings two weeks apart eliminates the possibility that he made an inadvertent error.

The Court gave significant weight to this testimony in its order detaining Dr. Lee. The Court noted that "Government witnesses testified in detail at the hearing about the clandestine circumstances in 1993 and 1994 under which Dr. Lee moved classified files in a very suspicious way from a secure restricted red partition computer system to an unsecure open green partition system and then in a devious manner downloaded that sensitive information to portable tapes." Order at 10. The Court specifically noted that " [a]ccording to the Government witnesses, <u>Dr. Lee told the T division employee he wanted to download his</u>

resume onto a tape." Id. at 10-11 (emphasis added). [10] The Court cited Dr. Lee's "secretive and deceptive" conduct as a basis for inferring criminal intent. Id. at 13. And on the issue of Dr. Lee's character, the Court stated in part (apparently referring to the "resume" testimony) that Dr. Lee "has lied to LANL employees . . . and has consciously deceived them about the classified material that he had put on the tapes. . . ." Id. The prosecution referred again to the "resume" testimony in its brief on appeal. Appellee's Answer Brief at 21 (filed Feb. 1, 2000).

> [10] Although the Court referred to "Government witnesses" in its opinion, only one witness--Agent Messemer--provided the "resume" testimony.

Several months after the detention hearing, the prosecution produced to the defense Dr. Ling's grand jury testimony and FBI memoranda of interviews with him. Those materials--unavailable to the defense or the Court at the time of the detention hearing--leave no doubt that Agent Messemer falsely recounted what Dr. Ling had said. In Dr. Ling's grand jury testimony, given under oath, he stated:

> Q. Did he tell you--did Mr. Lee tell you what information he wanted to download onto this tape that you're referring to?
>
> A. No. Just that he wanted to download some files.

Grand Jury T. 5/7/99 at 45 (emphasis added). Throughout his grand jury testimony, Dr. Ling referred repeatedly to the "files" or "data" that he understood Dr. Lee to be downloading. E.g., id. at 43 ("download some data"), 45 ("download the file") , 50 (after the downloading, Dr. Lee "deleted the files" from Mr. Ling's machine as a courtesy; "all the files that he downloaded, he deleted") , 50-51 (Dr. Lee "probably would have created a subdirectory to contain all his files"). Never in his grand jury testimony did Dr. Ling state that Dr. Lee had asked to use his computer to download a "resume." [11]

> [11] The relevant pages from Dr. Ling's grand jury transcript are attached as Exhibit Q.

Dr. Ling made similar statements in interviews with Agent Messemer. In an interview conducted by Agent Messemer and another FBI agent on May 3, 1999, for example, Dr. Ling

> recalled that one day . . . LEE WENHO asked LING to assist him in the transference of some file on the open network onto tape. (IBM 6150). LEE WENHO didn't discuss what was going to be placed on the tape.... According to LING, LEE WENHO didn't discuss what exactly he was transferring from the open LANL system onto the IBM cartridge.

FBI 302 Memorandum at 6, fbi/sub-a/1730 (emphasis added).

On May 4, 1999 (the next day), Dr. Ling telephoned Agent Messemer. According to Messemer's memorandum of the interview, Dr. Ling "reiterated that he had no idea what LEE WENHO downloaded when he was afforded access to LING's SUN SPARC-1 workstation." FBI 302 Memorandam, fbi/sub-a/1746 (emphasis added). In a further interview by Agent Messemer and another agent, on May 5, 1999, Dr. Ling stated that he had shown Dr. Lee "how to download files from the RHO (open system) LANL computer onto his workstation's hard drive and then save this data onto an IBM 6150 cartridge," and that he had observed Dr. Lee with "one or possibly two cartridges," each of which would hold 150 megabytes of data. Dr. Ling added:

> Later in the same day, LING received a telphone [sic] call from LEE who expressed his appreciation, indicated he satisfactorily completed the download and noted that he erased the files he downloaded onto LING's hardrive. LING interpreted LEE's statement to mean LEE erased the files out of professional courtesy to LING, to save him the chore. Thus, LING was unable to ascertain what exactly LEE had downloadad.

FBI 302 Memorandum at 2, fbi/sub-a/1749 (emphasis added).[12]

> [12] Even if the prosecution now claims that Dr. Ling told the "resume" story during some interview that was not memorialized in any FBI 302 memorandum (or that was not produced to the defense), at a minimum it had an obligation to disclose to the court and the defense that he had told an entirely different story under oath before the grand jury and in several interviews with Agent Messemer.

The significance of Agent Messemer's apparently false testimony can hardly be overstated. By misrepresenting what Dr. Ling had said, Agent Messemer sought (with obvious success) to convince the

Court that Dr. Lee's conduct had been "secretive and deceptive" (to use the Court's words) and "nefarious" (to use Agent Messemer's word). In fact, as the discovery confirms, Dr. Lee told Dr. Ling the simple truth: that he wanted to use his computer to "download some files." [13]

[13] In other respects as well, Agent Messemer appears to have misrepresented the evidence concerning Dr. Lee's conduct. We intend to develop some of those misrepresentations at the upcoming bond hearing.

VI. THE LENGTH AND SEVERITY OF DR. LEE'S PRETRIAL IMPRISONMENT FAVOR RELEASE.

Together with all of the other circumstances set forth above and to be developed at the hearing, the length and severity of Dr. Lee's pretrial imprisonment to date--and the period of detention that he still faces--weigh heavily in favor of release.

By the time the Court hears this motion, Dr. Lee--a presumptively innocent, sixty year-old man with no criminal record and no history of violence--will have served more than eight months in prison. He has served those months under extraordinarily harsh conditions of confinement. Through a government order bearing the Orwellian title "Special Administrative Measures," Dr. Lee has been deprived of the limited freedoms that even most convicted murderers enjoy. He can see his family only once a week, and then only with FBI agents monitoring the conversation. He cannot receive any other visitors. Except when he is meeting with counsel, he must remain in his cell twenty-three hours per day. His "exercise"-- typically one or two hours per week--consists of kicking a soccer ball alone in a fenced area while shackled at the wrists, waist, and ankles. [14] He can make periodic telephone calls to immediate family members--monitored, of course, by the FBI--and to counsel, but he cannot call anyone else. We know of no case not involving terrorism or espionage in which such draconian conditions of detention have been imposed.

[14] Although we are told that Dr. Lee may soon be permitted to exercise without shackles, that change in his conditions of confinement has not yet occurred.

In United States v. Salerno, 481 U.S. 739 (1987), the Supreme Court upheld the pretrial detention provisions of the Bail Reform Act on the ground that such detention "is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." Id. at 748. The Court appeared to rest this determination on two principal considerations: that "the maximum length. of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act," id. at 747, and that, by statute, "detainees [must] be housed in a ‘facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal,'", id. at 748 (quoting 18 U.S.C. § 3142(i) (2)). The court expressly declined to determine "the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." Id. at 747 n.4.

Under the circumstances of this case, Dr. Lee's pretrial imprisonment long ago crossed the line that the Supreme Court drew in Salerno between regulation and punishment. Dr. Lee may be separated from persons who have been convicted, as Salerno contemplated, but in a perverse twist his conditions of confinement are actually more stringent than most such persons must endure. How many convicted criminals, after all, must wear shackles when they exercise? How many convicted criminals cannot meet with their own family members without FBI agents present? To call Dr. Lee's detention "regulatory" rather than "punitive" perverts the English language.

The purportedly "stringent time limitations" of the Speedy Trial Act, on which Salerno relied, have little significance here. The Act requires that the trial of a detained person begin within ninety days of his detention. 18 U.S.C. § 3164(c). When the Senate enacted the pretrial detention provisions of the Bail Reform Act, it was informed that this ninety-day period represented the "upper-bound" or "worst-case limit" of pretrial detention. See, e.g., United States v. Claudio, 806 F.2d 334, 340 (2d Cir. 1986). In a complex case such as this, however, almost all time is excludable from the Speedy Trial Act computation. 18 U.S.C. § 3164(b) (incorporating exclusions set forth in § 3161(h) into computation of ninety-day period under § 3164). As a result, pretrial detention can stretch far beyond the ninety-day period without violating §3164. See, e.g., United States v. Gatto, 750 F. Supp. 664, 673 (D.N.J. 1990).

Although the ninety-day period in § 3164 provides illusory protection in a case such as this, that period "represent[s] the considered view of the Congress as to the normal limit on pretrial detention" and "provides at least a point of reference in [a court's] consideration of the constitutional limit on such detention." Claudio, 806 F.24 at 341. The Tenth circuit also attaches significance to § 3164(c), although the

court has recognized that Congress "contemplated some extension of the ninety-day limit on incarceration before trial when it incorporated the § 3161(h) exclusions into § 3164." United States v. Theron, 782 F.2d 1510, 1516 (10th cir. 1986).

Theron has obvious significance here. In that case, the defendant had been incarcerated "more than four months" when his motion for release was heard. Id., at 1516. The Tenth Circuit concluded that he would be incarcerated eight months before trial began, and that the trial would last from two to six months. See id. . Although the court declined to "establish a bright line," it declared that

> Theron has been incarcerated without bail for more than four months. He took no steps to delay the trial; he sought immediate trial and announced ready to defend. The government asserted it was ready to prosecute. We have no hesitancy in saying that in such circumstances four months additional incarceration before trial is too long. Theron must be released on bond with other appropriate restrictions or tried within the next thirty days.

Id. at 1516-17. Theron cited with apparent approval two cases that had ordered defendants released based an six months' pretrial detention. See id. at 1516 (citing United States v. Hall, 651 F. Supp. 13 (W.D.N.Y. 1985), and United States v. Lo Franco, 620 F. Supp. 1324 (N.D.N.Y. 1985)); see also United States v. Khashoggi, 717 F. Supp. 1048, 1051 (S.D.N.Y. 1989) (release granted in part because case would not come to trial for at least six months); United States v. Vastola, 652 F. Supp. 1446, 1447-48 (D.N.J. 1907) (defendants detained for three months released in part because continued detention would require defendants "to remain in jail for 1-1/2 years without determination of their innocence or guilt"); cf. United States v.Jackson, 823 F.2d 4, 7 (2d Cir. 1987) (noting that "a potentially long trial commencing over seven months after detention has already begun raises grave due process concerns for the government to allay").

By the time of the hearing on this motion, Dr. Lee will have been detained more than the eight months found excessive in Theron. By the time trial begins--assuming it begins as scheduled--Dr. Lee will have been imprisoned almost eleven months. Trial will require a minimum of two months and probably more, particularly with recesses occasioned by the year-end holidays. Even under the most conservative estimate, therefore, Dr. Lee will have spent thirteen months or more in prison before his innocence or guilt has been determined.

Like the defendant in Theron, Dr. Lee has not sought to delay the trial. The principal delay to date results from the more than four-month period between the indictment and the government's completion of the secure room in which the defense works at the courthouse. During this time, the prosecution could provide only limited discovery, and defense counsel could not discuss the case in detail with Dr. Lee. Although we do not suggest that the government deliberately engineered this lengthy delay, it failed to address or resolve before indictment the obvious logistical problems that the case would present. Cf. Claudio, 806 F.2d at 342-43 ("It suffices for present purposes to conclude that the government, even if not deserving of blame, bears a responsibility for a portion of the delay significant enough to add considerable weight to the defendants' claim that the duration of detention has exceeded constitutional limits.").

In addition to the length of the delay and the government's partial responsibility for that delay--discussed above--some courts also have considered the strength of the evidence on which detention is based in determining whether due process requires release. See, e.g. , United States v. Gonzales, 995 F. Supp. 1299, 1303 (D.N.H.), aff'd, 1998 U.S. App. LEXIS 11796 (10th Cir. June 5, 1998) (unpublished). In our view, the evidence at the first detention hearing did not justify detaining Dr. Lee either for dangerousness or risk of flight. In light of the new information set forth above (and to be elicited at the upcoming hearing), the evidence supporting detention is even more patently inadequate. The core of that evidence consists of gross hyperbole (the testimony of Drs. Younger, Krajcik, and Robinson) and what appears to be outright misrepresentation (Agent Messemer's "resume" testimony and other aspects of his testimony that we will develop at the hearing). To prolong Dr. Lee's already excessive imprisonment under these circumstances would violate his basic right to Due Process.

CONCLUSION

For the foregoing reasons, and for the additional reasons that will be offered at the hearing on this motion, the court should release Dr. Lee from detention pending trial.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JC/DS

WEN HO LEE,
Defendant.

DECLARATION OF DR. HAROLD M. AGNEW

I, Dr. Harold M. Agnew, do hereby declare and state:

1. I was the Director of Los Alamos National Laboratory from 1970 until 1979. I have been directly involved in research and testing of nuclear weapons for the last fifty years. I have had the privilege of advising Presidents Lyndon B. Johnson, Richard Nixon, Jerry Ford, Jimmy Carter, George Bush, and their senior staff, and the United States Congress regarding matters relating to nuclear weapons.

2. I have a doctorate in nuclear physics from the University of Chicago and have devoted my life to understanding nuclear weapons and to monitoring the development of nuclear weapons and nuclear energy throughout the world. My most recent work has included the following:

3. I am familiar with all aspects of U.S. nuclear weapons design and manufacture. When I was director of Los Alamos, I, along with many other scientists, oversaw the basis for the design of the W-88, which is a modern U.S. nuclear warhead.

4. I disagree with the statement that if the People's Republic of China ("PRC"") or some other nuclear power obtained the codes at issue here, it "would change the global strategic balance" and would jeopardize the security of American citizens.

5. If the People's Republic of China had already obtained these codes, or were to obtain these codes, it would have little or no effect whatsoever on today's nuclear balance. In reaching my firm conclusion, I am not expressing any opinion on the guilt or innocence of Dr. Lee, nor would I condone the passing of nuclear codes or any classified information by a United States individual to a foreign power, or the mishandling of such codes.

6. A brief summary of the reasons why the codes would be of little or no value to the People's Republic of China are set out in a letter I wrote to the *Wall Street Journal* which was published on May 17, 1999. I did not write this letter at the request of any third party, and I did not even know whether Dr. Lee was going to be charged at the time that I wrote this May 17, 1999 letter.

7. To fully understand why the codes for the United States nuclear stockpile would be of very limited use to the People's Republic of China or any other foreign country with a nuclear arsenal, one must understand that the PRC and the former Soviet Union have developed their own codes for the design of nuclear weapons. These nuclear weapons were tested by the PRC and the former Soviet Union from 1949 until 1996, using various techniques. The Soviet union and the PRC developed codes tailored specifically for the materials, weapons designs, delivery vehicles and manufacturing capabilities that these nuclear powers possess. Thus, today the PRC possesses a nuclear capability based on tested nuclear weapons and its own existing codes. As I concluded in my letter to the *Wall St. Journal*, in my opinion, "no nation would ever stockpile any device based on another nation's computer codes." Nor would they place any weapon in their stockpile without a nuclear test.

8. In addition, it is unlikely that the codes in question would be used by any nuclear power. It appears that most, if not all, of the codes presently being refined and developed at Los Alamos Laboratory were modified after all of the current U.S. nuclear systems had entered our nation's stockpile. It is highly likely that most, if not all, of the revised and updated codes in question were never used in their present state to design an existing nuclear weapon that has been tested and stockpiled. Thus, the PRC or other foreign

power should not assume that these codes were the exact codes used for existing nuclear weapons that have been tested.

9. Further, the present value to a foreign power of any code for U.S. nuclear weapons design was long ago diminished by the wide distribution of the underlying science and engineering of the United States' and other nations' nuclear design codes. This information has been widely available in the open literature.

I declare that the foregoing is my opinion and correct to the best of my knowledge and that this declaration was executed on May 27, 2000, at Solana Beach, CA.

[signed]
Harold M. Agnew

DECLARATION OF WALTER GOAD

I am Walter Goad, Fellow Emeritus of the Los Alamos National Laboratory. At LANL, Fellow is a status recognizing scientific excellence outside the managerial ladder. I hold a PhD in Physics from Duke University. I have been awarded a Los Alamos National Laboratory Distinguished Service Award and am a Fellow of the American Physical Society and of the American Association for the Advancement of Science. I reside at 156 Santa Fe County Road 84C, Espanola, NM 87532.

I joined the staff of the Theoretical Division of what was then the Los Alamos Scientific Laboratory in late 1950, as the crash program to develop thermonuclear weapons was getting underway. The crash program was ordered by President Truman in the wake of the first Soviet atomic bomb test. I came out from Duke with my professor, Lothar Nordheim, who had been recruited to visit for a year by Edward Teller. For the next fifteen years I was a member of the team that developed the first thermonuclear weapons and several subsequent generations of thermonuclear weapons.

Development of nuclear weapons is the work of many hands. Science, engineering, fabrication and testing are all necessary, and in all these efforts creating workable concepts is the key to success. At the core of the work is a team of theoretical physicists who must find workable concepts for the basic design of the weapon itself. They have to understand and analyze all the physical mechanisms and material behaviors involved in the explosion of the weapon, and with feedback from all the other groups involved, come up with the detailed design. I was a member of this core theoretical team at Los Alamos, contributing to every aspect of its work.

The late J. Carson Mark was Theoretical Division Leader and shepherded the work with great skill and wisdom. Otherwise, the theoretical team was without formal hierarchy. Dr. Mark often summarized the current status of our work, sketching a view of current priorities, and members of the team took on problems according to individual abilities and interests. The core team usually averaged a dozen people or so, sometimes augmented by such eminent visitors as Enrico Fermi and Hans Bethe. We developed the basic approaches which still form the basis of U.S. nuclear design efforts, including early versions of the computer codes. Gradually, in the 1960s, the work became more structured, and a Theoretical Design Division was formed, predecessor of the current X-Division. Now, as current leaders of the nuclear weapons effort have testified, X-Division has hundreds of members in a highly structured organization.

Around 1960 cooperation with the U.K. nuclear weapons effort, which had been suspended at the end of WWII, was reinstated, and for several years I served on Joint Working Groups whose mission was to see how we could now help each other. The U.K. effort was nearly as unstructured as our own. I feel that I have direct hands-on experience in two distinct nuclear weapons programs, experience with a breadth that is now rare.

Since about 1970, I have worked primarily on research in computational biology, although I have continued to follow the weapons program with interest.

I have studied the indictment of Dr. Wen Ho Lee, and the transcript of his detention hearing before Judge Parker. I have also studied the testimony of Dr. Stephen Younger before Magistrate Judge Svet.

Dr. Younger before Magistrate Judge Svet, and then Dr. Paul Robinson before Judge Parker, testified in apocalyptic terms of danger to the U.S. strategic position posed by the computer codes and data copied onto tapes by Dr. Wen Ho Lee. My experience and expertise tells me that these assertions are exaggerations, grossly misleading in their import. As I explain more fully in the Appendix (which I incorporate in this declaration) the scientific knowledge and computational expertise required for nuclear weapons design is now widely dispersed. Therefore any nation with a substantial scientific establishment is capable of designing nuclear weapons on its own. Only a group already deeply engaged in the design of nuclear weapons could profit from the Lee tapes (if they still exist). At most, the U.S. codes and data could augment, not revolutionize, their efforts. Furthermore, changes in the world strategic balance require not just scientific expertise and information, but the commitment of extensive technical and industrial resources to the practical development, production, and deployment of weapons and weapons carriers.

Dr. Robinson's testimony that loss of the Lee tapes could catastrophically endanger U.S. missile defense deserves special notice. In the late 1950s, Dr. Lew Allen and I made the first assessment of the nuclear

aspects of missile defense by nuclear warhead-carrying anti-missile-missiles. Dr. Allen was then an Air Force Captain; later he became Air Force Chief of Staff and Director, successively, of the National Security Agency and the Jet Propulsion Laboratory. The missile defense system now under consideration would not use this technology, but the fundamental problem of missile defense was already clear. At very low cost, attacking missiles can in mid-flight deploy decoys or enveloping radar shields which can effectively confuse any defense. Nothing has changed that. For any nation developing missile carriers for nuclear weapons, the kinds of incremental advances available from advanced nuclear weapons design have essentially no impact on this basic problem of missile defense.

Summing up, Drs. Younger and Robinson assert that in foreign hands the Lee tapes could reorder the world strategic balance, that their possible existence poses a danger equivalent to "betting the country" or leaving the "crown jewels" open to theft. From the perspective of my experience and expertise, these assertions represent unbridled exaggeration. The result is not a measured judgment of risk, but incitement of apprehension, even paranoia, that can override fairness and justice.

Unhappily, our history has seen other examples in which exaggerations of danger have overridden the traditional American values of fairness and justice--most memorably to people of my generation, in the era of Senator Joseph McCarthy. These currents of fear are always deeply troubling and damaging, and in this case are doing specific and incalculable damage to the very military-scientific establishment that is ostensibly being protected.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 17, 2000.

[signed]
Walter Goad

APPENDIX

New scientific discoveries in the 1920s and 1930s made nuclear weapons possible and by the onset of WWII this was widely understood around the world. The question was, could a workable weapon be built. Those who thought deeply about the problem knew, roughly, how to go about finding out. The U.S. succeeded by bringing enough scientific talent and industrial capability to the task, redirecting resources from other areas of military technology. The Germans seem to have failed because they thought a workable weapon could not be developed, and certainly not by the Americans. The biggest secret, that it was possible, was broken to the world by the detonations at Hiroshima and Nagasaki. In the years since, the technology of nuclear weapons has been widely publicized in magazine articles and books, and now on the Internet.

Now, 55 years after Hiroshima, the fundamental data and the computational methods needed by nuclear weapons designers have been brought to a high state of development by the worldwide scientific community pursuing not weapons design but fundamental scientific questions. There has been much work on the structure and behavior of stars and astronomical objects of all kinds. Scientists have pursued the behavior of extreme states of matter in these and all kinds of other cosmic and terrestrial contexts, including nuclear and thermonuclear reactors. There has been much work in computational physics of the atmosphere and the coupled ocean dynamics. These represent systems at least as complex, in many ways more complex, than nuclear weapons. The basic problems and techniques of computation and physical analysis extend seamlessly over all these fields.

And in all these endeavors, there have remained basic scientific problems of computability which cannot be solved by more computing power alone. These are typified by the problem of long range predictions of weather and climate, and extend to predictions of nuclear weapons behavior. This accounts for the fact that, after the enormous investment of effort over many years, weapons codes can still not be relied on for significantly new designs. This is testified to, for example, by Dr. Paul Robinson before the Senate Armed Services Committee on the Comprehensive Test Ban Treaty. He opposed the treaty on the ground that, to develop significantly new nuclear weapons, the U.S. required the ability to conduct tests.

In some corners of the world of relevant data, there are results from classified work in the U.S. that are of value in improving the accuracy of some of the computational modules of the U.S. weapons codes. These incremental improvements are of value, of course, but make marginal contributions to the overall reliability of the codes.

To pursue nuclear weapons development requires commitment by a substantial group of able scientists. The techniques and data needed are at hand in the scientific literature, but the group must come, by practice, to thoroughly understand them. (As Dr. Younger testified before Magistrate Judge Svet, "it is possible to run [the U.S. codes] and get the wrong answer"). To actually achieve results, the design group must be part of a much larger engineering and industrial-military complex. Dr. Younger suggests that such a group could train itself by studying the hundreds of thousands of lines of computer code included in the Lee tapes. I think this a particularly inefficient way of going about it, given all the fundamental information in the scientific literature, although to the extent that the databases accompanying the codes save effort needed to marshal relevant data, they could make a contribution to the design group's efforts.

No computer code is in itself a recipe to be relied on. Scientific judgment must deal with uncertainties in the relation of computation to reality in ways consonant with the particular priorities and resources at hand--reconciling reliability and safety, cost and availability of materials and manufacturing capabilities, suiting warheads to carrier design, and so on. Only a highly capable group would have any chance of using U.S. source-language design codes to find out how U.S. scientists deal with these uncertainties by appealing to test data. Although any group with limited manpower would find it a severe drain of effort to trace through and understand hundreds of thousands of lines of source code, it is possible that it could realize some advancement of its effort if it came to understand aspects of U.S. experience.

The extent to which test data is included in the Lee tapes has not been established in the testimony produced by the government. Nevertheless, in considering how such data might be used, we have first to remember that the U.S. designs its weapons in the context of a lavish nuclear-military industrial complex, almost unlimited in its capability; no particular U.S. design is likely to closely match another group's priorities. Second, as indicated above, the use of design codes to extrapolate significantly beyond tested designs is highly problematical. Thus, any group that relied on its understanding of U.S. experience from the Lee tapes alone would significantly expand the inherent uncertainties of its work. The Lee tapes might augment an experienced foreign design group's work, but not qualitatively change it.

We can note the conditions under which two relatively poor nations, India and Pakistan, recently acquired nuclear weapons. Both possess substantial scientific establishments and were willing to commit the required resources. As dangerous as these developments are to the stability of the region, no one has argued that they affect the world strategic balance.

Earlier, China tested a number of nuclear weapons. It has a large pool of well-trained scientists, many educated in the West, and it also has, at least potentially, extensive resources for building weapons and carriers and maintaining them. Its ability to shift the world strategic balance depends on its committing the required resources to building and maintaining weapons and carriers. Just as the U.S., it undoubtedly has the ability to design weapons tailored to particular military uses, but with its own design priorities. For all the reasons discussed above, there is no reason to suppose that knowledge of U.S. computer codes and design practices could more than modestly augment Chinese capabilities.

In summary, the situation created by proliferating nuclear weapons is indeed dangerous, but there is no reason to suppose that deciphering and running the complicated computer codes with accompanying data on the Lee tapes could make more than a marginal difference. As noted above, for all its scientific and computational might, the U.S. is still only able to make incremental advances on the basis of computer codes.

Nevertheless, the U.S. classified literature, taken as a whole, contains a great deal of information acquired at great cost, and its protection is properly a national priority. These secrets are much more akin to ordinary industrial proprietary secrets whose loss could offer finite but valuable aid to a competitor than to crown jewels whose loss would be catastrophic.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JUN 23 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION

Dr. Wen Ho Lee, through undersigned counsel, respectfully moves the Court, pursuant to the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America, for discovery of materials relevant to establishing that the government has engaged in unconstitutional selective prosecution.

The grounds for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing was mailed to opposing counsel this 25th day of June, 2000.

Nancy Hollander

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JUN 23 2000 [date stamped]

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 99-1417 JP

WEN HO LEE,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY OF MATERIALS RELATED TO SELECTIVE PROSECUTION

INTRODUCTION

Defendant Wen Ho Lee is the only person the U.S. Department of Justice (DOJ) has selected for indictment under the draconian Atomic Energy Act since it was passed in 1948. During this fifty-year period, the DOJ has repeatedly declined to fully investigate, much less charge, individuals who may have compromised classified nuclear weapons related information.

The DOJ also indicted Dr. Lee under 18 U.S.C. § 793(c) and (e) for the alleged mishandling of computer codes and data files, even though these files had not been classified at the time of Dr. Lee's alleged activities. Instead, the computer codes and data files had been designated as "protect as restricted data" (PARD), which ranks between unclassified and confidential on the Los Alamos National Laboratory (LANL) security hierarchy. Moreover, the government obtained the indictment under § 793 even though it concededly has no evidence that the codes and data files were ever transferred to any unauthorized person. Not one person other than Dr. Lee has ever been charged under § 793 for mishandling materials that had not been formally classified and that were not transferred.

Dr. Lee has obtained concrete proof that the government improperly targeted him for criminal prosecution because he is "ethnic Chinese." This direct evidence includes the following:

- A sworn declaration from a LANL counterintelligence official who participated in the investigation of Dr. Lee that Dr. Lee was improperly targeted for prosecution because he was "ethnic Chinese."
- Videotaped statements of the FBI Deputy Director who supervised counterintelligence investigations until last year admitting that the FBI engaged in racial profiling of Dr. Lee and other ethnic Chinese for criminal counterintelligence investigations.
- The sworn affidavit the U.S. Attorney's Office used to obtain the warrant to search Dr. Lee's home, in which the FBI affiant incorrectly claimed that Dr. Lee was more likely to have committed espionage for the People's Republic of China (PRC) because he was "overseas ethnic Chinese."
- A posting to the Los Alamos Employees Forum by a LANL employee who assisted counterintelligence investigations and personally observed that the DOE engaged in racial profiling of Asian-Americans at Los Alamos during these investigations.

Dr. Lee has requested that the government provide specific reports and files to him that squarely relate to the issue of whether he has been selectively prosecuted as a result of improper racial profiling. The government has refused to provide any of these documents to Dr. Lee.

Because Dr. Lee is the only person who has ever been selected for prosecution under the Atomic Energy Act,[1] and the only person ever prosecuted in remotely similar circumstances under § 793, and because he has uncovered specific direct admissions from the government that he was targeted for criminal investigation because he is "ethnic Chinese," he has made the necessary showing to obtain this discovery. Even if Dr. Lee did not have this direct evidence, he has also satisfied the stringent requirements of United States v. Armstrong, 517 U.S. 456 (1996), which held that in the absence of direct evidence of impermissible racial targeting, a defendant is nevertheless entitled to discovery if he provides some

evidence that similarly situated people have not been prosecuted and that his investigation and prosecution were caused by improper racial motivations.

[1] At Dr. Lee's detention hearing on December 13, 1999, FBI Special Agent Robert Messemer conceded that Dr. Lee is the only person who has ever been charged under the Atomic Energy Act. See Transcript of Proceedings, December 13, 1999, at 139.

This memorandum summarizes compelling evidence that the DOJ had an informal policy of refusing to bring criminal charges in situations similar to and (even more egregious than) Dr. Lee's case. In addition, we provide several specific examples of similarly situated individuals whom the government has chosen not to indict under either the Atomic Energy Act or § 793. Unlike the meritless selective prosecution discovery motions discussed in Armstrong, where several thousand men and women of all races had been charged under the same statutes as the defendants, Dr. Lee can conclusively establish that he is the only person whom the government has ever chosen to indict under the Atomic Energy Act and the only person indicted in similar circumstances under § 793.

FACTUAL BACKGROUND

A. The Indictment

On December 10, 1999, the government brought a fifty-nine-count indictment against Dr. Lee. Thirty-nine counts allege that Dr. Lee violated the Atomic Energy Act because he purportedly mishandled material containing restricted data, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation. Dr. Lee was also charged with ten counts of unlawfully obtaining national defense information in violation of 18 U.S.C. § 793(c), and with ten counts of willfully retaining national defense information in violation of 18 U.S.C. § 793(e).

B. Dr. Lee's Discovery Requests

Dr. Lee's counsel have made a written request to the prosecution for specific materials his counsel believe contain direct evidence that Dr. Lee was improperly selected for prosecution because he is "ethnic Chinese." [2] Among the several categories of materials requested were: (1) the reports and memoranda supporting the findings of the DOE's Task Force on Racial Profiling's January 2000 report, (2) the Defensive Information to Counter Espionage videotapes, that were created by DOE counterintelligence and shown to DOE employees until last year, and are now prohibited at LANL because they allegedly contain racial stereotypes; (3) DOE or DOJ memoranda and reports confirming that the FBI targets Americans of Chinese ethnicity for potential criminal espionage involving the PRC; (4) the DOJ's and DOE's responses to the numerous Congressional inquiries related to the justification for and details of the investigation of Dr. Lee; (5) the classified September 1999 State Department report by Jacqueline Williams-Bridger, detailing hundreds of cases of mishandling classified information, including cases of actual passing of classified information; and (6) information concerning specific cases in which the government declined to prosecute under circumstances similar to, or more egregious than, this case. The government has refused to produce any of the materials requested by Dr. Lee's counsel.

[2] See May 1, 2000, letter from Mark Holscher to AUSA Robert Gorence, attached as Exhibit A.

I. THE LEGAL STANDARD FOR DISCOVERY REGARDING SELECTIVE PROSECUTION

The Supreme Court established the threshold for discovery on selective prosecution claims in United States v. Armstrong, 517 U.S. 456 (1996). The Court held that to obtain discovery in a case in which the court is asked to infer discriminatory purpose, a defendant must produce (1) some evidence that similarly situated individuals have not been prosecuted, and (2) some evidence of improper motivation in deciding to prosecute. The Court did not decide whether a defendant should be required to produce some evidence that similarly situated persons have not been prosecuted if the prosecution has admitted having a "discriminatory purpose." Id. at 469 n.3.

II. DR. LEE MORE THAN MEETS THE LEGAL STANDARD FOR DISCOVERY REGARDING SELECTIVE PROSECUTION

As we demonstrate below, Dr. Lee clearly meets the legal standard that Armstrong establishes for discovery related to a selective prosecution claim. In Part A, he presents direct evidence that government officials have admitted a racial basis for investigating Dr. Lee, and in Part B, he establishes that the government has declined to prosecute similarly situated persons.

A. Dr. Lee has Direct Evidence that He was Targeted for Criminal Investigation Because He is "Ethnic Chinese."

The troubling chain of events that led to Dr. Lee's indictment began when the DOE's Chief Intelligence Officer, Notra Trulock, incorrectly concluded in 1995 that the PRC had obtained the design information for the W-88 warhead from someone at the Los Alamos National Laboratory.[3] Mr. Trulock began an Administrative Inquiry to identify the suspect or suspects who should be the focus of this counterintelligence investigation. On May 29, 1996, Mr. Trulock issued the Administrative Inquiry which listed Dr. Lee as the main suspect. This Administrative Inquiry led to meetings between DOE counterintelligence officials and FBI Special Agents in New Mexico regarding Dr. Lee. The FBI then opened a criminal investigation of Dr. Lee.

[3] Just last year the DOJ conceded in a press conference that this conclusion was incorrect, and it opened a criminal investigation into the over 450 individuals outside LANL who had received this design information. See, e.g., Vernon Loeb and Walter Pincus, New Leads Found in Spy Probe, Washington Post, Nov. 19, 1999 at Al, attached as Exhibit B.

1. Vrooman's Declaration Establishes that the Government Engaged in Improper Racial Profiling

Robert Vrooman, who was the Chief Counterintelligence Officer at LANL from 1987 until 1998, participated in the Administrative Inquiry and assisted in the resulting criminal investigation of Dr. Lee. Mr. Vrooman is adamant that Mr. Trulock's targeting of Dr. Lee for investigation was the result of improper racial profiling. In a declaration, attached as Exhibit C, Mr. Vrooman states:

> Mr. Trulock's office chose to focus specifically on Dr. Lee because he is "ethnic Chinese." Caucasians with the same background and foreign contacts as Dr. Lee were ignored.

Vrooman Decl., Ex. C at 3, ¶ 9. Vrooman is also unequivocal in stating that this impermissible racial profiling was the main reason Dr. Lee was targeted for criminal prosecution. "I state without reservation that racial profiling was a crucial component in the FBI's identifying Dr. Lee as a suspect." Id. at 3,¶ 12.[4]

[4] Vrooman consistently raised this concern with federal officials, long before he provided his declaration here. As he indicated in a May 1999 letter to U.S. Senator Domenici: "[e]thnicity was a crucial component in identifying Lee as a suspect. Caucasians with the same background as Lee were ignored." See Ex. I to Ex. C. Vrooman also wrote to Senator Conrad Burns in June 1999 that "Mr. Lee was selected as the prime suspect mainly because he is ethnic Chinese." See June 25, 1999, letter from Robert Vrooman to U.S. Senator Conrad Bums, attached as Exhibit D.

Vrooman has also made clear that Trulock, who was the highest ranking DOE employee overseeing all counterintelligence investigations, intentionally targeted "ethnic Chinese" because Trulock held the belief that these American citizens could not be trusted like other American citizens. As Vrooman states in his declaration, Trulock told him that "ethnic Chinese should not be allowed to work on classified projects, including nuclear weapons." Id. at 3, ¶ 13.[5] Trulock made these statements while he was chief of the DOE's counterintelligence office, and when he was personally assisting the criminal investigation of Dr. Lee. Trulock's statements that American citizens who are "ethnic Chinese" should be barred from sensitive jobs at LANL are a violation of federal civil rights statutes that prohibit racial discrimination for employment.[6] Trulock's statements are further corroboration that Trulock intentionally targeted Dr. Lee because he was "ethnic Chinese."

[5] Vrooman confirmed this troubling fact in the letter he wrote to Senator Domenici on May 11, 1999, See Ex. I to Ex. C.

[6] See 42 USCA § 2000e-2 ("It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

2. Former FBI Deputy Director Paul Moore has Confirmed that Dr. Lee was Targeted by the FBI Due to Racial Profiling

The FBI used the same impermissible racial profiling in its criminal investigation of Dr. Lee. The Deputy Director of the FBI responsible for all criminal counterintelligence prosecutions until 1999 confirmed that the FBI's criminal investigation of Dr. Lee was premised on the same impermissible racial bias, namely, that "Chinese-Americans" were more likely to commit espionage. The Deputy Director, Paul Moore, oversaw portions of the criminal investigation of Dr. Lee. In a televised interview with Jim Lehrer, on December 14, 1999, regarding the arrest and indictment of Dr. Lee, Deputy Director Moore admitted that racial profiling was used, but attempted to justify this racial classification as reasonable:

> There is racial profiling based on ethnic background. It's done by the People's Republic of China. ... Now the FBI comes along and it applies a profile, so do other agencies who do counter intelligence investigations -- they apply a profile, and the profile is based on People's Republic of China, PRC intelligence activities. So, the FBI is committed to following the PRC's intelligence program wherever it leads. If the PRC is greatly interested in the activities of Chinese-Americans, the FBI is greatly interested in the activities of the PRC as [regards] Chinese-Americans.

The News Hour With Jim Lehrer, December 14, 1999, Tuesday, Transcript #6619, attached as Exhibit E at 12.

Moore's statements ignored the fact that senior FBI officials, in memoranda the government is withholding from Dr. Lee, had concluded long before December 1999 that it did not have credible evidence that the Taiwanese-born Dr. Lee had engaged in any improper activities with the PRC. In his videotaped interview, Moore then attempted to explain why the DOJ had indicted Dr. Lee:

> So, now, the U.S. in my opinion, this signals that the U.S. is fighting back. This is the situation quite similar to the Al Capone case where they couldn't [lock] him up for his racketeering activities, so they cast about and they found something else that they could get him for.

Id. at 14.

Moore, however, later conceded that the FBI's targeting of American citizens who are "ethnic Chinese" for increased scrutiny for espionage did not make sense. In response to a statement by Nancy Choy of the National Asian Pacific-American Bar Association that targeting people for criminal investigation based on their race was improper, Moore backtracked from his earlier statement that the racial targeting of "ethnic Chinese" by the FBI was reasonable. After Ms. Choy challenged the profiling, Moore admitted that:

> Ethnic profiling doesn't work for the PRC, it doesn't work for the FBI. You cannot predict someone's intelligence, somebody's espionage behavior based on his ethnic background. (Emphasis added.)

Id. at 13.

Moore did not even attempt to address the issue of how such racial targeting could even be considered for a citizen of the United States who was born in Taiwan. The Attorney General of the United States, in testimony before a Senate subcommittee, also stated that it was illogical to claim that a Taiwanese-born scientist like Dr. Lee would be predisposed to assist the PRC. "Now, if you are using that information to suggest that you are an agent of a foreign power, to whit, [sic] the PRC, the immediate question is raised, how are you that if you are clearly working with the Taiwanese Government on matters that apparently involve non-classified information?" Top Secret Hearing Before the Senate Committee on the Judiciary, 106th Cong. (1999), (visited June 22, 2000) (http://www.fas.org/irp/congress/1999_hr/renofisa.html) (statement of Attorney General Janet Reno).

3. Acting Counterintelligence Director Washington Also Confirmed Trulock's Profiling of Chinese Americans

Eugene Washington, who was DOE's acting Director of Counterintelligence in 1996, also believes that Trulock engaged in improper racial profiling. Washington confirmed in an interview with the Washington Post in August 1999, that "he told Trulock that he was unfairly singling out Lee and another Chinese American scientist." Vernon Loeb and Walter Pincus, Espionage Whistleblower Resigns: Energy's Trulock Cites Lack of Support as Debate About His Tactics Grows, Washington Post, August 24, 1999, attached as Exhibit F. Washington apparently sent Trulock a memorandum recommending that the investigation be

closed and apparently questioning the DOE's focusing on Chinese Americans. This government has not produced this memorandum to Dr. Lee.

4. The Search Warrant Affidavit the DOJ Submitted to Search Dr. Lee's House Contains Additional Proof that Dr. Lee was Targeted Because He is "Ethnic Chinese."

The once-sealed affidavit in support of a search warrant to search Dr. Lee's home confirms that the government considered Dr. Lee's race to be evidence of possible espionage.[7]

> [7] This affidavit was written after internal FBI memoranda apparently concluded that Dr. Lee did not pass W-88 information to the PRC. The government has refused to turn over to the defense the FBI 302's dated November 29, 1998, January 22, 1999, February 26, 1999, and September 3, 1999, memoranda which, according to multiple press reports, directly contradicted the sworn declaration provided to the United States Magistrate Judge in New Mexico.

To support the now fully discredited allegations that Dr. Lee may have committed espionage, the affidavit asserts that FBI counterintelligence experts were relying in part on the fact that Dr. Lee was "ethnic Chinese." As the affidavit states, the "supervisory Special Agent of the FBI who specializes in counterintelligence investigations regarding the People's Republic of China" who"has supervised from FBI headquarters PRC counterintelligence investigations for the past five years" explained to the investigative agent "that PRC intelligence operations virtually always target overseas ethnic Chinese." The affidavit leaves no doubt that improper racial profiling, which started with Mr. Trulock, continued to be a substantial basis for the targeting of Dr. Lee in 1999.

5. Another LANL Employee Has Also Confirmed that the DOE Engaged in Racial Profiling.

Dr. Lee has uncovered additional corroboration that DOE's counterintelligence staff used racial profiling. In an e-mail to his fellow employees, Michael Soukup wrote that the DOE pressured him to investigate Asian-Americans because of their ethnicity when he assisted the DOE in counterintelligence investigations. See Letter of Michael Soukup, dated April 12, 2000, and published in the Los Alamos National Laboratory Online Forum, http://www.lanl.gov/orgs/pa/News/forum/letter2000-080.html.

Specifically, Soukup states:

> While I was assigned to NIS-9 (until mid-1998), I supported, on a part-time basis, the counterintelligence investigation into alleged Chinese espionage at Los Alamos. Based upon my experience and observations, I conclude that racial profiling of Asian-Americans as a result of the investigation indeed took place, but principally at the DOE. Further, DOE personnel directed some Los Alamos National Laboratory staff to undertake research that profiled Asians and Asian-Americans at the Laboratory. I do not believe any of us were happy with this.

Soukup's statement buttresses Vrooman's declaration and provides an additional basis to believe that discovery regarding selective prosecution could lead to additional proof of improper racial profiling.

B. Evidence that Similarly Situated Individuals Have Never Been Prosecuted Under the Atomic Energy Act or § 793(c) and (e)

It is clear that race played an impermissible role for selecting Dr. Lee for prosecution under the Atomic Energy Act and the Espionage Act, 18 U. S.C. § 793. During the past fifty-two years, no American has ever been prosecuted under the Atomic Energy Act. FBI Special Agent Messemer conceded this fact at the December 13 bail hearing. See fn.1, supra. Evidence that similarly situated individuals have not been prosecuted can be found in both statements of DOJ officials concerning the practices of the DOJ in declining to prosecute similar or more egregious cases as well as specific examples of similarly situated individuals that the DOJ declined to charge.

Not only have there been no other prosecutions under the Atomic Energy Act, the DOJ had a policy of not bringing cases such as this under § 793 as well. As a former DOJ official told the Washington Post a few months ago, for twenty years the Department had followed a practice of not prosecuting civilians where no evidence existed that the classified materials in question had been transferred to a third party. According to this official, "[n]o matter how gross the violation, there would be no prosecution if the agency took strong administrative action." See Walter Pincus and Vernon Loeb, U.S. Inconsistent When Secrets Are Loose, Washington Post, March 18, 2000, at Al, attached as Exhibit G. Here, not only had Dr. Lee's files not been classified at the time he allegedly mishandled them, but also the indictment does not allege that the files in

question were provided to any third party and the government conceded at the detention hearing that it has no such evidence. Dr. Lee was terminated -- obviously "strong administrative action" -- and under DOJ practice there should have been "no prosecution."

Further evidence that DOJ has never prosecuted similarly situated individuals can be found in the Department's apparent blanket refusal to bring criminal charges where State Department officials have mishandled classified materials. In 1999 alone, the State Department investigated thirty-eight incidents of mishandling classified information. See id. A classified analysis by the State Department likewise detailed numerous similar breaches, in a September 1999 report written by Jacqueline Williams-Bridger. According to press reports, this classified document, which the government has not provided to the defense, details hundreds of breaches of appropriate procedures for handling classified information, including the intentional transferring of secret information, which did not result in criminal prosecution. See, e.g., S. Rep. No. 106-279, at 10-15 (2000); Vernon Loeb & Steven Mufson, State Dept. Security Has Been Lax, Audit Finds: Many Offices Not Swept For Listening Devices, Washington Post, Jan. 17, 2000, at Al, attached as Exhibit H. It is critical to note that these individuals who were not prosecuted included State Department employees who intentionally transferred secret or top secret information to unauthorized persons. By contrast, Dr. Lee did not provide information to any unauthorized person, and the material at issue had not been classified at the time of his alleged actions.

Employees of the DOE and the national weapons laboratories have a long history of unprosecuted mishandling of classified information. According to the 1999 Report by the President's Foreign Intelligence Advisory Board entitled Science at Its Best, Security at Its Worst, attached as Exhibit I, designs of classified weapons had been left unsecured on library shelves at Los Alamos, and personnel were "found to be sending classified information to outsiders via an unclassified email system," yet no prosecutions resulted. This report also outlined dozens of examples of systemic mishandling of classified information by laboratory employees. See id. at 3-6, 15, 22. During the entire time of LANL's woeful security record, nota single employee faced charges under the Atomic Energy Act or § 793. Based on discovery Dr. Lee has received to date, the DOE investigated dozens of cases of mishandling of classified information at LANL, without a single prosecution. See Pincus, U.S. Inconsistent When Secrets are Loose, Ex. G at 4.

In addition to the evidence of the government's practice of not prosecuting violations of the Atomic Energy Act and § 793(c) and (e), Dr. Lee has uncovered several individuals who have not been investigated criminally, much less indicted.

- **John Deutch:** During his tenure as director of the CIA, former Director John Deutch used his unsecured personal computer at home to create and access top secret files even though he had a secure computer in his home. See S. Rep. No. 106-279, at 9 (2000); Bob Drogin, CIA Reprimands 6 for Actions in Deutch Investigation, L.A. Times, May 26, 2000, at A14, attached as Exhibit J.

- **Kathleen Strang:** According to published reports Arms Control and Disarmament Agency employee, Kathleen Strang "improperly removed. . . [classified] documents from a storage vault at the State Department, repeatedly left them overnight in an open safe accessible to dozens of people without security clearances" and then ignored several warnings to protect these documents. These classified documents reportedly included highly sensitive details of how the U.S. intelligence community monitors nuclear tests and weapons development. These reports state that Ms. Strang gave other sensitive information to the Japanese. Apparently, one could draw a complete picture of how U.S. intelligence monitors nuclear tests and weapons development from these documents. See Bob Woodward, ACDA Aide Faulted on Security, Washington Post, Nov. 4, 1986, at Al, attached as Exhibit K.

- **Anonymous sources of Bill Gertz:** A government employee or government employees unknown to Dr. Lee provided Bill Gertz with classified material from the National Security Agency published in the May 1999 book Betrayal, which includes fifty-nine pages of secret documents (including those covered by the Atomic Energy Act) relating to Chinese missile technology. See Bill Gertz, Betrayal: How the Clinton Administration Undermined American Security (1999).

- **Fritz Ermarth:** CIA employee Fritz Ermarth reportedly transferred secret and top secret files between his home computer and his work computer, resulting in a virus entering the CIA's classified network. See Pincus, U.S. Inconsistent When Secrets Are Loose, at Al, Ex. G.

- **LANL Scientist:** A LANL nuclear scientist allegedly downloaded the "Green Book" containing secret restricted data regarding U.S. nuclear strategy and the vulnerabilities of U.S. nuclear weapon systems onto an unclassified LANL computer with Internet access. See id.[8]

[8] Dr. Stephen Younger, whose testimony that the nuclear balance of power would be adversely affected if Dr. Lee were released is partly responsible for Dr. Lee being held without bond, was involved in evaluating the seriousness of this security violation and deferring the appropriate punishment of the LANL scientist referred to above.

- **M.K:** A CIA agent identified only as M.K. sold twenty-five CIA computers to the public without erasing top-secret information on their hard drives. The CIA learned of the breach when an individual who purchased a computer called to say that the hard drive of his computer contained files that he didn't think should be there. See Vernon Loeb, CIA Employees Sue Agency for Unfettered Right to Legal Help, Washington Post, May 14, 1999, at A31, attached as Exhibit L.

- **James R. Conrad:** In 1987 the government declined to prosecute defense contractor James R. Conrad, who Department of Defense investigators accused of removing classified documents from the Pentagon. Conrad earlier had transmitted classified information including missile launch commands and wartime bomber routes over unsecured computer lines from his computer in San Diego to Fairfax County, Virginia. See Secrets Breach Reported, The Dallas Morning News, June 12, 1987, at A8, attached as Exhibit M.

- **Unnamed defense contractor:** The DOJ investigated an employee of a defense contractor in Southern California for transferring hundreds of secret documents and storing them in his garage. DOJ lawyers apparently overruled the investigative agencies and declined to prosecute this employee.

The defense has been unable to locate a single reported decision dating back to the 1950s in which a civilian was prosecuted under § 793(c) or (e) without any allegation that he provided classified material to an unauthorized person. Unlike the defendants in the cases that have been brought, [9] the government has not even alleged that Dr. Lee transferred national-defense information to any unauthorized recipient.

[9]See e.g., Coplon v. United States, 191 F. 2d 749, 750-53 (D.C. Cir. 1951) (defendant was arrested while attempting to deliver data slips of F.B.I. reports to a Russian agent); Scarbeck v. United States, 317 F.2d 546, 548 (D.C. Cir. 1962) (defendant communicated classified information to representatives of the Polish Government); United States v. Dedeyan, 584 F.2d 36, 38 (4th Cir. 1978) (defendant showed a cousin who was working with a Soviet agent a classified study); United States v. Kampiles, 609 F.2d 1233, 1235 (7th Cir. 1979) (defendant was charged with willfully delivering a national-defense document to unauthorized persons); United States v. Truong Dinh Hun, 629 F.2d 908, 911 (4th Cir. 1980) (defendant arranged to have someone deliver classified papers to Vietnamese agents); United States v. Harper, 729 F.2d 1216, 1217 (9th Cir. 1984) (defendant was charged with obtaining and selling national-defense information to Polish agents; United States v. Smith, 780 F.2d 1102, 1103 (4th Cir. 1985) (defendant sold classified information to a Soviet agent); United States v. Walker, 796 F.2d 43, 45 (4th Cir. 1986) (defendant was arrested while attempting to deliver classified defense information to a Soviet agent); United States v. Zettl, 835 F.2d 1059, 1060 (4th Cir. 1987) (defendant delivered Navy program element descriptions to an unauthorized person); United States v. Morison, 844 F.2d 1057, 1060 (4th Cir.1988) (defendant sent secret Naval satellite photographs to a British publisher for publication); United States v. Whitworth, 856 F.2d 1268 (9th Cir. 1988) (defendant was charged with obtaining and delivering national-defense information to a foreign government); United States v. Miller, 874 F.2d 1255, 1258 (9th Cir. 1989) (defendant copied and delivered national-defense information to the Soviet government).

Even the defendants in reported military court cases, tried under the more stringent provisions of the Uniform Code of Military Justice, were tried when the evidence showed that they actually transferred materials or allowed an unauthorized third-party to physically obtain classified information.[10]

[10] See, e.g., United States v. Roller, 42 M.J. 264, 265 (C.M.A. 1995) (defendant left classified documents in his garage, which allowed a moving company employee to obtain access to the documents); United States v. Baba, 21 M.J. 76, 77 (C.M.A. 1985) (defendant was charged with willfully delivering or cause to deliver three documents to unauthorized persons); United States v. Gonzalez, 16 M.J. 428, (C.M.A. 1983) (defendant left two classified messages in an unauthorized recipient's desk drawer); United States v. Grunden, 25 C.M.A. 327, 2 M.J. 116,119 (C.M.A. 1977) (defendant attempted to communicate national-defense information); United States v. Anzalone, 40 M.J. 658, 813 (N-M.C.M.R. 1994) (defendant disclosed and mailed information about military forces to unauthorized persons); United States v. Schoof, 34 M.J. 811, 813 (N-M.C.M.R. 1992) (defendant attempted to deliver microfiches to a foreign power); United States v. Lonetree, 31 M.J. 849, 852 (N-M.C.M.R. 1990) (defendant identified the names of United States intelligence agents to Soviet

agents and provided the floor plans and office assignments of personnel in United States Embassies in Moscow and Vienna). But see United States v. Chattin, 33M.J. 802, 803 (N-M.C.M.R. 1991) (Defendant pleaded guilty to removing classified documents and willfully retaining it. Chattin was sentenced to confinement for four years, reduction to pay grade E-1,forfeiture of all pay and allowances, and a bad conduct discharge. The convening authority suspended all confinement in excess of three years for twelve months).

Similarly situated individuals who have not transferred any national-defense information have not been prosecuted under the Espionage Act. [11] The government has never alleged that Dr. Lee transferred the materials to anyone, nor that he left them unprotected where they could be stumbled upon by anyone. In fact, the evidence presented by the government itself at the bail hearings in this case confirms that Dr. Lee password-protected any materials on which he worked.

[11] Dr. Lee anticipates that the government will attempt to rely on United States v. Poulsen, 41 F.3d 1330,1333-35, (9th Cir. 1994) (defendant was charged with violating 18 U.S.C. § 793(e), in a second superseding indictment, for storing computer tapes of United States Air Force tasking orders in a rental storage unit). But Poulsen was not similarly situated to Dr. Lee because Poulsen allowed a third party to gain actual access to the tapes. Unauthorized third-party access constitutes transfer of the information. Poulsen stole the computer tapes from a previous employer and stored the tapes under a false name and address. Defendant then defaulted on the rental payments. The tapes were discovered by a third party, the rental-unit owner, while the rental-unit owner was evicting all contents from the unit due to defendant's seventy-one-day default.

C. Dr. Lee Meets Both Prongs of the Test Stated In Armstrong.

Dr. Lee indisputably meets both prongs of the Armstrong test, and must be granted discovery because he has submitted credible evidence that similarly-situated individuals have not been prosecuted as well as statements from government and law enforcement officials demonstrating improper motivations to prosecute Dr. Lee. Dr. Lee was selected from among more than a dozen identically situated individuals at LANL for criminal investigation in 1996 because he was "ethnic Chinese." This improper classification was employed for the next three years, and was explicitly reaffirmed in the April 9, 1999, search warrant application. The evidence of selective prosecution Dr. Lee has already uncovered far exceeds the Armstrong threshold.

Armstrong denied discovery to defendants who were charged with distributing crack cocaine in violation of 21 U.S.C. §§ 841 and 846. In Armstrong, the defense offered only one hearsay affidavit that in the year Armstrong was prosecuted, the twenty-three other § 841 cases handled by the Federal Public Defender in Los Angeles involved black defendants. See id. at 459. The defendants in Armstrong presented no evidence that the prosecution undertook any targeting based on race, see id., nor did the defendants make any showing that non-blacks had not been charged in other years or by one of the ninety-two other U.S. Attorney's Offices in 1991. In Armstrong, the government submitted proof that 3,500 defendants had been charged with violating § 841 in the previous three years and eleven non-blacks had been charged for distributing crack cocaine. Id. at 482 n.6.

Dr. Lee's compelling showing here stands in stark contrast to the anemic showing in Armstrong. First, this Court has direct evidence in the form of a sworn declaration and a videotaped statement from government agents who assisted in the criminal investigation of Dr.Lee, which establish that a racial profiling was used to target Dr. Lee. Second, in contrast to Armstrong, where the government proved that 3,500 men and women of all races had been charged under §§ 841 and 846 during a three-year period, Dr. Lee is the only person who has been charged under the Atomic Energy Act in the past fifty-two years. Third, Dr. Lee has provided this Court with examples of similarly situated non-Asians who have not been prosecuted under either the Atomic Energy Act or § 793. The defendants in Armstrong made no showing whatsoever that similarly situated non-blacks had not been prosecuted. Equally as compelling, Dr. Lee has provided this Court with evidence that the DOJ had a policy of not prosecuting individuals similarly situated to Dr. Lee. Additionally, no case has been brought under § 793 involving prosecution for information that had not been formally classified at the time of the defendant's conduct.

The evidence Dr. Lee has presented by far exceeds the threshold found sufficient to permit discovery in other cases decided under the Armstrong standard. For example, In United States v. Jones, 159 F.3d 969 (6th Cir. 1998), the Sixth Circuit overturned a District Court's decision and granted discovery under circumstances directly analogous to this case. In Jones police officers sent taunting letters to two black defendants, but not to a white defendant involved in the same conspiracy, and made a T-shirt with the black defendants' pictures, but not the white defendants. In Jones, the court found that the taunting letters and T-

shirt had established a prima facie case of racial motivation on the part of the investigating officers, and had set forth "some evidence" of discriminatory effect, warranting discovery. The court found that although the defendant was unable to produce "prima facie evidence" of discriminatory effect, "some evidence" was enough when coupled with the evidence of discriminatory motivation. Id. at 977. The Jones analysis holds even greater force here, where key investigators have unequivocally stated that the DOE practiced racial profiling which led to Dr. Lee's indictment, and the lead counterintelligence official at DOE made racially-charged statements regarding the fitness of American citizens who are "ethnic Chinese" to work on nuclear weapons programs. Dr. Lee has presented more than "some evidence" of discriminatory effect. Unlike the defendant in Jones who could not show that others were not prosecuted, Dr. Lee has shown that no one else has ever been prosecuted under the Atomic Energy Act provisions at issue in this case, nor has anyone else been prosecuted under § 793 for mishandling information that had not been formally classified and that had not been furnished to any unauthorized person.

Similarly, in United States v. Tuitt, 1999 WL 791927 (D.Mass. 1999), the trial court ordered that the defendant be provided discovery under far less compelling circumstances. In Tuitt, the defendant's attorney compared four counties within the judicial district over a four-month period and found a statistically significant difference between the crack cocaine prosecutions brought in federal court and the crack cocaine prosecutions brought in state court. See id. at *4. Tuitt held that this showing was enough to meet the Armstrong standard where "Defendant is simply attempting to gain discovery so that he can more adequately determine whether a selective prosecution claim might indeed be viable." Id. at * 11. Again Dr. Lee far surpasses the threshold met by the Tuitt defendant. Rather than four months, Dr. Lee's attorneys examined reported cases covering fifty years, and rather than four counties, the search covered fifty states, without finding a single other reported case of prosecution under the Atomic Energy Act.

Similarly, in United States v. Glover, 43 F. Supp. 2d 1217 (D. Kan. 1999), the court granted discovery on a selective prosecution claim regarding imposition of the death penalty where the defense provided far less evidence on either prong of the Armstrong test. In Glover, the defendant presented some statistical evidence that over a three-and-one-half-year period, "the Attorney General authorized a greater number of black defendants for death-penalty prosecution than white defendants." Id. at 1234. The court found that this evidence, coupled with evidence that two other similarly-situated defendants were not prosecuted in federal court, was enough to permit discovery. See id. Rather than the mere statistical inference found sufficient in Glover, Dr. Lee has presented credible evidence in the form of specific statements made by investigators in this case that race was a factor in selecting Dr. Lee for prosecution. Moreover, he has presented some evidence of not two, but several individuals mishandling classified information without facing criminal charges of any kind, much less a potential life sentence.

CONCLUSION

Dr. Lee has presented compelling evidence the government singled him out for prosecution because of his race and refused to prosecute similarly situated individuals. Dr. Lee is entitled to the information the government is withholding from him -- information that will prove this is an egregious example of selective prosecution in violation of Dr. Lee's rights under the United States Constitution.

This Court should grant this motion and order the government to provide Dr. Lee the requested discovery materials, as set forth in Exhibit A.

Respectfully submitted,

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FAS Note: The following FBI affidavit was filed in support of an application for a search warrant to search the home of Wen Ho Lee. The application was filed on April 9, 1999. The affidavit when filed was classified Secret (Restricted Data) and was declassified a year later with deletions as indicated. HTML by FAS from hardcopy.

AFFIDAVIT

I, MICHAEL W. LOWE, being duly sworn, depose and say:

(1) I, MICHAEL W. LOWE, am a Special Agent of the Federal Bureau of Investigation (FBI), United States Department of Justice, assigned to the Albuquerque Division, Santa Fe Resident Agency, and have been a Special Agent for approximately 12 years. The information set forth in this affidavit is the result of my own investigation or has been communicated to me by others involved in this investigation. Among these other individuals is a Supervisory Special Agent of the FBI who specializes in counterintelligence investigations regarding the People's Republic of China (PRC). This investigator has been a Special Agent for 19 years; he has worked on counterintelligence investigations for over ten of these years, and has supervised from FBI headquarters PRC counterintelligence investigations for the past five years.

(2) I believe that probable cause exists to issue a search warrant for the residence of LEE WEN HO (hereafter known as LEE), 80 Barcelona Avenue, White Rock, New Mexico, 87544, for evidence of violations of Title 18, United States Code, Section 1924 (Unauthorized Removal and Retention of Classified Documents or Materials), Title 18 United States Code, Section 793 (Gathering, Transmitting or Losing Defense Information), and Title 18 United States Code, Section 1001 (False Statements). The basis for my belief is set forth below.

(3) LEE, who lives at 80 Barcelona Avenue (described fully in Attachment A), is a hydro-dynamicist/mathematician who was formerly assigned to the X-Division of Los Alamos National Laboratory (LANL), which is managed by the Department of Energy (DOE). LEE is a naturalized United States citizen born on December 21, 1939, in Nantow, Taiwan. Sylvia Lee, his wife, is also a naturalized United States citizen born December 6, 1943, in Hunan Province, China. Sylvia Lee worked at the Los Alamos National Laboratory from November 1980 to June 1995, where the last position held was "Computer Technician." She had a Top Secret clearance from March 12, 1991, until her departure from LANL on June 9, 1995.

(4) The FBI expert described in paragraph (1) has explained that PRC intelligence operations virtually always target overseas ethnic Chinese with access to intelligence information sought by the PRC. Travel to China is an integral element of the Chinese intelligence collection tradecraft, particularly when it involves overseas ethnic Chinese. FBI analysis of previous Chinese counterintelligence investigations indicates that the PRC uses travel to China as a means to assess closely and evaluate potential intelligence sources and agents, as a way to establish and reinforce cultural and ethnic bonds with China, and as a safehaven in which to recruit, task, and debrief established intelligence agents.

(5) Based on information supplied by DOE, the FBI began an investigation of LEE and Sylvia Lee on May 30, 1996. A review of FBI records disclosed that LEE had previously been the subject of an FBI foreign counterintelligence investigation during approximately 1982-1984, when he was in contact with a suspected PRC intelligence agent. LEE was overheard on court-authorized electronic surveillance contacting a former employee of the Lawrence Livermore National Laboratory who had been suspected of passing classified weapons information to the PRC. On December 3, 1982, court-authorized telephone surveillance of the employee intercepted a call from LEE. LEE introduced himself, explained that he was a weapons designer at the Los Alamos National Laboratory, and commented that he had heard about the employee's "matter." LEE wanted to meet the employee and stated that he thought he could find out who had "squealed" on the employee.

(6) On November 9, 1983, the FBI interviewed LEE in Los Alamos, New Mexico. LEE was not told that the FBI had intercepted his call to the Lawrence Livermore employee on December 3, 1982. Lee stated that he had never attempted to contact the employee, did not know the employee, and had not initiated any telephone calls to him. LEE stated that the employee was no longer at the Lawrence Livermore Laboratory, and that he had no way of contacting him at his home. In a subsequent interview with the FBI, LEE admitted that he had called the Lawrence Livermore employee and had previously misled the FBI about the contact.

(7) On January 24, 1984, LEE passed a polygraph examination which included questions concerning whether he had ever passed classified information to any foreign government. The FBI's foreign counterintelligence investigation of LEE was closed on March 12, 1984.

(8) The X-Division of LANL, where LEE worked from 1982 through December 23, 1998, has the highest level of security of any division at LANL. It is LANL's research and development division responsible for the design of thermonuclear weapons. LEE was part of a team responsible for developing thermonuclear weapons for the United States. LEE has explained (during a February 9, 1999, interview with Special Agents of the FBI) that, while at LANL, he worked on five Lagrangian mathematical codes, also known as "source codes." LEE explained that two of these codes are classified because they are used to develop nuclear weapons. Charles Neil, Technical Staff member and Team Leader in the X-Division has informed the FBI that the mathematical codes with which LEE worked were used to develop various nuclear weapons, including a weapon known as the W-88.

(9) According to Neil, both of the classified source codes and other materials with which LEE worked represent decades of nuclear weapons testing and design. In essence, the information is more valuable to a weapons designer than an actual bomb blueprint. With source codes and other identifying information a bomb designer does not have to do any actual testing. By plugging variables (such as different materials or different dimensions) into various equations and computer programs and viewing the results a designer could build the most sophisticated nuclear weapons.

[Paragraph deleted]

[1] Hu Side became the head of the PRC weapons program in January of 1994.

(11) LEE said during his December 23, 1998 pre-polygraph interview that he had social contact with PRC visitors to LANL, including visits to his residence. Following the interview on December 23, 1998, DOE polygraphers administered a polygraph examination of LEE. The examiner's initial opinion was that LEE was not deceptive. However, subsequent quality control reviews of the results, by both DOE and by FBI Headquarters (HQ) resulted in an agreed finding that LEE was inconclusive, if not deceptive, when denying he ever committed espionage against the United States.

(12) Following LEE's 1988 trip to China he was debriefed by LANL Internal Security officer ROBERT VROOMAN. VROOMAN asked LEE if he had been asked any inappropriate questions during his trip. LEE responded in the negative. VROOMAN retained his notes from that debriefing and in February 1999 prepared a report containing his recollections based an his notes. LEE was confronted with that report during his interview by the FBI on March 5, 1999. He offered no explanation for why he did not remember to tell VROOMAN about the incident in his hotel room. He said that the only reason he remembered the incident prior to his DOE polygraph was because he had been asked a direct question regarding espionage which for some reason prompted him to remember the question posed to him by ZHENG.

(13) On January 17, 1999, LEE was interviewed at his residence by FBI Special Agents. During this interview, LEE stated that in 1984 or 1985, he was at a conference in Hilton Head, South Carolina, where he met LI DE YUAN from the PRC's Institute of Applied Physics and Computational Math (IAPCM). (IAPCM is the PRC's Nuclear Weapons Design Institute, and is part of the Chinese Academv of Engineering Physics (CAEP), the home of the PRC's overall Nuclear Weapons Program). LEE said LI was a mathematician familiar with Lagrangian mathematics, which LEE said is one of LEE's areas of expertise. LEE also said that it was as a result of his meeting, and "developing a relationship with LI, that he was invited to the IAPCM in both 1986 and 1988.

(14) LEE further stated that when he went to the IAPCM in 1986, he was invited to speak on computational mathematics. He said he was excited and was treated very well by his PRC counterparts. LEE said he met various people during this trip, two of whom were LI WEI SHUN and WANG ZHI SHEU. LEE said WANG worked in "the same project areas" as he did, and they spent a lot of time together at the

conference. LEE stated that following the 1986 trip to the IAPCM, he began to receive cards and letters from these scientists.

(15) LEE furthermore stated that he was invited to attend a second conference in the PRC in 1988,[2] where he again met PRC scientists, including one named ZHENG SHAO TONG. LEE stated that one evening after dinner he received a phone call from ZHENG asking if they could meet. LEE agreed, and shortly thereafter, ZHENG arrived at his hotel room with HU SIDE. LEE acknowledged that he knew that ZHENG was an administrator with the IAPCM. LEE stated that he thought HU SIDE was an explosives expert. LEE reaffirmed what he had said during the December 23, 1998 pre-polygraph examination that when asked a question which involved a classified response he told them he did not know the answer and did not wish to discuss this matter.

[2] This conference was the subject matter of the pre-polygraph interview referred to in Paragraph 11 of this Affidavit.

(16) LEE's contact with ZHENG and HU SIDE in 1988 should have been reported to LANL security officials pursuant to DOE regulations. A review of all the documentation that LEE provided DOE security in 1988 reveals no report of this approach to LEE by ZHENG and HU SIDE. On July 12, 1988, LEE did submit a Foreign Trip Report, as was required by LANL. In his report, LEE described the business trip that he made to Beijing in June 1988. While LEE specified ten different people with whom he met during this trip, he failed to include HU SIDE. LEE also did not disclose that anyone from the PRC had asked him about any classified matters.

(17) On February 10, 1999, the FBI conducted a polygraph examination of LEE. During this examination, the FBI asked LEE whether he had provided two classified codes (discussed in paragraph 8) to any unauthorized person and whether he deliberately obtained any W-88 documents. It was the examiner's opinion that the polygraph results were inconclusive as to those questions. The second question was rephrased to cover a broader range of activities. LEE was then asked the follow two questions:

Q: Have you ever given any of those two codes to an unauthorized person?

A: No.

Q: Have you ever provided W-88 information to any unauthorized person?

A: No.

The polygraph examiner concluded that LEE's answers to these questions were deceptive.

(18) The polygraph examiner then gave LEE an opportunity to discuss his answers further. During the discussion, LEE volunteered the following new information that he had not revealed in the prior interviews with the FBI or DOE. LEE said that during his trip to the PRC in 1986, he was approached by WEI SHEN LI, who LEE knew to be involved in the PRC's Nuclear Program. LI came to see LEE, and asked if LEE could assist him in solving a problem he (LI) was having. LEE agreed. LEE illustrated what he had provided to LI in the form of an equation to assist LI in solving his problem. The polygrapher's report states that LEE said that this equation was the same used in two classified codes. LEE admitted that his assistance to Ll could have been used easily for nuclear weapons development.

(19) In the Foreign Trip Report that LEE submitted to LANL security officials following his 1986 trip, LEE failed to reveal that he had been asked to assist LI in solving a mathematical problem. LEE also did not divulge that he had helped LI solve the problem, and that the help he provided could have been used easily for nuclear weapons development.

(20) Following the polygraph examination, LEE also provided information about the trip he made to Beijing in 1988 that he had not revealed in the earlier interviews. LEE said that he was approached by ZHI SHIU WANG, a PRC scientist, following a conference he attended in China in 1988. According to LEE, WANG asked LEE to help him solve a mathematical problem. LEE admitted that his answer to WANG contained portions of equations similar to those in the classified codes referred to in paragraph 8. LEE drew notes to illustrate WANG's problem. LEE said that this information could be used in weapons development; however, he stated that he never discussed nuclear weapons with WANG. LEE acknowledged that he had fully assisted WANG with his mathematical problem even though he had assumed WANG was part of the PRC's Nuclear Weapons Program. LEE was confident that his assistance to WANG had solved or improved

WANG's problem. LEE stated he assumed that WANG knew that he (LEE) worked on nuclear weapons because of LEE's association with LANL.

(21) According to NEIL, LEE, as a mathematician in the X-Division, had a "Z" number and password which enabled him to access the X-Division's most highly classified information by computer. A "Z" number is a unique identifier given to every individual at LANL who requires access to LANL's Common File System (CFS). The CFS is LANL's file storage system. It is comprised of two separate parts: the closed part of the system, on which classified information is stored; and the open part of the system, which stores only unclassified information. The open part of the system is accessible from anywhere in the world to any Internet user. The closed part of the system is accessible only to those working at LANL with the security clearances authorized by LANL. As an X-Division employee, LEE had access to both parts of the CFS.

(22) CHARLES NEIL, LEE's most recent supervisor in the X-Division, advised that there is no direct communication allowed between the closed and open parts of the CFS. Under LANL rules, unclassified information can be on the closed side of the system; however, employees are prohibited from placing classified information on the open side of the CFS. Occasionally there is a need to transfer unclassified files between the closed and open parts of the CFS. From 1980 to 1994, there were two methods of transferring files between the two parts of the CFS. One method was to use a piece of equipment with appropriate software, called "Machine C." The second transfer method involved downloading files from one part of the CFS directly onto either a 3-1/2-inch floppy disk or a larger capacity storage cartridge. The use of "Machine C" for this purpose was discontinued in 1994. In 1996 the use of a piece of equipment called "Mercury" was implemented to transfer files from the closed to the open part of the CFS. This method, which is still used, maintains a record of the names of the files that have been. transferred. Between 1994 and 1996 the downloading method utilizing floppy discs or storage cartridges was the only method available to transfer files from the closed to the open part of the CFS. This transfer method can still be used in addition to "Mercury".

(23) LANL commonly uses 3M DC 6150 cartridges to download files for transfer between the open and closed parts of the CFS. Once files have been downloaded from one part, they can be uploaded easily into any other computer that has a compatible operating system. On March 5, 1999, LEE consented to a search of his offices at LANL by the FBI.[3] In LEE's X-Division office, investigators found a notebook with a LANL supply order form, dated December 20, 1995. This order form indicated that LEE special-ordered a box of five 3M DC 6150 cartridges in 1995. Neil stated that this was unusual because the cartridges are readily available at X-Division's supply room and do not normally have to be special ordered. In LEE's T-Division office, where he was assigned following suspension of his security authorization, investigators found six 3M DC 6150 cartridges. A preliminary examination of those cartridges by LANL personnel determined that they do not contain classified information. These 3M DC 6150 cartridges are also available from office supply stores and are not unique to LANL.

> [3] 3 As described below in paragraph 29, LEE was reassigned from one LANL division (the X-Division) to another (the T-Division) following suspension of his security authorization. Hereafter, the search of both of LEE's offices will be referred to as "the March search."

(24) As an X-Division employee, LEE was permitted to create directories in the CFS and to name those directories himself. Upon its creation, every directory created by each X-Division employee is recorded in the CFS. LEE named one of the directories that he created his "KF1" directory. The KF1 directory was located in the open part of the CFS. LANL computer experts have analyzed the KF1 list, as well as two other directories that LEE created. These experts have determined that LEE's three directories listed approximately 300 files. Some of these files are library files, which contain or contained additional files. In total, the LANL experts estimate that the directories LEE created contained as many as 1600 files. Preliminary examination of the KF1 list reveals that the names of many of the files listed were the names of files known to be classified at the Secret level. The LANL experts are in the process of retrieving and reviewing the files themselves. So far, this review has revealed that 21 of the files listed in LEE's KF1 directory are indeed Secret documents. Among these 21 Secret files is one of the classified codes (described above in paragraph 8) and design contours for two additional nuclear weapons. The LANL experts have determined that LEE began transferring classified files from the CFS closed system to the open system on his KF1 directory from [several words deleted] According to CHARLES NEIL, there is no legitimate work related purpose for storing classified files on the open side of the CFS.

(25) CHARLES NEIL told me that only the LANL employee given the "Z" number and password and LANL's system administrator can access or delete files in directories created by LANL employees. Both "Z" numbers and passwords are closely guarded, non-shared pieces of information which LANL employees

are required to keep confidential. LEE, or anyone with Lee's "Z" number and password could access his KF1 directory on the open CFS from anywhere in the world. In an interview conducted by the FBI on March 5, 1999, LEE refused to provide his password to allow FBI Special Agents access to his laptop computer.

(26) On April 5, 1999, during the continuing examination of papers and notes from LEE's office, investigators located instructions in a notebook on how to copy the classified code (referred to in paragraph 8) onto a floppy disk. These instructions were handwritten in LEE's notebook. At the top of the notation were Chinese characters which have been translated as "method to print entire directory onto disk."

(27) As a LANL employee in the X-Division, LEE was permitted to use LANL computers at home. LEE had two computers assigned to him, and recorded on his personal properyy log. These two computers were a MacIntosh laptop and a MacIntosh desk top.

(28) During the January 17, 1999, interview of LEE at his residence, an interviewing Special Agent observed a desktop computer located in the living room. The Agent observed that the computer was the focal point of a work area that contained documents and other items. During a later interview of' LEE, conducted on March 5, 1999, LEE stated to FBI Special Agents that he kept at his residence a MacIntosh desktop computer which belonged to LANL. LEE admitted that he used this computer "because I sometimes work at home." LEE also stated that he used this desktop computer to connect to the LANL computer in his office. LEE also stated that he used the computer in his residence to check E-mail and to do word processing. On March 5, 1999, LEE turned over to FBI investigators the LANL-owned MacIntosh desktop computer that had been in his house. LEE's LANL-owned MacIntosh laptop computer was seized on March 5, 1999 during a consent search of LEE's T-Division office. Although not specifically asked, LEE did not produce any computer discs or storage cassettes that he utilized at home on his LANL-owned computers. According to LANL experts, LEE's LANL-owned MacIntosh laptop and desktop computer utilized removable cartridges in lieu of a hard drive. LANL experts have determined that no classified information was contained on the cartridges within either computer at the time they were seized or produced.

(29) Shortly after the polygraph that DOE conducted on December 23, 1998, DOE suspended LEE's access to all classified information. LANL also reassigned LEE from the X-Division to the T-Division, which does not handle classified information. Between that time and March 5, 1999, LEE tried to gain physical access to the X-Division on two separate occasions. On at least one occasion during this time, LEE obtained unescorted access to X-Division.

(30) During the March search of LEE's X-Division office, investigators found a notebook. This notebook contained a one-page computer-generated document which listed all of the files in the KF1 directory that LEE had created in the CFS. During the search, Charles Neil, examined this list and explained that the files named in LEE's KF1 directory were contained in the open part of the CFS. The files contained highly classified information. Neil tried to access the files listed in LEE's KF1 directory. He discovered that the majority of the files had been deleted. Neil sought assistance from Thomas Stup, CFS administrator for the X-Division. Stup examined LEE's KF1 directory files and determined that the files had been deleted between February 9, 1999 and February 11, 1999, the day after the FBI polygraphed LEE.

(31) During the March search of Lee's X-Division office, FBI and DOE investigators located three multi-page documents that did not bear classification markings as required by regulation despite the fact that those documents contained classified information. The classification stamps or marks had been removed in several ways. In the first classified document, the classified stamp had been covered up while the document had been copied on a copying machine. In a second classified document, the classification markings had been physically cut from the top and bottom of each pace. In the third classified document, the classification marking had been deleted by computer command before the document was printed. According to CHARLES NEIL, there is no bona fide LANL-related employment purpose in deleting classification designations or markings from a classified document. In fact, such deletions would constitute a LANL security violation. Based on my training and experience, removing classification designations or markings is a way to minimize risk of detection or apprehension when gathering, removing, or retaining classified materials in an unauthorized fashion. Additionally, the removal of classification markings as described above from classified documents would facilitate LEE's ability to remove classified documents from LANL in an unauthorized fashion.

(32) On April 7, 1999, employees at LANL's Computer Help Desk stated that their logs reveal that LEE had made the following four requests for assistance. First, on March 2, 1998, LEE asked how to access his closed file X-Division CFS from overseas. This was just before a personal trip that LEE made to Taiwan

which began on March 15, 1998. This trip lasted for 45 days. The Help Desk informed LEE that it was not possible to access the closed CFS from overseas. Second, on January 21, 1999, (which was four days after the FBI interviewed him at home), LEE asked how to hook up a laptop into GAMMA, which is a LANL processing computer used to make calculations rather than store information. Third, also on January 21, 1999, LEE sought help in deleting files. During his request for help, LEE stated that, despite his deletion efforts, the files were "not going away." The Help Desk surmised that he needed to take one last step to delete the files and told him how to complete the process. Fourth, on February 1, 1999, LEE said that he was dialing in from his LANL-owned MacIntosh computer (which was at his residence) and was getting in (obtaining access to LANL's computer system) but was getting disconnected.

(33) LEE was fired from LANL on March 8, 1999. DOE revoked LEE's security clearance that same day. Additionally, LEE certified on or about March 8, 1999 that he had returned all LANL property. Although LEE has been residing with family in the Los Angeles, California area between on or about March 9, 1999 until on or about April 7, 1999, he is not known to have any office or other location other than his residence out of which to work or which provided him computer access.

(34) Based on the foregoing information, there is probable cause to believe that there is evidence in LEE's residence that reveals violations of 18 U.S.C. §§ 793, 1001, and 1924.

(35) The affiant requests that a search warrant be issued for LEE's residence, as described in Attachment A.

(36) I believe that there is probable cause to believe that evidence of the above-described criminal activities will be found in LEE's residence. These conclusions are based on my experience and training relating to the types of records and items that persons engaged in the activities described above typically keep at their residence as well as on the facts recited above.

(37) Items to be seized are described in Attachment B of this Affidavit, and include but are not limited to computer disk or other computer memory storage devices, records, documents and materials including those used to facilitate communications, electronic data, and computer equipment and peripherals.

ATTACHMENT A

80 Barcelona Avenue
White Rock, New Mexico 87544

80 Barcelona Avenue is a one story, brown brick, maroon framed, ranch-style house with a two car garage. The brick covers only the front portion of the house, the sides of which are brown stucco and the roof is a maroon color. Directly in front of the house and adjacent to Barcelona Avenue are five evergreen trees and a white mailbox. Beneath the mailbox is a receptacle for the "Monitor," a local Los Alamos, New Mexico, newspaper. Barcelona Avenue runs roughly east and west. The house is on the north side of the street in approximately the center of the block, facing south.

The house has been verified to be the personal residence of LEE and his wife by other persons living in the area as well as by two Special Agents of the FBI who interviewed LEE at this location.

ATTACHMENT B

Items to be seized:

Computer hardware is described as any and all computer equipment, including any electronic devices which are capable of collecting, analyzing, creating, displaying, converting, storing, concealing, or transmitting electronic, magnetic, optical, or similar computer impulses or data. These devices include but are not limited to any data processing hardware (such as central processing units and self-contained "laptop" or "notebook" computers); internal and peripheral storage devices (such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, optical and compact disk storage devices, and other memory storage devices) ; peripheral input/output devices (such as keyboards, printers, scanners, plotters, video display monitors, and optical readers); and related communications devices (such as modems, cables and connections, recording equipment, RAM or ROM units, acoustic couplers, automatic dialers, speed dialers, programmable telephone dialing or signaling devices, and electronic tone-generating devices); as well as any devices, mechanisms, or parts that can be used to restrict access to such hardware (such as physical keys and locks).

Computer software is described as any and all information, including any instructions, programs or program code stored in the form of electronic, magnetic, optical or other media which are capable of being interpreted by a computer or its related components. Computer software may also include certain data, data fragments or control characters integral to the operation of computer software. These items include, but are not limited to operating system software, applications software, utility programs, compilers, interpreters, communications software and other programming used or intended to be used to communicate with other computer components.

Computer related documentation is described as any written, recorded, printed or electronically stored material which explains or illustrates the configuration or use of any seized hardware, software or related item.

Also included as items to be seized are any computer generated document or hard copy related to LANL, source codes, input decks, FORTRAN codes and other mathematical calculations.

Computer passwords and data security devices are described as all of the devices, programs, or data - whether themselves in the nature of hardware or software - that can be used or are designed to be used to restrict access to or facilitate concealment of any computer hardware, software, computer related documentation, electronic data, records, documents or materials within the scope of this application. These items include but are not limited to any data security hardware (such as encryption devices, chips and circuit boards) passwords, and similar information that is required to access computer programs or data or to otherwise render programs or data into a useable form.

In addition to computers and computer related hardware and software as described above, items to be seized include any books, records, receipts, notes, e-mail, ledgers, documents, agreements, worksheets, correspondence or information relating to or describing work involving the Los Alamos National Laboratory and work projects therein. These items may include classified as well as unclassified documents.

Any and all documents or records relating to travel to or correspondence with any PRC official, scientist or resident.

Due to the use of computers, this data may be in the form of paper documents or may be stored in the form of electronic, magnetic, optical or other media capable of being read by a computer or computer related equipment. This media includes but is not limited to any fixed disks, external disks, removable hard disk cartridges, floppy disk drives and diskettes, tape devices and tapes or other memory storage devices not in paper form which may have been used as a means of committing, or constitute evidence of the commission of, violations of Title 18, United States Code, Sections, 1924 and 793.

Other items to be seized include notebooks, diaries, calendars, evidence of transactions, telephone records, and credit card records.

The phrase "records, documents and materials," including those used to facilitate communications includes but is not limited to records of personal and business activities relating to Los Alamos National Laboratory, such as business documents, associate names and addresses, correspondence, e-mail, log books, diaries, telephone records, bank records, reference materials and photographs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. WEN HO LEE, Defendant.	)	CRIMINAL NO. 99-1417 42 U.S.C. § 2276: Tampering, Altering, Concealing and Removing Restricted Data, 42 U.S.C.§ 2275; Receipt of Restricted Data; 18 U.S.C. § 793(c): Unlawful Gathering of National Defense Information; 18 U.S.C.§ 793(e): Unlawful Retention of National Defense Information.

INDICTMENT

The Grand Jury charges:

GENERAL ALLEGATIONS:

I. INTRODUCTION

1. Los Alamos National Laboratory (LANL) is a facility managed and funded by the United States Department of Energy and operated by the University of California. LANL is responsible for the research, design, development and safe stewardship for approximately 85% of the U.S. nuclear arsenal. LANL is located within the State and District of New Mexico.

2. The X Division at LANL has responsibility for the research, design and development of thermonuclear weapons in the U.S. nuclear arsenal. The X Division shares the highest level of security of any division at LANL.

3. The defendant WEN HO LEE resides in New Mexico. Between 1980 and December 23, 1998, WEN HO LEE was assigned to the X Division at LANL as a hydrodynamicist/engineer. While employed at LANL in the X Division, defendant WEN HO LEE held a Q clearance, which allowed WEN HO LEE access to Top Secret information and Restricted Data information. On December 23, 1998, the defendant WEN HO LEE, was transferred from the X Division to an unclassified area within another division at LANL. Defendant WEN HO LEE's employment at LANL was terminated on March 8, 1999.

II. RESTRICTED DATA

4. The term "Restricted Data" means all data concerning: (1) the design, manufacture or utilization of atomic weapons: (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy. 42 U.S.C.§ 2014(y).

5. Secret Restricted Data (SRD) denotes information that is classified "secret" within the category of Restricted Data. SRD is applied to information the unauthorized disclosure of which reasonably could be expected to cause serious damage to national security. SRD information is the most closely guarded level and category of information that is routinely used within the X Division at LANL.

6. Confidential Restricted Data (CRD) denotes information that is classified "confidential" within the category of Restricted Data. CRD is applied to information the unauthorized disclosure of which reasonably could be expected to cause damage to national security.

III. LEE'S REPRESENTATIONS REGARDING CLASSIFIED INFORMATION NON-DISCLOSURE

7. On June 28, 1987, the defendant WEN HO LEE signed a statement representing to the United States that:

a. Intending to be legally bound, I (defendant WEN HO LEE) hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is information that is classified under the standards of Executive Order 12356, or under any other Executive Order or statute that prohibits the unauthorized disclosure of information in the interest of national security. I (defendant WEN HO LEE) understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

b. I (defendant WEN HO LEE) hereby acknowledge that I (defendant WEN HO LEE) have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I (defendant WEN HO LEE) contemplate disclosing this information have been approved for access to it, and that I (defendant WEN HO LEE) understand these procedures.

c. I (defendant WEN HO LEE) have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause irreparable injury to the United States or could be used to advantage by a foreign nation. I (defendant WEN HO LEE) hereby agree that I (defendant WEN HO LEE) will never divulge such information unless I (defendant WEN HO LEE) have officially verified that the recipient has been properly authorized by the United States Government to receive it or I (defendant WEN HO LEE) have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of the information that such disclosure is permitted. I (defendant WEN HO LEE) further understand that I (defendant WEN HO LEE) am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

d. I (defendant WEN HO LEE) have been advised and am aware that any breach of this Agreement may result in the termination of any security clearances I (defendant WEN HOLEE) hold and removal from any position of special confidence and trust requiring such clearances. In addition, I (defendant WEN HO LEE) have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provision of Sections 641, 793, 794, and 798, Title 18 United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I (defendant WEN HO LEE) recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

e. I (defendant WEN HO LEE) understand that all classified information to which I (defendant WEN HO LEE) may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I (defendant WEN HO LEE) do not now, nor will I (defendant WEN HO LEE) ever, possess any right, interest, title, or claim whatsoever to such information. I (defendant WEN HO LEE) agree that I (defendant WEN HO LEE) shall return all materials which have, or may have, come into my possession or for which I (defendant WEN HO LEE) am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship that requires access to classified information. If I (defendant WEN HO LEE) do not return such materials upon request, I (defendant WEN HO LEE) understand that this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

f. Unless and until I (defendant WEN HO LIE) am released in writing by an authorized representative of the United States Government, I (defendant WEN HO LEE) understand that all conditions and obligations imposed upon me by this Agreement apply during the time I (defendant WEN HO LEE) am granted access to classified information, and at all times thereafter.

8. On April 19,1995, defendant WEN HO LEE signed a statement representing to the United States that he understood that:

a. No classified information or computing was allowed on the X Division open LAN (local area network), i.e., the unclassified, open partition.

b. As a LANL computer user, he had responsibility for ensuring that information, especially sensitive information, was properly protected.

IV. THE LANL COMPUTING SYSTEM

9. At all times material to this indictment, the LANL computing environment utilized, in part, "Cray" large mainframe computers and "Sun" workstations to perform most of the computational work to design and simulate nuclear weapons.

10. At all times material to this indictment, the computing environment and architecture at LANL consisted of four security partitions, with each partition having an assigned associated color. The four partitions were the Open (green), the Administrative (blue), the National Security (yellow), and the Secure (red). The use of the words "green"and "red" corresponded to the Open and Secure partitions. The Open partition was utilized only for unclassified computing, and users were not required to have a security clearance. The Secure partition allowed both classified and unclassified computing, but only by personnel with Q clearances. Multiple computers serviced each security partition.

11. The Common File System (CFS), as it existed at all times prior to 1995, was a single archival data storage system which spanned the partitions. From 1995 to the present, CFS existed with an Open (green) system and a Secure (red) system on separate networks. At all times material to this indictment, CFS functioned as a hierarchical system, allowing lower classification level work to be performed in higher security partitions while preventing files with higher classification levels from being accessed or utilized on the Open partition.

12. At all times material to this indictment, all CFS files and directories were given a partition designation, i.e., either red, blue, yellow or green. The security partitions relevant to this indictment were red and green. Red files could exist only in red directories, but green files could exist in both red and green directories. Every file stored in CFS was assigned a security classification level.

13. Green files could be accessed from the red partition, or even up-partitioned to red files, to compute using unclassified data on classified machines. After the computing utilizing the unclassified data in the red partition was completed, the unclassified results of the computation could legitimately be transferred to the open network, down-partitioning the unclassified files to green if necessary.

14. The action of down-partitioning a file could only be executed from a red partition machine. It was the responsibility of the Q-cleared user to verify that a file contained only unclassified material before down-partitioning the file. Files could be down-partitioned only after a Q-cleared user designated and marked the file as unclassified. Down-partitioning files and subsequently moving them into a lower partition were legitimate actions, but only if the files did not contain classified material.

V. NUCLEAR WEAPONS TERMINOLOGY

15. The following glossary defines terms used in the X Division at LANL at all times material to this indictment:

a. A "Source Code" is the human readable set of instructions that can be given to a computer to perform a calculation simulating a physical event. LANL source codes are usually written in a "high level language" and are then translated into instructions to be acted on directly by the computer. The physics packages within a source code address matters such as detonation, high explosive burn, hydrodynamics, radiation transport, neutron transport, thermonuclear burn, and weapon aging and degradation. Thermonuclear weapon design source codes model and simulate events which closely resemble test data from past nuclear weapons tests.

b. An "Input Deck/Input File" is a set of instructions read by a computer to set up a nuclear weapon to be simulated. An input deck/input file typically contains exact dimensions and other geometrical information about a particular nuclear weapon at initial time (before detonation). It also typically includes information about the materials and the initial conditions of those materials for a particular nuclear weapon.

c. "Contour" is the information that describes the size and shape of the components of a nuclear weapon.

d. "Data Files" contain information relating to the physical and radioactive properties of materials at different temperatures and densities. Data files include equation of state, neutron cross section, and opacity information.

e. "Equation of State" (EOS) is a set of data that describes how materials will react in given temperature and density environments. EOS tables correlate the pressure and energy of a material as a function of temperature and density.

f. "Neutron Cross Section" is a set of data that describes how likely a material in a given environment is to interact with a neutron. For example, neutrons can be absorbed, can trigger a fission event, and can deposit energy. Neutron cross section tables correlate information of how likely a material is to interact with a neutron as a function of neutron energy.

g. "Opacity" is information that describes how likely a material in a given environment is to interact with radiation. Opacity tables correlate information of how likely a material will absorb radiation as a function of temperature and density.

h. A "Primary" is the first stage of a nuclear weapon. The Primary uses chemical high explosives and nuclear materials to start a nuclear reaction that produces sufficient energy to drive the Secondary stage.

i. A "Secondary" is the second stage of a nuclear weapon. The Secondary uses the energy produced by the Primary to trigger a thermonuclear burn (nuclear fusion reaction). It is this thermonuclear burn that drives the ultimate destructive force of the nuclear weapon.

VI. DESCRIPTION OF SRD FILES THAT DEFENDANT WEN HO LEE MOVED FROM THE SECURE PARTITION TO THE OPEN PARTITION

16. Between a date certain in 1993 and a date certain in 1994, the defendant WEN HO LEE collected SRD and CRD material contained in classified files that existed on the Secure network, assembled the SRD and CRD material into TAR files (a "TAR File" is an archive file and constitutes a "container file" in which groups of other files are collected at the direction of the file creator), and then transferred the SRD and CRD TAR files to one of defendant WEN HO LEE's Open green directories on the CFS within the green partition. Alternatively, defendant WEN HO LEE transferred some files from red to green partitions, and then assembled the TAR file in the open network on a green machine, and later saved it to the green CFS.

17. . The specific transfer of classified files from the Secure red partition to the Open green partition was usually accomplished by defendant WEN HO LEE as follows:

a. Defendant WEN HO LEE collected and saved SRD and CRD TAR files in his red directories within the red partition;

b. Defendant WEN HO LEE designated and marked the SRD and CRD TAR files which he had previously saved in his red directory as unclassified;

c. Defendant WEN HO LEE down-partitioned SRD and CRD files;

d. Defendant WEN HO LEE saved the SRD and CRD TAR files on his Open green CFS directories and then usually deleted the SRD and CRD TAR files (interim versions marked as unclassified) that he had previously saved on his red directory.

e. In some cases, defendant WEN HO LEE assembled some of the TAR files on an open machine after he had transferred classified material from the red to the green partition; defendant WEN HO LEE then saved the TAR file to one of his green partition CFS directories.

18. The specific TAR files created by defendant WEN HO LEE and transferred from the Secure red partition to the Open green partition, or assembled in the Open green partition after transfer from the Secure red partition, are identified as follows:

File 1	Level: Secret	Category: Restricted Data

This TAR file represents SRD material and contains the most current source Code at that time for a Cray version of a Secondary nuclear design code (designated in this indictment as source Code A). This TAR file

also contains the library routines used by Code A to access opacity data files (designated in the indictment as DATA 8). The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U. S. national security.

File 2 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains the source code for a Sun workstation version of Code A from 1994. It also contains input decks to set up SRD test problems. The Sun version of Code A is different from the Cray version of the code in that it does not contain all the physics models of the Cray version. However, the Sun version is usable "as is" on Sun workstations. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 3 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains eight Secondary and Primary input decks for Code A. The input decks contained in this TAR file are varied and have specific weapon details. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 4 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains a complete Secondary nuclear design source code which was a predecessor to Code A (referred to in this indictment as source Code D); the complete unclassified source code for a bomb analysis tool used to compare bomb test results with predicted calculated results (referred to in this indictment as source Code C); SRD EOS parameter files; 23 input decks for Primary nuclear devices; and a complete Primary nuclear device source code (referred to in this indictment as source Code F). The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 5 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains classified and unclassified EOS and opacity data files used in nuclear weapon design codes. The data are in American Standard Code for Information Interchange (ASCII) format, which means they can be easily translated to any computer system. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 6 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains one Primary input deck, one Secondary test problem, and one Secondary design test problem designed to run on a source code which was developed to test high energy radiation transport (referred to in this indictment as source Code G), dating from 1994. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 7 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains classified EOS and opacity data files. This TAR file also contains the neutron cross section data files. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 8 Level: Confidential Category: Restricted Data

This TAR file represents CRD material and contains the Cray source code (referred to in this indictment as source Code H) for a computer code dating from 1993 that can be used to perform Primary implosion studies. The unauthorized disclosure of this TAR file reasonably could be expected to result in damage to U.S. national security.

File 9 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains four input decks for a class of Primary devices for Code H, an input deck for Code C, and an Input deck for a Primary yield source code (referred to as source Code K). The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 10 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains 20 files, 19 of which are themselves TAR files and one file which is described above in File 1. The 19 TAR files contain various versions of some of the Code A library codes: the input library, the memory management libraries, the graphics library, and the libraries of source codes Band E. The library files date from 1992 to 1994. These libraries supply essential functions required by Code A for it to perform. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 11 Level: Confidential Category: Restricted Data

This TAR file represents CRD material and contains the Cray source code for Code H, dating from 1993. Code H is a code that can be used for Primary implosion studies. The unauthorized disclosure of this TAR file could result in damage to U.S. national security.

File 12 Level: Confidential Category: Restricted Data

This TAR file contains twenty-five sub-files. Twenty-two sub-files are unclassified. The remaining three files represent CRD material and contain graphics images from simulations of a Primary nuclear device. The unauthorized disclosure of this TAR file reasonably could be expected to result in damage to U.S. national security.

File 13 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains the Fortran code for source code G. This TAR file also contains the Fortran source code for a library of unclassified routines to access and manipulate equation of state and opacity physics data. In addition to the Fortran code for G, this archive contains an index that describes the variables and other data and control structures of the code. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 14 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains the Fortran source code for source code G and associated libraries used to compile an executable version of the code. It also contains source codes for unclassified utility programs and for a program to link source code G and source code A calculations. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 15 Level: Confidential Category: Restricted Data

This TAR file contains fifty-five sub-files. Forty-two sub-files are unclassified explosively-formed penetrator contours, test problems and simulations. Thirteen sub-files represent CRD material and contain the contours and input file yield calculations for a class of Primary nuclear devices. The unauthorized disclosure of this TAR file reasonably could be expected to result in damage to U.S. national security.

File 16 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains the entire source code which is used to calculate the nuclear yield of a Primary device (referred to as Code K). Code K contains normalization factors to actual experimentally tested weapons systems. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 17 Level: Secret Category: Restricted Data

This TAR file contains twelve sub-files. Ten sub-files contain unclassified information. One sub-file represents CRD material and contains an Input deck for a class of Primary nuclear devices. One sub-file represents SRD material and contains descriptions of a class of Primary nuclear devices. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 18 Level: Secret Category: Restricted Data

This TAR file represents SRD material and contains eighty-two sub-files. Within the sub-files is the complete source code for a Primary weapon design code (referred to as Code I) and for required library routines to compile and run Code I. The TAR file also contains Primary nuclear device input decks for Code I and for Code B. This TAR file also contains link files that assimilate designs produced by Code I and Code B. The unauthorized disclosure of. this TAR file reasonably could be expected to result in serious damage to U.S. national security.

File 19 Level: Secret Category: Restricted Data

This is a TAR file containing fourteen sub-files. Within the sub-files are two Secret Restricted Data files. Specifically one sub-file contains an SRD EOS data file; the other sub-file contains an SRD opacity data file. The unauthorized disclosure of this TAR file reasonably could be expected to result in serious damage to U. S. national security.

VII. DEFENDANT WEN HO LEE'S DELETIONS OF SRD AND CRD TAR FILES ON THE OPEN SYSTEM

19. Between January 20, 1999 and February 10, 1999, the defendant WEN HO LEE deleted over 360 files that he had maintained in his green partition directories on the Open CFS. Within the deleted files were the 19 previously designated SRD and CRD TAR files that the defendant WEN HO LEE had moved from the Secure red partition to the Open green partition, or assembled on the Open green partition after transfer from the Secure red partition, between a date certain in 1993 and a date certain in 1994.

VIII. DEFENDANT WEN HO LEE'S DOWNLOADING OF SRD MATERIAL ONTO 150 MEGABYTE CASSETTE CARTRIDGES

20. At times certain between a date certain in 1993 and a date certain in 1994, the defendant WEN HO LEE downloaded SRD and CRD information on to portable 150 megabyte 6150 tape cartridges. Specifically, defendant WEN HO LEE downloaded what has previously been identified as TAR File 19 on to a 6150 tape (hereinafter referred to as Tape B); defendant WEN HO LEE downloaded TAR Files 4 and 18 on to a 6150 tape (hereinafter referred to as Tape C); defendant WEN HO LEE downloaded TAR Files 8, 9, 16, and 17 an to a 6150 tape (hereinafter referred to as Tape D); defendant WEN HO LEE downloaded TAR Files 12 and 16 on to a 6150 tape (hereinafter referred to as Tape G); defendant WEN HO LEE downloaded TAR Files 9,11, and 16 on to a 6150 tape (hereinafter referred to as Tape F); defendant WEN HO LEE downloaded TAR Files 2, 3 and 7 on to a 6150 tape (hereinafter referred to as Tape H); defendant WEN HO LEE downloaded TAR file 5 on to a 6150 tape (hereinafter referred to as Tape K); defendant WEN HO LEE downloaded TAR File 14 on to a 6150 tape (hereinafter referred to as Tape L); defendant WEN HO LEE downloaded TAR Files 6 and 13 on to a 6150 tape (hereinafter referred to as Tape M).

21. On a date certain in 1997, defendant WE HO LEE downloaded SRD information that had not previously been transferred from the Secure to the Open system and placed the SRD information on to a 6150 tape (hereinafter referred to as Tape N). The information contained on Tape N is identified as follows:

Tape N Level: Secret Category: Restricted Data

This tape Contains several SRD source codes and input docks. The first TAR file contains the complete source code for the current version of the most up-to-date Primary weapon design code (hereinafter referred to as Code B.) The second TAR file contains the complete source code for the auxiliary libraries used by Code B. The third file is a binary file which contains an EOS table, which was developed in 1997, for a special material used in a specific Primary design. The fourth file is an input file used by Code B to produce output for comparison with experimental implosion data. The fifth file is an input file for Code B to set up and simulate a specific modern Primary device. The sixth file is an input file for a utility code which allows the user to compare the calculated results with the experimental data (hereinafter referred to as Code C). This input file contains both experimental data and Code B simulation results for a specific modern Primary device.

22. Tapes B, C, D, F, G, H. K, L, M and N all contain Restricted Data at either the Secret or Confidential level, and their unauthorized disclosure could reasonably be expected to result in either serious damage or damage to U.S. national security. Defendant WEN HO LEE at some time removed and possessed Tapes B, C, D, F, G. H, K, L, and M outside the secure environment within LANL. As of the date of this indictment, Tapes D, F, H, K, L, M and N are unaccounted for.

COUNT 1

23. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

24. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 1 as previously described in this indictment, involving and incorporating Restricted Data,

which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 2

25. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

26. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 2 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with the research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 3

27. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

28. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 3 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 4

29. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

30. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 4 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 5

31. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

32. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 5 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National laboratory in connection with the research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 6

33. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

34. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 6 as previously described in this indictment, involving and incorporating Restricted Data,

which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.G. § 2276.

COUNT 7

35. The grand jury realleges and incorporates paragraphs 1-22 of the General Allegations.

36. On a date certain in 1994, in the State anc District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States. and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 7 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 8

37. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

38. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 8 as previously described in this Indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 9

39. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

40. On a date certain In 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 9 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 10

41. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

42. On a date certain in 1994, in the State an District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 10 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 11

43. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

44. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 11 as previously described in this indictment, involving and incorporating Restricted

Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 12

45. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

46. On a date certain in 1994. in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document. writing, plan, and model, to wit: the information contained in File 12 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 13

47. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

48. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 13 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 14

49. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

50. On a date certain in 1994, in the State and district of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered. and concealed a document, writing, plan, and model, to wit: the information contained in File 14 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with the research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C. § 2276.

COUNT 15

51. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

52. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 15 as previously described in this indictment. involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C. § 2276.

COUNT 16

53. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

54. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 16 as previously described in this indictment, involving and incorporating Restricted

Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C. § 2276.

COUNT 17

55. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

56. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in file 17 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 18

57. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

58. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered with, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 18 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In Violation of 42 U.S.C.§ 2276.

COUNT 19

59. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

60. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, tampered wih, altered, and concealed a document, writing, plan, and model, to wit: the information contained in File 19 as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 20

61. The grand jury realleges and incorporates paragraphs 1-22 of the General Allegations.

62. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape 8 as previously described in this indictment, involving and incorporating Restricted Data which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 21

63. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

64. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape C as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at

Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 22

65. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

66. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape D as previously described in this indictment, involving and incorporating Restricted Data which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 23

67. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

68. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape G as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 24

69. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

70. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape F as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 25

71. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

72. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape H as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C. § 2276.

COUNT 26

73. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

74. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States. and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape K as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at

Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 27

75. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

76. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape L as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 28

77. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

78. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape M as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C. § 2276.

COUNT 29

79. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

80. On a date certain in 1997, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, removed a document, writing, plan, and model, to wit: the information contained on Tape N as previously described in this indictment, involving and incorporating Restricted Data, which was used by scientists at Los Alamos National Laboratory in connection with research and development relating to atomic energy conducted by the United States and financed by federal funds.

In violation of 42 U.S.C.§ 2276.

COUNT 30

81. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

82. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, and information, to wit: the files contained an Tape B as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 31

83. The grand Jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

84. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, and information, to wit: the files contained on Tape C as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 32

85. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

86. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, and information, to wit: the files contained on Tape D as previously described in this indictment, involving and incorporating Restricted Data.

In Violation of 42 U.S.C.§ 2275.

COUNT 33

87. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

88. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, and information, to wit the files contained on Tape G as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 34

89. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

90. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, and information, to wit: the files contained on Tape F as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 35

91. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

92. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, and information, to wit: the files contained on Tape H as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 36

93. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

94. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired and attempted to acquire a document, writing, plan, model, and information, to wit: the files contained on Tape K as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 37

95. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

96. On a date certain in. 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United. States, and with the intent to secure an advantage to a foreign nation, acquired arid attempted to acquire a document, writing, plan, model, and information, to wit: the files contained on Tape L as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 38

97. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

98. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired arid attempted to acquire a document, writing, plan, and information, to wit: the files contained on Tape M as previously described in this indictment, involving and incorporating Restricted Data.

In violation of 42 U.S.C.§ 2275.

COUNT 39

99. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

100. On a date certain in 1997, in the State and District of New Mexico, the defendant WEN HO LEE, with the intent to injure the United States, and with the intent to secure an advantage to a foreign nation, acquired arid attempted to acquire a document, writing, plan, and information, to wit: the files contained on Tape N as previously described in this indictment, involving and incorporating Restricted Data.

COUNT 40

101. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

102. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as File 19, all of which was gathered on a portable 6150 tape [Tape B], knowing and having reason to believe at the time he obtained Tape B, that Tape B would be retained and not delivered to an officer and employee of the United States entitled to receive Tape B, contrary to the provisions of 18 U.S.C. .§ 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 41

103. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

104. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as Files 4 and 18, all of which was gathered on a portable 6150 tape (Tape C), knowing and having reason to believe at the time he obtained Tape C, that Tape C would be retained and not delivered to an officer and employee of the United States entitled to receive Tape C, contrary to the provisions of 18 U S.C.§ 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 42

105. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

106. On a date certain in 1993, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as Files 9, 16 and 17 and the Confidential Restricted Data contained in what was previously described in this indictment as File 8, all of which was gathered on a portable 6150 tape [Tape D], knowing and having reason to believe at the time he obtained Tape D, that Tape D would be retained and not delivered to an officer and employee of the United States entitled to receive Tape D, contrary to the provisions of 18 U.S.C. § 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 43

107. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

108. On dates certain in 1993 and 1994, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Confidential Restricted Data contained in what was previously described in this indictment as Files 12 and 15, all of which was gathered on a portable 6150 tape [Tape G], knowing and having reason to believe at the time he obtained Tape G, that Tape G would be retained and not delivered to an officer and employee of the United States entitled to receive Tape G, contrary to the provisions of 18 U.S.C.§ 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 44

109. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

110. On dates certain in 1993 and 1994, In the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as File 9, and the Confidential Restricted Data contained in what was previously described in this indictment as Files 11 and 15, all of which was gathered on a portable 6150 tape [Tape F], knowing and having reason to believe at the time he obtained Tape F, that Tape F would be retained and not delivered to an officer and employee of the United States entitled to receive Tape F, contrary to the provisions of 18 U.S.C.§ 793(e).

In violation of 18 U.S.C. º 793(c).

COUNT 45

111. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

112. On a date certain in 1994,. in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as Files 2, 3, and 7, all of which was gathered on a portable 6150 tape [Tape H], knowing and having reason to believe at the time he obtained Tape H, that Tape H would be retained and not delivered to an officer and employee of the United States entitled to receive Tape H, contrary to the provisions, of 18 U.S.C. § 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 46

113. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

114. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as File 5, all of which was gathered on a portable 6150 tape [Tape K], knowing and having reason to believe at the time he obtained Tape K, that Tape K would be retained and not delivered to an officer and employee of the United States entitled to receive Tape K, contrary to the provisions of 18 U.S.C. § 793(e).

In violation of 18 U.S.C. § 793(c).

COUNT 47

115. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

116. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was

previously described in this indictment as File 14, all of which was gathered on a portable 6150 tape [Tape L], knowing and having reason to believe at the time he obtained Tape L, that Tape L would be retained and not delivered to an officer and employee of the United States entitled to receive Tape L, contrary to the provisions of 18 U.S.C. § 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 48

117. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

118. On a date certain in 1994, in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit: the Secret Restricted Data contained in what was previously described in this indictment as Files 6 and 13, all of which was gathered on a portable 6150 tape [Tape M], knowing and having reason to believe at the time he obtained Tape M, that Tape M would be retained and not delivered to an officer and employee of the United States entitled to receive Tape M, contrary to the provisions of 18 U.S.C. § 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 49

119. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

120. On a date certain in 1997. in the State and District of New Mexico, the defendant WEN HO LEE, for the purpose of obtaining information respecting the national defense, unlawfully obtained documents and writings connected with the national defense, to wit the Secret Restricted Data which was previously described in paragraph 21 of this indictment, all of which was gathered on a portable 6150 tape [Tape N], knowing and having reason to believe at the time he obtained Tape N, that Tape N would be retained and not delivered to an officer and employee of the United States entitled to receive Tape N, contrary to the provisions of 18 U.S.C. § 793(e).

In violation of 18 U.S.C.§ 793(c).

COUNT 50

121. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

122. On a date certain in 1993 through on or about March, 1999, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape B, did willfully retain and failed to deliver Tape B to an officer and employee of the United States entitled to receive Tape B.

In Violation of 18 U.S.C.§ 793(e).

COUNT 51

123. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

124. On a date certain in 1993 through on or about March, 1999, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape C, did willfully retain and failed to deliver Tape C to an officer and employee of the United States entitled to receive Tape C.

In violation of 18 U.S.C.§ 793(e).

COUNT 52

125. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

126. On a date certain in 1993 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over

documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape D, did willfully retain and failed to deliver Tape D to an officer and employee of the United States entitled to receive Tape D.

In violation of 18 U.S.C.§ 793(e).

COUNT 53

127. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

128. On dates certain in 1993 and 1994 through on or about March, 1999, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape G, did willfully retain and failed to deliver Tape G to an officer and employee of the United States entitled to receive Tape G.

In violation of 18 U.S.C.§ 793(e).

COUNT 54

129. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

130. On a date certain in 1994 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape F, did willfully retain and failed to deliver Tape F to an officer and employee of the United States entitled to receive Tape F.

In violation of 18 U.S,C. § 793(e).

COUNT 55

131. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

132. On a date certain in 1994 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape H, did willfully retain and failed to deliver Tape H to an officer and employee of the United States entitled to receive Tape H.

In violation of 18 U.S.C.§ 793(e).

COUNT 56

133. The grand jury realleges, and incorporates Paragraphs 1-22 of the General Allegations.

134. On a date certain in 1994 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Dati which had been gathered on to Tape K, did willfully retain and failed to deliver Tape K to an officer and employee of the United States entitled to receive Tape K.

In violation of 18 U.S.C.§ 793(e).

COUNT 57

135. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

136. On a date certain in 1994 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape L, did willfully retain and failed to deliver Tape L to an officer and employee of the United States entitled to receive Tape L.

In violation of 18 U.S.C. § 793(e).

COUNT 58

137. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

138. On a date certain in 1994 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape M, did willfully retain and failed to deliver Tape M to an officer and employee of the United States entitled to receive Tape M.

In violation of 18 U.S.C.§ 793(e).

COUNT 59

139. The grand jury realleges and incorporates Paragraphs 1-22 of the General Allegations.

140. On a date certain in 1997 through on or about the date of the indictment, in the State and District of New Mexico, the defendant WEN HO LEE, having unauthorized possession of, access to, and control over documents and writings relating to the national defense, to wit: the Restricted Data which had been gathered on to Tape N, did willfully retain and failed to deliver Tape N to an officer and employee of the United States entitled to receive Tape N.

In violation of 18 U.S.C. § 793(e).

A TRUE BILL:

[signed]
FOREPERSON OF THE GRAND JURY

[signed]
John J. Kelly
United States Attorney
10 December 1999

FAS Intelligence Resource Program

Awareness of National Security Issues and Response [ANSIR]

The FBI is the lead counterintelligence agency in the United States. It has the principal authority to conduct and coordinate counterintelligence and counterterrorism investigations and operations within the United States. The FBI, supported by other U.S. agencies as needed, conducts espionage investigations when the subject of the investigation is not under the jurisdiction of the Department of Defense, Uniform Code of Military Justice. ANSIR is the FBI's program for the Awareness of National Security Issues and Response. The ANSIR program, formerly known as DECA (Development of Espionage, Counterintelligence and Counterterrorism Awareness) disseminates information concerning national security matters.

ANSIR is the FBI's national security awareness program. It is the "public voice" of the FBI for espionage, counterintelligence, counterterrorism, , cyber and physical infrastructure protection and all national security issues. The program is designed to provide unclassified national security threat and warning information to U.S. corporate security directors and executives, law enforcement, and other government agencies. It also focuses on the "response" capability unique to the FBI's jurisdiction in both law enforcement and counterintelligence investigations.

Each of the FBI's 56 field offices has an "ANSIR" Coordinator and is equipped to provide national security threat and awareness information, on at least a monthly basis, to as many as 500 recipients. "ANSIR-FAX" is the first initiative by the U.S. Government to provide this type of information to as many as 25,000 individual U.S. corporations who have critical technologies or sensitive economic information that are targeted by foreign intelligence services or their agents. Each "ANSIR" coordinator in the FBI's is a member of the American Society for Industrial Security. This membership enhances public/private sector communication and cooperation for the mutual benefit of both. FBI "ANSIR" Coordinators meet regularly with industry leaders and security directors for updates on current national security issues.

NATIONAL SECURITY THREAT LIST

The FBI's foreign counterintelligence mission is set out in a strategy known as the **National Security Threat List (NSTL)**. The NSTL combines two elements:

- First, it includes national security threat issues regardless of the country of origin.
- Second, it includes a classified list of foreign powers that pose a strategic intelligence threat to U.S. security interests.

Until recently the issue threat portion of the NSTL consisted of seven categories of foreign intelligence activity that were deemed to be significant threats to U.S. national security interests. They were:

- Collection of information relating to defense establishments and related activities of national preparedness.
- Proliferation of special weapons of mass destruction to include chemical, biological, nuclear, and delivery systems of those weapons of mass destruction.
- U.S. critical technologies as identified by the National Critical Technologies Panel.
- Collection of U.S. industrial proprietary economic information and technology, the loss of which would undermine the U.S. strategic industrial position.
- Targeting of U.S. intelligence and foreign affairs information and U.S. Government officials.
- Perception management and active measures activities.
- Clandestine foreign intelligence activity in the United States.

The issue threat portion of the NSTL has recently been revised in concert with the U.S. Intelligence Community and key elements of the U.S. Government. As a result, the FBI identified eight categories of foreign intelligence activity that

were deemed to be significant threats to U.S. National security interests. The FBI investigates the activities of any country that relate to any of these eight issues.

The Key Issue Threats are:

1. Terrorism
2. Espionage
3. Proliferation
4. Economic Espionage
5. Targeting the National Information Infrastructure
6. Targeting the U.S. Government
7. Perception Management
8. Foreign Intelligence Activities

The following is an explanation of the above Key Issue Threats:

1. Terrorism

   This issue concerns foreign power-sponsored or foreign power-coordinated activities that:

   A. involve violent acts, dangerous to human life, that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any state;

   B. appear to be intended :

      - to intimidate or coerce a civilian population;
      - to influence the policy of a government by intimidation or coercion; or
      - to affect the conduct of a government by assassination or kidnapping; and

   C. occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

2. Espionage

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity directed at the U.S. Government or U.S. corporations, establishments, or persons, which involves the identification, targeting and collection of U.S. national defense information.

3. Proliferation

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity directed at the U.S. Government or U.S. corporations, establishments or persons, which involves:

   A. the proliferation of weapons of mass destruction to include chemical, biological, or nuclear weapons, and delivery systems of those weapons of mass destruction; or
   B. the proliferation of advanced conventional weapons.

4. Economic Espionage

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity directed at the U.S. Government or U.S. corporations, establishments, or persons, which involves:

   A. the unlawful or clandestine targeting or acquisition of sensitive financial, trade or economic policy information, proprietary economic information, or critical technologies; or
   B. the unlawful or clandestine targeting or influencing of sensitive economic policy decisions.

5. Targeting the National Information Infrastructure

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity directed at the U.S. Government or U.S. corporations, establishments, or persons, which involves the targetting of facilities, personnel, information, or computer, cable, satellite, or telecommunications systems which are associated with the National Information Infrastructure. Proscribed intelligence activities include:

A. denial or disruption of computer, cable, satellite or telecommunications services;
B. unauthorized monitoring of computer, cable, satellite or telecommunications systems;
C. unauthorized disclosure of proprietary or classified information stored within or communicated through computer, cable, satellite or telecommunications systems;
D. unauthorized modification or destruction of computer programming codes, computer network databases, stored information or computer capabilities; or
E. manipulation of computer, cable, satellite or telecommunications services resulting in fraud, financial loss or other federal criminal violations.

6. Targeting the U.S. Government

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity directed at the U.S. Government or U.S. corporations, establishments, or persons, which involves the targeting of government programs, information, or facilities or the targeting or personnel of the:

   A. U.S. intelligence community;
   B. U.S. foreign affairs, or economic affairs community; or
   C. U.S. defense establishment and related activities of national preparedness.

7. Perception Management

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity directed at the U.S. Government or U.S. corporations, establishments, or persons, which involves manipulating information, communicating false information, or propagating deceptive information and communications designed to distort the perception of the public (domestically or internationally) or of U.S. Government officials regarding U.S. policies, ranging from foreign policy to economic strategies.

8. Foreign Intelligence Activities

   This issue concerns foreign power-sponsored or foreign power-coordinated intelligence activity conducted in the U.S. or directed against the United States Government, or U.S. corporations, establishments, or persons, that is not described by or included in the other issue threats.

Up to $500,000 Reward for Stopping Espionage

An amendment to Title 18, U.S.C., Section 3071, recently enacted, authorizes the Attorney General to make payment for information of espionage activity in any country which leads to the arrest and conviction of any person(s):

1. ...for *commission* of an act of espionage against the United States;
2. ...for *conspiring or attempting* to commit an act of espionage against the United States;
3. or which *leads to the prevention or frustration* of an act of espionage against the United States.

In cooperation with other US Government agencies, the NACIC (National Counterintelligence Center) provides certain reports, as appropriate based upon classification and dissemination caveats, to US private firms with and without classified government contracts. The NACIC has responded to limited tasking from US corporations for threat information and will seek to make this service more available to private-sector customers.

The CIA's National Resources Division is responsiable for monitoring industrial espionage. The CIA provides information to the FBI for use, as appropriate and in accordance with memoranda of understanding and executive orders, in the ANSIR Program. On occasion, CIA briefs US corporate officials directly concerning the foreign intelligence threats facing US companies. CIA has presented these briefings, which describe the ways various countries conduct economic intelligence collection against the United States, to individual corporations and at industry-wide conferences, often with FBI participation. The briefings cover foreign economic activities worldwide, focusing on intelligence-gathering techniques used by specific countries. The Agency plans to offer another briefing on commercially available technical gear used by foreign services to conduct economic espionage against US companies.

As appropriate, CIA coordinates with other US Government agencies, specifically the FBI, before notifying a US company that it is the specific target. CIA also participates in planning and implementing an array of activities under the auspices of the NACIC's interagency Awareness Working Group. These programs are designed to inform and assist US companies that are actual or potential targets.

Sources and Methods

- FBI ANSIR Program
- American Society for Industrial Security

http://www.fas.org/irp/ops/ci/ansir.htm
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National Counterintelligence Center

A COUNTERINTELLIGENCE READER

EDITOR
FRANK J. RAFALKO

Volume 1: American Revolution to World War II

Volume 2: Counterintelligence in World War II

Volume 3: Post-World War II to Closing the 20th Century

Volume 4: American Revolution into the New Millenium

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VOLUME ONE

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AMERICAN REVOLUTION TO WORLD WAR II

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National Counterintelligence Center

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A COUNTERINTELLIGENCE READER

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In the Supreme Court of the United States

[date stamped: December 7, 2000]

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

In this espionage case, petitioners Theresa Squillacote and her husband Kurt Stand were subjected to 550 consecutive days of round-the-clock telephonic and physical surveillance, purportedly under the auspices of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801, et seq. In the course of that surveillance, the government intercepted and transcribed several of Squillacote's sessions with her psychotherapists, and later apparently used that information to design an undercover operation tailored, by its explicit terms, to "exploit" her psychiatric vulnerabilities. Pet. App. 115a. The court of appeals concluded that the government had made a sufficient showing to warrant the FISA surveillance without, however, affording defense counsel any opportunity even to examine, much less effectively challenge, the government's submissions in support of FISA authority. The court also sustained the trial court's refusal to hold a hearing regarding whether, and to what extent, the government had made derivative use of privileged psychotherapist-patient communications it obtained during the FISA surveillance. And the court held that, for purposes of the espionage statutes, it makes no difference that the "information" provided by the defendant is wholly in the public domain, so long as it was not the *government itself* that originally disseminated that information to the public.

The following three questions are presented:

1. Whether, in agreement with the Ninth and Tenth Circuits but in conflict with the Second, Third, and Seventh Circuits, the court of appeals correctly held that the government, having intercepted communications protected by a common-law, non-constitutional privilege, is entitled to make derivative use of those communications.

2. Whether, for purposes of the espionage statutes, information that is in the public domain nevertheless "relates to the national defense" because the government did not itself release the information to the public.

3. Whether the court of appeals erred in sustaining the FISA surveillance in this case, without affording defense counsel, pursuant to 50 U.S.C. §§ 1806(f) and 1825(g), an opportunity even to see the applications on the basis of which the surveillance was ordered.

[Table of Contents and Table of Authorities omitted here; see PDF version]

PETITION FOR A WRIT OF CERTIORARI

Petitioners Theresa Marie Squillacote and Kurt Alan Stand respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-66a) is reported at 221 F.3d 542. The order of the court of appeals denying rehearing (Pet. App. 67a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A timely petition for rehearing was denied on September 8,2000. Pet. App. 67a-68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved in this case, 18 U.S.C. §§ 793, 794 and 50 U.S.C. §§ 1801-1829, are set forth in pertinent part in the Appendix. Pet. App. 69a-107a.

STATEMENT

Even for espionage cases, the government's investigation and prosecution of petitioners Theresa Squillacote and Kurt Stand is astonishing. For starters, virtually all of the government's evidence was derived from 550 days of electronic surveillance (and several secret physical searches) conducted under the purported auspices of the Foreign Intelligence Surveillance Act ("FISA"). Yet to this very day, petitioners -- although having the statutory right to challenge the basis for the surveillance and searches -- have never seen the applications that the government submitted to receive authorization to tap petitioners' phones, bug their bedroom, search their belongings, download their computer, even intercept their phone conversations while they were staying in a hotel on vacation. But that is not all: The government then capitalized on this unchecked surveillance authority by intercepting several privileged communications between Squillacote (or her husband) and Squillacote's psychotherapists -- and (so it appears) thereafter used that privileged information to develop a psychological profile on Squillacote in order to "exploit" her psychiatric infirmities in an undercover operation. And once the case got to trial, the government successfully prevailed upon the district court to instruct the jury that it did not matter, for purposes of the espionage statutes, that the information contained in classified documents passed by Squillacote to an undercover agent was already in the public domain.

The court of appeals sustained the government's position on each of these crucial issues. Without disclosing its reasoning or affording defense counsel an opportunity to see the government's FISA applications, the court held that there was sufficient probable cause to conduct the 550-day surveillance. Without seriously reckoning with a line of conflicting circuit decisions, it held that a breach of the psychotherapist-patient privilege-- because it is not constitutionally rooted -- does not require the government to show that its evidence was independently derived. And in a flat repudiation of well-settled espionage case law, the court below held that information is "related to the national defense" even if it is widely and readily available to the public. For each of these reasons, the petition for a writ of certiorari should be granted.

1. Petitioners Squillacote and Stand are a married couple who lived with their two young children in the District of Columbia from the early 1980s to October 1997. During the 1980s, Ms. Squillacote worked as an attorney for the National Labor Relations Board, and in 1991 began work as a lawyer at the Department of Defense, where she held a security clearance. See Pet. App. 4a. Stand held a number of jobs in the private sector throughout the 1980s and in the 1990s (including most recently as a labor union representative (see Pet. App. 110a)); he has never held a position with a security clearance. Court of Appeals Joint Appendix ("JA") 430.

In October 1997, Squillacote and Stand (along with a friend of the couple, James Clark) were arrested for conspiracy to commit espionage. Their arrest was the culmination of an extensive FBI investigation spanning several years. That investigation began some time after the fall of East Germany, when the United States made a cash payment to an undisclosed source in exchange for records that ostensibly came from the former East German intelligence service and contained the names of the two defendants. JA421. After massive surveillance by the FBI unearthed no evidence that defendants had ever passed classified information (JA2089), the government (in approximately January 1996) obtained the first of 20 separate authorizations to conduct clandestine surveillance of defendants' residence pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801, et seq., see Pet. App. 7a.

The government conducted electronic surveillance lasting some 550 consecutive days. See Pet. App. lla. During this electronic surveillance, the government intercepted (and in at least two instances transcribed) telephone conversations between Squillacote (or her husband) and Squillacote's psychotherapists. See Pet. App. 22a; see also Pet. App. 119a-128a. The government also conducted two secret physical searches of defendants' home pursuant to FISA.

2. Despite the voluminous information collected through the FISA wiretaps and physical searches, by the summer of 1996 the government still had no evidence that Squillacote or Stand ever passed classified materials. JA2089; see also Pet. App. 10a. Accordingly, the government set about creating a psychological profile of Squillacote in order to develop a sting operation against her. Pet. App. 108a-118a. The Behavioral Analysis Program team -- a special unit of psychologist(s) and FBI agents that develops psychological "assessments of individuals -- prepared a profile that described, with remarkable precision, Squillacote's unique psychiatric vulnerabilities. Capitalizing on the government's hundreds of hours of taped surveillance (including, apparently, of Squillacote's psychiatric sessions), the profile described Squillacote as having the "mind of a newly pubescent child" (Pet. App. 113 a); reviewed her history of depression and her use of prescribed anti-depressants (Pet App. l lla); identified Squillacote's "narcissistic" and "histrionic" personality (Pet. App. 115a); and noted her "poor impulse control" (Pet App. 114a), constant need for "reassurance, approval, and praise," (Pet. App. l15a n.5), and "excessively emotional behavior." (Ibid.) The profile even recognized that, once arrested, Squillacote was a serious risk for suicide, see Pet. App. 113a.

Having catalogued Squillacote's psychological weaknesses, the profile then devised a "false flag" operation that was "designed to exploit her narcissistic and histrionic characteristics." Pet. App. 115a. The profile recommended swift action tO exploit Squillacote's "emotional vulnerability" (Pet. App. 112a), and to ensure that the sting operation was launched while Squillacote was still working at the Pentagon (which, as the government learned, she was about to leave). JA2090. Closely adhering to the recommendations set out in the psychological profile, the government launched its false flag operation, luring Squillacote to a meeting, purportedly with an "emissary" of a South African government official to whom she had written a political letter in 1995. See Pet. App. 8a. At their initial encounter, the "emissary" -- actually, an undercover agent -- appealed to Squillacote's emotions and political sympathies (JA2188-89; 2199, 2204) and insisted-- in the face of Squillacote's contrary expressions --that she furnish him something "we didn't have access to[.]" JA630. At the next meeting, on January 5, 1997, Squillacote brought four classified documents from her workplace. Much if not all of the information contained in those documents was already in the public domain.

3. On February 17, 1998, a grand jury in the Eastern District of Virginia returned a five-count indictment against Squillacote and Stand, together with James Clark. Count 1 charged all three defendants with conspiring to transmit "information relating to the national defense" to East Germany, the Soviet Union, the Russian Federation, and the Republic of South Africa, in violation of 18 U.S.C. § 794(c). Count 3 charged Squillacote and Stand with attempted espionage, in violation of 18 U.S.C. § 794(a). Count 4 charged Squillacote and Stand with obtaining national defense information, in violation of 18 U.S.C. § 793(b). Count 5 charged Squillacote with making false statements, in violation of 18 U.S.C. § 1001. JA82. On June 3, 1998, Clark pleaded guilty to Count 1 (and Count 2 was dismissed). JA352.

Prior to trial, petitioners moved to suppress the evidence obtained pursuant to FISA, contending that the government lacked probable cause that petitioners were "agents of a foreign power" within the meaning of FISA (see 50 U.S.C. § 1801(b)(2)(A)-(D)) at the time that FISA authorization was granted and renewed. See 50 U.S.C. §§ 1805(a)(3), 1824(a)(3). Petitioners also sought disclosure of the government's applications in support of the FISA searches and surveillance, claiming that disclosure was "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. §§ 1806(f), 1825(g). Without disclosing the government's applications -- and, accordingly, without permitting a truly adversarial proceeding -- the district court denied the motion in all respects, concluding (without explanation) that the government had established probable cause that petitioners were "agents of a foreign power" at all relevant times.

Petitioner Squillacote also moved pre-trial to suppress evidence obtained through the interception of privileged psychotherapist-patient communications, as well as for a pre-trial evidentiary hearing at which the government would shoulder the "heavy burden" of establishing that its evidence had not been derived from such privileged communications. See Pet. App. 23a. The court denied Squillacote's motion, holding that a "'taint analysis" was not required because the communications were not protected by "a constitutionally-based privilege." Pet. App. 23a.

4. Petitioners presented two principal lines of defense at trial. First, they contended that they _ere entrapped by the government's actions -- Squillacote directly, and Stand "derivatively." In support of that defense,

petitioners presented the testimony of two forensic psychiatrists (one from John Hopkins and the other from the Austen-Riggs Center in Stockbridge, Massachusetts), as well as Squillacote's treating psychiatrist at the time of the sting operation. Taken together, these experts testified that Squillacote suffered from clinical depression and borderline personality disorder, and that the government's sting operation had successfully exploited her unique psychiatric infirmities. JA1014-1583.[1]

[1] One of the expert psychiatrists testified that Squillacote's personality disorder likely had its roots in the significant childhood trauma that she experienced as a result of numerous painful surgeries and protracted hospitalizations to correct severe physical deformities, including a missing right leg (below the knee), a clubbed left foot, and the absence of fingers on one hand. JA1503-11. The psychiatrist testified that this type of childhood trauma (which often occasions extended separation from parents and isolation) is highly associated with borderline or "Cluster B" personality disorders. JA1155-1156.

Second, petitioners contended that the government did not carry its burden of proving that the four documents Squillacote passed to the undercover agent contained "information relating to the national defense" -- an element of the espionage statutes. See 18 U.S.C. §§ 793 and 794. In light of the failure of the government's witnesses to ascertain whether the same information was present in publicly available sources -- and in light of the fact that much (if not all) of the information was in fact contained in publicly available sources -- petitioners asserted that this critical element of the espionage charges had not been proved. JA1426. Over petitioner's objections, however, the district court instructed the jury "that information is related to the national defense when the government makes efforts to guard the information, regardless of the public's accessibility to the information." JA2398.

After three days of jury deliberations, defendants were convicted on all counts. Petitioner Squillacote was sentenced to a period of incarceration of nearly 22 years, and petitioner Stand was sentenced to more than 17 years in prison.

5. The court of appeals affirmed. See Pet. App. la-66a. The court rejected petitioners' claim that the district court should have ordered disclosure of the government's FISA applications, holding that "because the documents submitted by the government were sufficient for the district court to determine the legality of the surveillance, we * * * deny the Appellant's request for disclosure under FISA." Pet. App. 15a. Thus deprived of any meaningful input from the defense, the court of appeals went on to review the government's FISA applications ex parte and in camera, and concluded -- again without explanation--that "each FISA application established probable cause to believe that Squillacote and Stand were agents of a foreign power." Pet. App. 14a.

The court of appeals next held that the district court properly refused to hold a hearing to determine whether the government had derived any of its evidence from petitioners' privileged psychotherapist communications. The court explained that: "[W]e do not believe that suppression of any evidence derived from the privileged conversations would be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a.

Finally, the court sustained the district court's instruction on the definition of "information relating to the national defense." Pet. App. 57a. The court did not dispute the fact that the government had never even sought to prove that the "information" at issue was outside the public domain. Indeed, the court recognized that petitioners had "presented evidence of the public availability of information similar to some of the information contained in the documents passed by Squillacote to the undercover agent." Pet. App. 58a. And the court acknowledged that the instruction given by the trial court effectively "prevented the jury from properly considering" this line of defense. Pet. App. 58a. Nevertheless, the court of appeals approved the instruction. In its view, this Court's decision in *Gorin v. United States*, 312 U.S. 19 (1941), and Judge Learned Hand's opinion for the Second Circuit in *United States v. Heine*, 151 F.2d 813 (1945), make clear that "the central issue is the secrecy of the information, *which is determined by the government's actions*." Pet. App. 61a (emphasis added). "Under this analysis," the court continued, "'the instructions given by the district court in this case were clearly correct, and properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense." Ibid.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE GOVERNMENT IS NOT PROHIBITED FROM MAKING DERIVATIVE USE OF

INFORMATION PROTECTED BY NON-CONSTITUTIONAL TESTIMONIAL PRIVILEGES SUCH AS THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

During the government's electronic surveillance of defendants' home under the auspices of FISA, defendant Squillacote was under the care of a psychologist and psychiatrist for severe depression. On several occasions, Squillacote's psychotherapists provided consultation and treatment over the telephone to Squillacote, both directly and indirectly (through her husband). As noted above, on at least eight occasions those conversations were intercepted by the government, and on two occasions they were transcribed and reviewed by government agents. See JA2173-80; Pet. App. 119a-128a. The transcribed conversations included highly sensitive, personal information about Squillacote's mental condition and her family's medical history, including Squillacote's mother's tendency toward depression and Squillacote's recent suicidal ideations. See JA2173-80. Some of the information conveyed by Squillacote (and her husband) to Squillacote's psychotherapists found its way into the Behavioral Analysis Program profile ("BAP") -- which, as explained above, was the psychological blueprint for the government's undercover operation against Squillacote. Pet. App. 11 la, 119a-128a. In addition, a government agent who listened to Squillacote's (and her husband's) privileged conversations with Squillacote's psychotherapists completed a diagnostic questionnaire that was relied upon in preparing the BAP. JA356-357 (Declaration of Thomas M. Chemlovski).

Nevertheless, the court of appeals held that Squillacote was not entitled to a hearing at which the government must bear the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *United States v. Harris*, 973 F.2d 333, 336 (4th Cir. 1992) (citing *Kastigar v. United States*, 406 U.S. 441 (1972)). The court agreed that the intercepted conversations were privileged; but it held that "because the privilege here at issue is not a constitutional one, the district court properly refused to suppress any evidence arguably derived from the government's interception of Squillacote's privileged communications with her psychotherapists. Pet. App. 27a.

A. The Circuits Are Divided Over Whether The Government Is Permitted To Make Derivative Use Of Information Protected By Non-Constitutional Testimonial Privileges

The Fourth Circuit's holding deepens an already pervasive conflict in the courts of appeal over whether the government may make derivative use of information it obtains in violation of a non-constitutional, common-law testimonial privilege. Like the Fourth Circuit, the Ninth and Tenth Circuits permit the derivative use of information protected by a common-law testimonial privilege. See *Nickel v. Hannigan*, 97 F.3d 403,408-409 (10th Cir. 1996) (declining to apply "the fruit of the poisonous tree" doctrine to the possible breach of attorney-client privilege, and holding that "any breach of [defendant's] attorney-client privilege that [his lawyer] may have committed had no effect on the admissibility" of evidence purportedly derived from privileged information); *United States v. Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir. 1980) ("[b]ecause we reject * * * Lefkowitz's argument that the marital privileges are somehow constitutionally grounded in, among other locations, the Fourth Amendment, we doubt that a secondary source of information obtained through information protected by the confidential marital communications privilege would in any way be 'tainted'"); *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) ("no court has ever applied ['the fruits of the poisonous tree'] theory to any evidentiary privilege" and adding that Ninth Circuit "would not be the first to do so").

By contrast, the Second, Third, and Seventh Circuits have held that the government is prohibited from making both direct and derivative use of information protected by testimonial evidentiary privileges. See *In re Grand Jury*, 111 F.3d 1083, 1088 (3d Cir. 1997) (because the government promised that neither witness's testimony nor its fruits would be used to prosecute witness's husband, the Third Circuit affirmed the district court's contempt order; held, such "use-fruits" immunity ensured that witness's testimony "will not have adverse legal consequences to her spouse," and thus "the purpose of the privilege is in no way undermined"); *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir. 1982) (where the government declined to grant a witness derivative use immunity protecting against the use of the witness's testimony against the spouse, trial court correctly refused to compel testimony over a claim of adverse spousal testimony privilege); *United States v. Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989) (ordering the district court to hold "an evidentiary hearing to determine whether the government's case was in any respect derived from a violation of the attomey-client privilege"); *In Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249, 255 (2d Cir. 1985) (sustaining contempt order against a witness who refused to provide grand jury testimony where the government promised to make no direct or indirect use of her testimony in any criminal investigation of her husband; held, the *"'use-fruits' immunity granted by the government to [the witness] is fully co-extensive with the scope of the privilege against adverse spousal testimony"*);[2] *United States v. White*, 970 F.2d 328 (7th Cir. 1992) (where government is complicit in obtaining information protected by the common law attorney-client privilege (i.e., attorney-client communications that occur

prior to the attachment of a defendant's Sixth Amendment right to counsel), court should consider "whether evidence that the government introduced to convict" defendants "stem[med] directly or indirectly" from privileged information).[3]

[2]The Fourth Circuit attempted to distinguish the decisions from the Second and Third Circuits involving the adverse spousal testimony privilege on the ground that those cases involved the "government's effort to compel a witness to testify over the witness's claim of privilege." Pet. App. 24a. But that is truly a distinction without a difference. Each of those cases plainly held that a right against *derivative use* was part and parcel of the underlying common-law privilege. That is why it would not have been sufficient, in *Ford*, for example, for the government to promise merely not to *directly* use the spouse's testimony. Rather, the court held that "'use-fruits' immunity is * * * is fully co-extensive" with the testimonial privilege. Ford, 756 F.2d at 255.

[3] Not surprisingly, the district courts are also in disarray on the question whether the violation of a common-law non-constitutional privilege requires a hearing to ensure that the government's evidence at trial has not been derived from privileged material. Compare *United States v. Longo*, 70 FF.Supp.2d 225,264 (W.D.N.Y. 1999) (in case involving alleged breach of attorney-client privilege by govemment before indictment, court held that "[w]here a violation of the attorney-client privilege is demonstrated, the remedy for such a violation is the suppression of evidence derived from the privileged communication[]"); *United States v. Weissman*, No. 52 94 Cr. 760 (CSH), 1996 WL 751386, at *8 (S.D.N.Y. Dec. 26, 1996) [afrer government mistakenly received interview notes protected by attorney-client privilege during its investigation of defendant, government was required to satisfy "heavy burden" that its evidence against defendant was "derived from legitimate independent sources of proof, rather than from the direct or indirect use of privileged information"); *United States v. Boffa*, 513 F. Supp. 517, 522-523 (D. Del. 1981) (although "there are no constitutional principles which are in need of vindication" since "the alleged governmental intrusion into the defendants' attorney-client relationships * * * occurred long before • * * their Sixth Amendment right to assistance of counsel had attached," if defendant can establish breach of common-law attorney-client privilege, government would be required to establish that "its proof at trial had an independent origin, untainted" by the privileged information) with *SEC v. OKC Corp.*, 474 F. Supp. 1031, 1039 (N.D. Tex. 1979) (rejecting application of "fruit of the poisonous tree doctrine" to evidence derived from information protected by attorney-client privilege).

B. Whether The Government Is Prohibited From Making Derivative Use Of Information Protected By A Testimonial Common Law Privilege--Such As The Psychotherapist-Patient Privilege -- Is An Important And Recurring Federal Question

Whether the government may electronically intercept (or otherwise acquire) the contents of privileged psychotherapist-patient communications and then use the information contained in those conversations to build a criminal prosecution is a question of surpassing importance in the development of federal criminal law. The very premise of common-law privileges is that frank and candid communications (whether with a psychiatrist, a lawyer, or a spouse) "depend[] upon an atmosphere of confidence and trust" (*Jaffee v. Redmond*, 518 U.S. 1, 9 (1996)). The question whether the protection against derivative use is limited only to information shielded from disclosure by a"constitutionally-based privilege" has profound implications for a broad range of citizens' everyday conduct.

Law enforcement, too, has the right to expect (and the need for) clear guidance from the Court concerning the constraints (if any) on its ability to make indirect use of privileged communications -- as the government apparently did in this case. Where it is clear to law enforcement officers that they are not permitted to derive evidence from privileged information-- such as after Fifth Amendment immunity has been conferred on a witness who is under investigation-- they have become quite accustomed to taking appropriate steps to segregate the privileged infolrnation from the remainder of the investigation to safeguard against any impermissible taint. See, e.g., *United States v. Lacey*, 86 F.3d 956, 972 (10th Cir. 1996) (no *Kastigar* hearing necessary because government "erect[ed] a so-called 'Chinese Wall' between those persons exposed to [defendant's] grand jury testimony and those who were not."). Indeed, certain components of the government have established "Chinese Wall" and "taint team" procedures to deal with situations in which even common-law privileged information has been intercepted. See, e.g., *United States v. Neill*, 952 F. Supp. 834, 840-841 (D.D.C. 1997) ("taint team" established to review materials protected by attorney-client privilege); *United States v. Burnett*, No. 95-CR-272 (JG), 1996 WL 1057161, at *6 n.6 (E.D.N.Y. March 11, 1996) ("Chinese Wall" erected to review attorney-client privileged material).

By contrast, in other cases involving the government's acquisition of privileged material (including this one), little has been done by the government to minimize the risk that the privileged material might taint the development of evidence to be used in the prosecution. See, e.g., *Weissman*, 1996 WL 751386, at *12 n.5 (government did not erect "Chinese Wall" to protect against possible taint from attorney-client privileged information). The Court should take this occasion to provide a uniform answer to this important and recurring area of federal criminal law -- by making clear that derivative use of even common-law privileged material is forbidden.

II. THE COURT OF APPEALS' CONSTRUCTION OF THE TERM "RELATING TO THE NATIONAL DEFENSE" IS INCONSISTENT WITH THIS COURT'S CASE LAW AND WORKS AN UNJUSTIFIED EXPANSION OF THE REACH OF THE ESPIONAGE STATUTES

To prove all but the false statement count in this case, the government was required to establish beyond a reasonable doubt that the defendants obtained, attempted to transmit, or conspired to transmit information "relat[ed] to the national defense." See 18 U.S.C. §§ 793(b), 794(a) and (c). The very heart of the defense case on this essential element was that the government had failed to prove that the information on which the government relied was *not lawfully available in thepublic domain*. To this end, petitioners established that the government had not conducted any inquiry to determine if the information was available to the public before January 5, 1997 (the date of dissemination). And, as if it were their burden of proof (not the government's), petitioners also showed the jury an array of publicly available documents that contained precisely the same information that the government relied upon to prove the espionage-related charges.

Remarkably, the district court stripped petitioners of their ability to present this defense by instructing the jury, in effect, that it was no defense at all. The jury was told that, to establish the element of relating to the national defense, the government need prove only "two things":

> . . First, it must prove that the disclosure of the material would be damaging to the United States or might be useful to an enemy 0fthe United States.
>
> And second, it must prove that the material is closely held by the United States Government.

JA1435; Pet. App. 58a. Over strenuous objection, the court declined to instruct the jury that the government also had to prove that the information was not lawfully available to the general public. The court of appeals sustained the district court's instruction, holding that this Court's decision in *Gorin v. United States, supra*, and Judge Learned Hand's opinion in *United States v. Heine, supra*, make clear that "the central issue is the secrecy of the information, *which is determined by the government's actions*." Pet. App. 61a (emphasis added).

In fact, however, *Gorin* and *Heine* provide cold comfort for the court of appeals' unprecedented construction of the term "relating to the nationaldefense." By holding, in substance, that information-- no matter how freely available to the public -- nevertheless relates to the national defense unless *the government* releases it, the court below wrenched the phrase from its statutory context and worked an unjustified expansion of the espionage statutes. Further review is plainly warranted.

A. *Gorin* and *Heine* Do Not Support -- If Anything, They Contradict -- The Court of Appeals' Construction

In *Gorin*, this Court held that the categories of "information" covered by the Espionage Act must be construed in the context of"[t]he obvious delimiting words in the statute," which required the government to prove "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." 312 U.S. at 27-28 (internal quotation omitted). This language, the Court reasoned, "requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established." Id. at 28. And, coming to the heart of the matter, the Court explained:

> Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.

Ibid. (emphasis added).

"When there is no occasion for secrecy," the Court held, the "information" at issue cannot give rise to espionage. True enough, when the government itself has released the information to the public, there is no longer any "occasion for secrecy." But the Court quite plainly did not hold that it is *only* when the

government itself releases the information that "there is no occasion for secrecy." That is why the Court used the critical, if diminutive, word "as" (and why we highlighted the term in the previous quotation). As the Court made clear, the central question is whether there is an "occasion for secrecy"; if there is not -- either because the government has relinquished the information or because the information has, by some other means, become widely disseminated to the public -- there simply cannot be the requisite inference of scienter, and thus the information does not "relate" to the national defense.

The Second Circuit's decision in *United States v. Heine*, 151 F.2d 813 (1945), reinforces the point. The defendant in that case culled all of the information he sent abroad from publicly available sources, and he contended on appeal that such information cannot give rise to an espionage prosecution. The court of appeals agreed. The court did, to be sure, observe that the government had "never thought it necessary to withhold" the information at issue. 151 F.2d at 816. But, as in *Gorin*, there was no intimation that it is *only* the government's decision-making that distinguishes information that does, and does not, relate to the national defense. If anything, the case suggests quite the opposite. In explaining why Heine's efforts to arrange the material in a useful manner did not render him culpable under the statute, the court of appeals, relying on *Gorin*, explained that "when the information has once been made public, and has thus become available *in one way or another to any foreign government*, the 'advantage' intended by the section cannot reside in facilitating its use by condensing and arranging it." ld. at 817 (emphasis added).

The court below read *Gorin* and *Heine* to mean that "the central issue is the secrecy of the information, which is determined by the government's actions." Pet. App. 61a. That is half right. "The central issue" is, indeed, "the secrecy of the information." But neither *Gorin* nor *Heine* can be fairly read to hold that only "the government's actions" can "determine" whether information is secret. If anything, the cases suggest exactly the opposite.

B. The Court of Appeals' Decision Works A Radical Change In Well-Settled Espionage Law

Until this case, no one would have guessed that the public availability of information was irrelevant to whether it "relates to the national defense." Indeed, the standard text on federal jury instructions-- 1 Sand, Siefert, Loughlin & Reiss, MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) ¶ 29.091, at 29-5 (1997) -- states in relevant part:

> Only information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section.

See also JA1645 (Defendants' Altemate Jury Instruction). Even the Fourth Circuit had consistently taken that view. See *United States v. Morison*, 844 F.2d 1057, 1071-1072 (4th Cir. 1988) ("the government must prove that the documents * * * are closely held in that they have not been made public *and* are not available to the general public") (emphasis added); *United States v. Truong*, 629 F.2d 908, 918, n.9 (4th Cir. 1980) (approving instruction that informed the jury "that the defendants would not be guilty of transmitting national defense information if the information were available in the public domain" -- that is to say, the district court "specifically instructed the jury that transmission of publicly available information did not fall within the statutory prohibitions").[4]

> [4] See also, e.g., 70 AM. JUR. 2DSEDITION,SUBVERSIVEACTIVITIES,AND TREASON § 35 (1987) ("One cannot be convicted of violating the Espionage Act if the information transmitted was made available to the public by the government, *or* if the information was available to everyone from lawfully accessible sources, *or* if the government did not attempt to restrict its dissemination.") (emphasis added); id. §43 ("The jury should be specifically instructed that the transmission of publicly available information does not fall within the statutory prohibitions.") (citing *Truong*); *United States v. Richardson*, 33 M.J. 127, 129 (C.M.A. 1991) (noting that, under the espionage statute governing military members, which "tracks the language of 18 U.S.C. § 794(a)," a defendant may be convicted only if he or she transferred "information that is not lawfully accessible to the public").

So well-established was this rule that **both** the government and the defendants requested that the jury be instructed that "[o]nly information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section." JA1645 (Defendants' Alternative Jury Instruction); see JA1483 (Government's Proposed Jury Instruction No. 10) ("[The Government must prove that the material is closely held in that it has not been made public by the United States Government *and* is not available to the general public.") (emphasis added). At trial, however, petitioners were able to show that, while the documents in question had not been declassified, information contained within them was lawfully available to the general public from other sources, such as *Jane's*

Intelligence Review and *Jane's International Defense Review*. JA 794-815, 872- 965, 1648-1650, Defense Exhibits ("DE") 205-215. This showing caused the government to withdraw its proposed instruction and replace it with the charge ultimately given by the district court. JA1534 (Government's Revised Jury Instruction No. 10).[5]

[5] Notably, the government has, in other forums, embraced petitioners' view of the law. See Hearings on the Peter Lee Case Before the Subcomm. on Administrative Oversight and The Courts of the Senate Committee on the Judiciary, 106th Cong. (2000), available in LEXIS, FDCH Political Transcription, April 12, 2000 ("Hearings"). In explaining his concerns about the viability of a prosecution under 18U.S.C. § 794, Department of Justice prosecutor Michael Liebman (one of the prosecutors in this case) explained to a subcommittee of the Senate Judiciary Committee that "even though the Department of Defense may in good faith and in full propriety classify a document or classify certain documents, if in fact, the information is not significant, *if in fact, there is substantially the same information available to the public, then it is not national defense information and therefore not a violation of those provisions*." Hearings at 28 (emphasis added).

Under the court of appeals' construction, any defense information -- no matter how widely and readily available -- "relates" to the national defense unless and until the government officially releases it. Not only does this violate the baseline presumption that criminal statutes be narrowly construed (see *Cleveland v. United States*, __U.S.__, 121 S. Ct. 365, 373 (2000)), but it also works a troubling and unjustified expansion of the espionage law in particular. As this Court explained in Gorin, the espionage statutes must not be construed to "force[] anyone, at his peril, to speculate as to whether certain actions violated the statute." 312 U.S. at 26. But the court below has done just that. The most widely available information may now give rise to an espionage prosecution, so long as the government was not the original disseminator. That is a considerable risk-- and raises profound First Amendment concerns -- since it will not always be easy to tell the original source of a leak, and since the government does not invariably acknowledge its own role in leaking information. Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe [a] protected freedom").

The court of appeals sought to justify its newly-minted construction of the espionage statutes by explaining that information from non-government sources can *never* be equivalent to the information contained in a government document because the former lacks the authoritativeness inherent in classified government material. See Pet. App. 63a. That is doubtless true in many cases. By the same token, however, there are certainly occasions (as in this case) in which the *fact* that a piece of information is in a government document carries no special significance and thus the public disclosure of that information by non-governmental sources can be said to constitute the same "information." For example, the government would be hard-pressed to persuade a jury that a classified report of an arms transfer between two foreign nations carries some special imprimatur that makes it more valuable than the public announcement by the foreign governments themselves that the arms deal has been consummated. And such classified information becomes even more obsolete affter public reports of the actual delivery of those weapons systems.[6]

[6] This was precisely the type of classified and publicly available informationat issue in this case. See, e.g.,Government Trial Exhibit("GE") 4 [classified document]; Defendants' Trial Exhibit [publicly available materials].

The bottom line is that the question of whether any particular piece of information in a classified document provides "information" above and beyond the content itself is an intensely fact-intensive one for the jury to decide. Here, the jury was not even given the opportunity to consider the issue. By sustaining the jury instructions in this case -- which made *absolutely no mention* of the fact "that transmission of publicly available information d[oes] not fall within the statutory prohibitions," *Truong*, 629 F.2d at 918 n.9 -- the court below held that there is *always*, as a matter of law, an imprimatur associated with government documents.

III. THIS COURT SHOULD REVIEW THE GOVERNMENT'S PURPORTED SHOWING OF PROBABLE CAUSE TO CONDUCT FISA SURVEILLANCE, AS WELL AS CLARIFY WHEN, IF EVER, DEFENSE COUNSEL SHOULD BE PERMITTED TO EXAMINE THE APPLICATIONS THAT SUPPOSEDLY SET FORTH TIIE REQUIRED PROBABLE CAUSE

Petitioners were the targets of 550 consecutive days of electronic surveillance and physical searches authorized by federal judges under FISA. This blanket surveillance-- which included microphones embedded in petitioners' home and bedroom, telephone intercepts, and at least three clandestine physical intrusions into petitioners' residence--was authorized and extended on at least 20 different occasions during

the 550 day period. See Pet. App. 11a, 14a. Under FISA, a judge of the Foreign Intelligence Surveillance Court ("FISC")-- consisting of seven district court judges appointed by the Chief Justice -- could have authorized each surveillance only upon a finding of "probable cause" that petitioners were, at the time of each application, "agents of a foreign power" or knowingly conspiring with or aiding and abetting an "agent of a foreign power." 50 U.S.C. § 1801(b)(2)(A), (D).[7]

[7] FISA permits a FISC judge to order surveillance only upon a finding "on the basis of the facts submitted by the [government] applicant [that] there is probable cause to believe that (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power .... " 50 U.S.C. § 1805(a)(3); see also 50 U.S.C. § 1824(a)(3) (addressing physical searches).

The court of appeals sustained the "probable cause" finding (Pet. App. 15a), after determining-- based on its own ex parte and in camera review of the FISA materials -- that FISA's probable cause standard was met. Pet. App. 14a. It also sustained the trial court's refusal to allow defense counsel to examine the applications that ostensibly showed the requisite probable cause. See Pet. App. 15a.

We believe both holdings are deeply mistaken and ask the Court to review them.[8]

[8] Petitioners have requested the Department of Justice to forward the government's FISA applications to the Court. Pet. App. 129a-130a.

1. With respect to the refusal to let defense counsel even examine the government's showing of probable cause, that is, to say the least, a striking anomaly in federal criminal law. In general, a warrant must issue before the government can conduct either an electronic surveillance or physical search of a residence. U.S. CONST., AMEND. IV; 18 U.S.C. §§ 2511, 2518, 2236; *United States v. Karo*, 468 U.S. 705, 714-15 (1984). Indeed, absent unusual circumstances, physical searches of a private home are generally to be announced and in the presence of the owner. *Richards v. Wisconsin*, 520 U.S. 385, 389 (1997). Moreover, in virtually all other warrant circumstances, the government's application for a warrant is either a matter of public record, or at least must be disclosed to provide the defendant with an opportunity to suppress any fruits of the surveillance. See, e.g., 18 U.S.C. § 2518(9) (Title III) and FED. R. CRIM. P. 41(g). Under FISA, however, the underlying FISA applications remain presumptively secret, only to be disclosed where "necessary to make an accurate determination of the legality" of the search or surveillance. 50 U.S.C. § 1806(f), 1825(g). There are no reported cases in which any Court has authorized such a disclosure.[9]

[9] It appears that only one circuit court has addressed the due process consequences of FISA's non-disclosure provision. See *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (finding no due process violation). Other courts have simply applied the in camera and ex parte review procedures without addressing any due process objections. See, e.g., *United States v. Johnson*, 952 F.2d 565, 571-72 (lst Cir. 1991); *United States v. Badia*, 827 F.2d 1458, 1464 (1 lth Cir. 1987) (denying request for disclosure of FISA application).

In this case, the courts denied petitioners access to each of the FISA applications and affidavits (see Pet. App. 15a), forcing petitioners to mount a virtually blind "probable cause" challenge to those surveillance and search orders. As a result, the only judicial evaluations of the legality of the 20 FISA orders occurred in camera and exparte, without any adversarial proceeding.[10] The courts did not articulate the bases for their findings that no disclosure was "necessary to make an accurate determination of the legality" of the surveillance, as required under the statute.

[10] In enacting FISA, Congress intended that the issue of probable cause be guided by "the same requisite elements which govern such determinations in the traditional criminal context." S. Rep. No. 95-604, at 47 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3948-49. In *Ornelas v. United States*, this Court held that "as a general matter determinations of... probable cause should be reviewed de novo." 517 U.S. 690, 699 (1996).

There was no legitimate justification for the courts to undercut petitioners' ability to mount a probable cause challenge to the massive FISA surveillance deployed against them by denying them access to the FISA applications and affidavits. FISA specifically provides that targets of FISA surveillance may move to suppress "evidence obtained or derived from such * * * surveillance," on the grounds that either the evidence was "unlawfully acquired" or that "the surveillance was not made in conformity with an order of authorization or approval." 50 U.S.C. §§ 1806(e) and 1825(0. Furthermore, while FISA permits the court to deny disclosure where the Attorney General certifies that "disclosure or an adversary hearing would harm

the national security of the United States" (50 U.S.C. §§ 1806(f), 1825(g)), FISA's legislative history indicates that Congress intended that disclosure would "typically" be given where the court's initial review of the application, order and fruits of surveillance indicates that the question of legality may be complicated by factors such as "'indications of possible misrepresentation of fact.'" *United States v. Belfield*, 692 F.2d 141,147 (D.C. Cir. 1982) (quoting S. Rep. 95-701, at 64 (1978), reprinted in 1978 U.S.C.C.A.N. at 3960).

Here, petitioners adduced substantial evidence that the government could not have met its probable cause showing in some or all of its FISA surveillance applications, raising serious questions regarding the lawfulness of the surveillance and the accuracy of the representations the government made to the FISA judges. Yet, the courts made their probable cause evaluations in a vacuum, using secret evidence never revealed to the petitioners, despite their prima facie probable cause challenge. This Court has never examined the lawfulness of this FISA provision, which permits sweeping invasions of privacy against United States citizens and then permits the government and the courts to deny defendants access to the applications and affidavits that purported to establish the probable cause basis in the first place. Without adequate guidelines for reviewing courts to follow when making their de novo probable cause determinations, defendants cannot possibly bring meaningful probable cause challenges.

2. This Court also should examine the sufficiency of the probable cause showings in this case. To be sure, in the usual case, the sufficiency of probable cause is a fact-bound question unworthy of the Court's review. But this hardly is "the usual case." Absent the Court's review, coupled with a truly adversarial proceeding, petitioners will never have a full and fair chance to contest the merits of this extraordinary surveillance.

FISA does not permit secret surveillance based on a *past* relationship with a foreign power, but instead authorizes surveillance only where there is probable cause to believe the target is in an *ongoing* agency relationship with a foreign power. 50 U.S.C. §§ 1805(a)(3), 1801(b).[11] In this case, the government has contended that surveillance was justified under FISA's "aiding and abetting" or "conspiracy" provision (50 U.S.C. § 1801(b)(2)(D)), yet this provision also requires a knowing, *present* agency relationship with a foreign power.[12] The Russian Federation is the only "foreign power" in this case with which petitioners could have had an "agency" relationship during the 550 days of FISA surveillance. [13]

[11] To be an "agent of a foreign power" requires, at a minimum, the knowing performance of activities for or on behalf of a foreign power sufficient to meet traditional standards of agency law. See S. Rep. 95-604, at 22, reprinted in 1978 U.S.C.C.A.N. at 3923.

[12] In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). Likewise, "in a conspiracy two different types of intent are generally required -- the basic intent to agree * * * and the more traditional intent to effectuate the object of the conspiracy." *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978). Thus, under Section 1801(b)(2)(D), the government was required to establish in its FISA applications that petitioners knowingly were conspiring or assisting an "agent or a foreign power" with the specific intent to engage in "clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States." See 50 U.S.C. § 1801(b)(2)(A).

[13] The indictment identified only four possible "foreign powers": East Germany, the Soviet Union, South Africa, and the Russian Federation. See JA86. East Germany and the Soviet Union, of course, ceased to exist in 1990, well before the FISA surveillance at issue here, and any prior agency relationship petitioners may have had with these defunct nations could not have satisfied FISA's strict surveillance mandates in 1996 and 1997. The government has never argued that petitioners were in any agency relationship with South Africa at the time the FISA surveillance commenced. Indeed, the predicate for the "false flag" operation -- initiated during the FISA surveillance -- was for a U.S. government agent to pose as a South African intelligence officer seeking to *initiate* an agency relationship with petitioners on behalf of that nation. See Pet. App. 115a-116a. That leaves the Russian Federation as the only possible "foreign power" for which petitioners could have been "agents" during the F1SA surveillance; but there was no probable cause to believe such a relationship with Russia actually existed.

Accordingly, each of the 20 FISA applications has to be evaluated, de novo, to determine whether there is probable cause to believe that petitioners were, at the time of each application (see *Sgro v. United States*, 287 U.S. 206, 210 (1932)), either an "agent" of the Russian Federation, or knowingly aiding and abetting

(or conspiring with) an agent of the Russian Federation. In its opinion, the court of appeals held: "We have reviewed de novo the relevant materials, and likewise concluded that each FISA application established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted." Pet. App. 14a. Yet, the court of appeals declined to provide any details to support its conclusion, stating it was relying *solely* on its ex parte and in camera review of the FISA applications and finding no error in the exclusion of petitioners from this secret examination. Pet. App. 14a-15a.

In making its own de novo assessment of the FISA applications, see *Ornelas v. United States*, 517 U.S. at 698 (probable cause determinations should be reviewed de novo), this Court should consider the following issues, among others, with respect to the initial FISA application in early 1996:

First, did the government inform the FISC judge that it was proceeding under FISA's "aiding and abetting" and "conspiring" provision and did it show that petitioners -- as the target of the surveillance -- were *knowingly* conspiring with or *knowingly* aiding and abetting or conspiring with an "agent of a foreign power" who had an existing agency relationship with a foreign power?

Second, if the government claimed that petitioners were "aiding and abetting" or "conspiring" with Lothar Ziemer -- their supposed former East German "handler" -- did the government claim that Ziemer had an ongoing agency relationship with the Russian Federation, and if so, could that claim have supported a probable cause finding in 1996 given that (a) Ziemer had been arrested in Germany in 1992 and convicted in 1995 for intelligence gathering activities,[14] and (b) the FBI had interviewed him and offered him immunity from prosecution in 1992?

> [14] It defies common sense to believe that the Russian Federation or any other foreign power would entrust Ziemer to perform intelligence activities on its behalf after his public arrest and conviction.

And *third*, even if the government adduced evidence sufficient to establish that Ziemer was acting as an agent of Russia in 1996, did the government adduce evidence sufficient to establish probable cause that petitioners knew of that relationship and conspired with or *knowingly* were assisting Ziemer in his agency relationship with Russia?[15]

> [15] The mere fact that petitioners had some continuing association with Ziemer, a former East German intelligence officer, is not sufficient to establish agency, conspiracy or aiding and abetting under FISA. Indeed, Congress specifically stated that secret surveillance under FISA is not justified based on "mere continued association and consultation with" agents of a foreign power. S. Rep. No. 95-701, at 28 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3997.

The same probable cause standard applies to each of the 19 subsequent FISA applications, whether they were for renewals of the initial electronic surveillance applications or whether they were for the three physical searches of petitioners' domicile in Washington, D.C.[16]

> [16] FISA authorizes surveillance against targets that are not themselves "foreign powers" only for periods of 90 days or less, and physical searches against such targets only for periods of 45 days or less. 50 U.S.C. §§ 1805(d), 1824(c).

With each subsequent application, the government should have brought to the attention of the FISC any new evidence that would have undercut the probable cause to believe that the petitioners were still agents of any foreign power or knowingly conspiring with or aiding and abetting agents of any foreign power. From the limited evidence made available to petitioners through discovery, several factors would have removed any probable cause during the course of the FISA surveillance:

For instance, the government learned during their FISA surveillance that Squillacote had been engaged in a romantic affair with Ziemer and that their relationship *ended* in May 1996, See Pet. App. 11la, leaving her sobbing and depressed. To the extent that the government previously had relied on some ongoing connection between petitioners and Ziemer to justify earlier surveillance orders, the clear break-up between Squillacote and Ziemer in the early months of the FISA surveillance was powerful evidence that no agency or other relationship existed after that date.

Similarly, when he government launched its "false flag" operation against Squillacote in mid-1996, it sought to capitalize on the fact that she had "end[ed] her affair with Ziemer" and thus was "emotional[ly] vulnerab[le]" to an approach by someone posing to be a member of the South African intelligence agency.

Pet. App. 12a. Thus, the government sought and obtained Justice Department approval to launch its false flag operation based on the government's fervent belief that Squillacote (and her husband) *were not* at that time acting as agents of a foreign power nor were they knowingly assisting or conspiring with any such agent, but craved to embark on such a relationship with a willing patron. This demonstrates that the government knew, no later than the summer of 1996 (early on in the FISA surveillance), that petitioners were not acting as an agent of any foreign power. At a minimum, it certainly tends to negate probable cause that petitioners were acting as "agents of a foreign power." Had this information been properly disclosed to the FISC judges during that period, authorization could not have been granted.

Some or all of the 20 FISA orders, therefore, were unlawfully issued and the evidence gathered as a result of those orders should have been suppressed. Petitioners urge the Court to grant certiorari and to articulate and apply the appropriate "probable cause" standard required by due process and provided for under FISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 00-969

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the government is barred from making derivative use of conversations allegedly protected by the evidentiary privilege for psychotherapist-patient communications.

2. Whether the district court improperly defined the terms "connected with the national defense" and "relating to the national defense" for purposes of 18 U.S.C. 793 and 794 (1994 & Supp. IV 1998).

3. Whether the court of appeals erred in upholding the validity of the government's applications for authorization to conduct electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 et seq., without disclosing the applications and the related materials to the defense.

[Table of Contents and Table of Authorities not included here: See PDF version]

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 221 F.3d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 8, 2000 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on December 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Theresa Marie Squillacote and Kurt Alan Stand were convicted on one count of conspiring to transmit documents and information relating to the national defense, in violation of 18 U.S.C. 794(a) and (c) (Count 1); one count of attempting to transmit documents and information relating to the national defense, in violation of 18 U.S.C. 794(a) and 2 (Count 3); and one count of obtaining documents connected with the national defense, in violation of 18 U.S.C. 793(b) and 2 (Count 4). Squillacote was also convicted on one count of making false statements, in violation of 18 U.S.C. 1001 (1994 & Supp. IV 1998) (Count 5). Squillacote was sentenced to 262 months' imprisonment to be followed by five years' supervised release. Stand was sentenced to 210 months' imprisonment to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-66a; Gov't C.A. Br. 2-4.

1. Squillacote and her husband, Stand, along with their friend, co-conspirator James Clark, are citizens of the United States who, over the course of decades, conspired to commit espionage against the United States on the behalf of various foreign powers. They began as agents of the German Democratic Republic (East Germany). Their handler was Lothar Ziemer, an officer with East Germany's foreign intelligence agency, commonly known as the HVA. By the early 1970s, Stand was working as an HVA agent for Ziemer. Stand recruited Clark to be an HVA agent in 1976, and Squillacote to be an HVA agent between 1979 and 1981. Pet. App. 3a.

The HVA provided the three conspirators with extensive training on such matters as detecting and avoiding surveillance, receiving and decoding messages sent by shortwave radio from Cuba, mailing and receiving packages through the use of "accommodation" addresses, using code words and phrases, using a miniature camera to photograph documents, and removing classified markings from documents. The conspirators received a substantial amount of money from the HVA to fund their trips to other countries to meet with their handlers. Pet. App. 3a-4a.

On instructions from the HVA, the conspirators moved to Washington, D.C. Squillacote enrolled in, and graduated from, law school. She chose to specialize in government procurement law in order to gain "a certain level of access." She sought jobs that would place her in proximity to sensitive classified information. She used family connections to obtain a temporary position with the House Armed Services Committee. She also applied for various jobs involving access to classified national defense information with governmental agencies such as the Central Intelligence Agency and the National Security Agency. In 1991, she obtained a job as an attorney with the Department of Defense. She eventually became the Director of Legislative Affairs in the Office of the Undersecretary of Defense (Acquisition Reform), a position that required a security clearance and provided access to valuable information. Pet. App. 4a-5a; J.A. 2190.[1]

By the time Squillacote secured that position, however, East Germany had collapsed. The conspiracy nonetheless endured. Ziemer had begun to work for the KGB, the Soviet Union's intelligence agency. Ziemer maintained his relationships with Stand, Squillacote, and Clark, and they, too, became involved with the KGB. Pet. App. 5a.

In April 1992, Ziemer was arrested and subsequently convicted in Germany on charges relating to his intelligence activities with the KGB. After Ziemer's arrest, the three conspirators discussed the possibility of future intelligence work, perhaps for Vietnam or Cuba, and Squillacote expressed her interest in South Africa's Communist Party. In September 1992, after Ziemer was released from prison, the conspirators reestablished contact with him, discussing threats to their safety as well as potential espionage activities. In 1994, Squillacote approached David Truong, who had been convicted some years earlier of espionage on behalf of North Vietnam, as part of her search for "another connection," but the overture went nowhere. Pet. App. 5a-6a; Gov't C.A. Br. 23-26; J.A. 2290.[2]

In 1995, Squillacote procured a post office box in Baltimore, Maryland, under the alias "Lisa Martin." Using that alias, she wrote to Ronnie Kasrils, the Deputy Defense Minister of South Africa and a senior Communist Party official. She spent months composing the letter, which detailed her views on the collapse of socialism and the future of communism. She hoped that Kasrils would "read between the lines." Both Stand and Clark were aware of the letter. Pet. App. 6a; J.A. 1912.

In February 1996, Squillacote received a Christmas card from Kasrils, thanking her for "the best letter" that he had received in 1995. Squillacote and Stand were delighted to receive the note, and they began to think that a connection might be made. Squillacote began a second letter to Kasrils. Pet. App. 6a; J.A. 1675.

In September 1996, Squillacote found a letter from Kasrils in her Baltimore post office box. The letter invited her to a meeting in New York City with a representative of "our special components." Pet. App. 6a-7a; J.A. 1681.

Unbeknownst to the conspirators, however, the FBI had been investigating them for many years. Starting in January 1996, the FBI obtained authorization under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 et seq., to conduct clandestine surveillance on petitioners.[3] The surveillance included the monitoring of all conversations in their house as well as calls made to and from their house and Squillacote's office. From the surveillance data, the FBI's Behavioral Analysis Program Team constructed a report that analyzed Squillacote's emotional makeup and offered suggestions on how to tailor a "false flag" operation to "exploit her narcissistic and histrionic characteristics."[4] The September 1996 letter, although ostensibly from Kasrils, was actually written by the FBI as part of that operation. Pet. App. 7a-8a; J.A. 2064.

In October 1996, Squillacote met with the undercover FBI agent who was posing as a South African intelligence officer. Over the next year, she met with the undercover agent three additional times. Stand attended one of the meetings. Pet. App. 8a-9a.

On January 5, 1997, at their second meeting, Squillacote gave the undercover agent four classified documents that she had taken from the Department of Defense. The documents were: (1) "Defense Planning Guidance for Fiscal Year 1997 through 2001," a numbered document, classified "secret," with restricted dissemination; (2) "Defense Planning Guidance Scenario Appendix for 1998 through 2003," a numbered document, classified "secret," which forbade reproduction or further dissemination without authorization; (3) "Defense Planning Guidance, Fiscal Years, 1996 through 2001, Final For Comment Draft," which was classified "secret," with restricted dissemination; and (4) "International Arms Trade Report September-October 1994," a CIA intelligence report on international arms trades, which was classified "secret," with restricted dissemination. Three of the documents were copies; the Scenario Appendix was an original. Although the undercover agent had never requested any documents or classified information, Squillacote stated that one day, when she and her secretary were alone in her office, she decided to "score what [she] could score." Pet. App. 9a; J.A. 509.[5]

Squillacote continued to meet with the undercover agent until she and Stand were arrested in October 1997. In a search of petitioners' home, authorities discovered a quantity of incriminating evidence, including espionage-related equipment and copies of two of the documents given to the undercover agent. Pet. App. 10a.

2. A federal grand jury returned a five-count indictment against the three conspirators. Count 1 charged Squillacote, Stand, and Clark with conspiring to transmit "writing[s and] information relating to the national defense" to East Germany, the Soviet Union, the Russian Federation, and South Africa, in violation of 18 U.S.C. 794(c). Count 2 charged Clark with transmitting documents relating to the national defense, in violation of 18 U.S.C. 794(a). Count 3 charged Squillacote and Stand with attempting to transmit "document[s] * * * relating to the national defense" to South Africa, in violation of 18 U.S.C. 794(a) and 2. Count 4 charged Squillacote and Stand with obtaining classified documents and writings "connected with the national defense," in violation of 18 U.S.C. 793(b) and 2. Count 5 charged Squillacote with making false statements, in violation of 18 U.S.C. 1001 (1994 & Supp. IV 1998). Clark, after pleading guilty to Count 1, testified against petitioners at trial. Gov't. C.A. Br. 2; J.A. 88, 157-161.

Before trial, petitioners moved to suppress evidence derived from the FISA-authorized surveillance and searches. They contended that the FISA warrants were not supported by probable cause to believe that they were "agents of a foreign power" within the meaning of FISA. The Attorney General filed an affidavit, pursuant to 50 U.S.C. 1806(f) and 1825(g), stating that the district court should review the FISA materials ex parte and in camera because their disclosure would harm national security. The court found that the FISA applications were supported by probable cause. The court also ruled that petitioners were not entitled to disclosure of the FISA warrant applications or to an adversarial hearing on the matter. Pet. App. 14a-15a.

The district court also denied petitioners' request for a hearing to determine whether the government's evidence was derived from sources independent of two allegedly privileged conversations with psychotherapists that were intercepted during the FISA-authorized surveillance. The court ruled that the

psychotherapist-patient privilege was not constitutionally based, and therefore that a taint analysis was inapplicable. Pet. App. 23a.

At the end of trial, the district court instructed the jury on the meaning of the terms "connected with the national defense" and "relating to the national defense," for purposes of 18 U.S.C. 793(b) and 794(a). The court explained that, "[t]o prove that documents, writings, photographs or information relate to the national defense, there are two things that the Government must prove": first, that "the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States," and, second, that "the material is closely held by the United States government." J.A. 1435. Petitioners objected on the ground that the jury should have been instructed that material cannot "relate to the national defense" if it is available in the public domain. Pet. App. 57a-58a.

3. The court of appeals affirmed. Pet. App. 1a-66a.

First, the court of appeals upheld the validity of the FISA-authorized surveillance of petitioners. The court rejected petitioners' argument that the FISA warrants were invalid because there was no probable cause to believe that petitioners were agents of a foreign power. The court concluded, based on its de novo review of the relevant materials, that each of the more than 20 FISA applications "established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted." Pet. App. 14a.

The court of appeals also ruled that the district court properly denied petitioners' request for disclosure of the FISA application materials. The court relied on 50 U.S.C. 1806(f), which requires an in camera and ex parte review of a FISA application where, as here, the Attorney General files an affidavit attesting that disclosure would harm national security and permits disclosure only when "necessary to make an accurate determination of the legality of the surveillance." The court explained that Section 1806(f) "clearly anticipates that an ex parte, in camera determination is to be the rule," and that "[d]isclosure and an adversary hearing are the exception, occurring only when necessary." The court concluded that no such necessity existed here because "the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance." Pet. App. 15a.

Second, the court of appeals rejected petitioners' argument that, under *Kastigar v. United States*, 406 U.S. 441 (1972), the district court was required to conduct a hearing to determine whether the government's evidence was derived from sources independent of conversations between petitioners and psychotherapists that were intercepted during the FISA-authorized surveillance.[6] The court explained that "a *Kastigar* analysis is not triggered by the existence of evidence protected by a privilege, but instead by the government's effort to compel a witness to testify over the witness's claim of privilege." Pet. App. 24a. Because neither Squillacote nor Stand was compelled to give testimony, the court found that *Kastigar* was "not applicable to this case." Id. at 23a. The court further noted that the psychotherapist-patient privilege is simply an evidentiary rule, not a constitutional requirement, and that derivative evidence generally need not be suppressed for a non-constitutional violation. Id. at 26a-27a & n.8.

Third, the court of appeals upheld the district court's jury instruction on the meaning of materials "connected with the national defense" or "relating to the national defense" for purposes of 18 U.S.C. 793(b) and 794(a). The court explained that, in determining whether documents relate to the national defense, "the central issue is the secrecy of the information, which is determined by the government's actions." The court concluded that the district court's instruction "properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense." Pet. App. 61a.

The court of appeals rejected petitioners' argument that information in official government documents does not relate to the national defense if it "is available to the general public, regardless of who made the information available." Pet. App. 58a. The court explained that "there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy"; thus, "[w]hen those estimates are included in an official document closely held by the government, those estimates carry with them the government's implicit stamp of correctness and accuracy," and are of a different character than "general, unofficial information about the same issues." Id. at 63a. Accordingly, the court concluded that "a document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information), until the official information in that document is lawfully available." Ibid.[7]

ARGUMENT

1. Petitioners ask the Court to decide whether the government is barred from making derivative use of allegedly privileged psychotherapist-patient communications that are intercepted during court-authorized electronic surveillance. Pet. 9-14. Neither this Court nor any other court of appeals has required the suppression of such derivative evidence (or a hearing under *Kastigar v. United States*, 406 U.S. 441 (1972)) in the circumstances of this case. There is not even any reason to conclude that any such derivative evidence was actually used in this case; as explained below (at 17-18), the record indicates the contrary. Petitioners' claim warrants no further review.[8]

During the FISA-authorized surveillance of petitioners, an FBI agent listened to and transcribed two short telephone conversations that occurred on May 2, 1996. One conversation was between Squillacote and one of her therapists; the other conversation was between Stand and another of Squillacote's therapists. See Pet. App. 119a-128a (transcripts of conversations).[9] The supervising FBI agent, upon learning of the conversations, ordered that no other conversation between petitioner and mental health providers be listened to, indexed, or transcribed. In accordance with those instructions, although six additional conversations between petitioners and various therapists were automatically intercepted, those conversations were not listened to or catalogued. The government did not introduce testimony about, or transcripts of, any patient-therapist conversations at petitioners' trial. But petitioners speculate that the government may have introduced evidence that was somehow derived from those conversations. See id. at 22a-23a; J.A. 354, 357.

a. This Court has recognized in other contexts that, where the government has obtained information in violation of a rule that is not itself constitutionally compelled, the government is not precluded from making derivative, as opposed to direct, use of the information in a criminal case. Put differently, the Court has not extended the "fruit of the poisonous tree" doctrine beyond evidence obtained in violation of the Constitution.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court held that evidence discovered as an indirect result of a search in violation of the Fourth Amendment had to be suppressed as "fruit of the poisonous tree," unless the government could demonstrate that the evidence was obtained "by means sufficiently distinguishable [from the illegality] to be purged of the primary taint." Id. at 488. The Court has applied *Wong Sun*'s "fruit of the poisonous tree" doctrine to other constitutional violations. See, e.g., *United States v. Wade*, 388 U.S. 218 (1967); *Harrison v. United States*, 392 U.S. 219, 222-223 (1968). The Court has also made clear, however, that the doctrine that evidence must be excluded as "'fruit of the poisonous tree' assumes the existence of a constitutional violation." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). Thus, the Court held that the doctrine does not apply to the "fruits" of statements obtained without administering the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), because those warnings, while serving to protect Fifth Amendment rights, are not themselves constitutionally compelled. See *Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of [Elstad's] constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."); accord *Michigan v. Tucker*, 417 U.S. 433, 445 n.19 (1974); cf. *Dickerson v. United States*, 120 S. Ct. 2326, 2335 (2000) (discussing *Elstad*).

The psychotherapist-patient privilege is not constitutionally required. It is an evidentiary rule that protects communications between a patient and a psychotherapist from being introduced in a judicial proceeding. See *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996); Fed. R. Evid. 501. Such "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence," and therefore "must be strictly construed." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation marks and citations omitted). The psychotherapist-patient privilege does not extend beyond the protected communication to include other evidence that is not, in itself, protected from disclosure. Thus, the court of appeals correctly held that "the suppression of any evidence derived from the privileged conversations would [not] be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a.[10]

b. Petitioners contend (Pet. 10-11) that decisions of the Second, Third, and Seventh Circuits conflict with the Fourth Circuit's decision in this case on the question "whether the government may make derivative use of information it obtains in violation of a non-constitutional, common-law testimonial privilege." No square conflict exists. None of the five assertedly conflicting cases cited by petitioners involves the psychotherapist-patient privilege. Two of the cases concern the attorney-client privilege, which the court of appeals distinguished, and neither of those cases actually suppressed evidence derived from a violation of that privilege. The remaining cases do not involve any "violation of a * * * privilege" at all; they instead concern the scope of the immunity that must be provided when witnesses invoke a privilege in judicial proceedings, a circumstance that the court of appeals here viewed as distinguishable.

Petitioners rely on two cases involving claims that the government prosecuted a defendant based on information derived from a violation of the attorney-client privilege. See *United States v. White*, 970 F.2d 328 (7th Cir. 1992); *United States v. Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991). Neither case squarely held that all evidence derived from a violation of the attorney-client privilege must be suppressed. In *White*, the court of appeals determined that the government had not introduced evidence at trial that "stem[med] directly or indirectly" from evidence obtained in violation of the attorney-client privilege; accordingly, the court concluded that it "need not determine whether due process is implicated" by the government's use of such information. 970 F.2d at 336. In Schwimmer, the court of appeals remanded the case to the district court to determine whether the government had introduced evidence derived from a violation of the attorney-client privilege and, if so, "whether a substantial right of the [defendant] was affected," thereby leaving open the possibility that the use of such evidence would not invalidate the prosecution. 892 F.2d at 245.

Moreover, the court in *Schwimmer* characterized the attorney-client privilege as serving constitutional values, which distinguishes it from other types of evidentiary privileges, including the psychotherapist-patient privilege involved in this case. See 892 F.2d at 243 (noting that the attorney-client privilege "provides essential support for the constitutional right to the assistance of counsel"). And the court of appeals here distinguished its decision in this case from the scenario in *White* on the basis that *White* involved the attorney-client privilege. Pet. App. 27a n.8. The court explained that, "[e]ven assuming that suppression of derivative evidence may, under extraordinary circumstances, be required in cases involving the attorney-client privilege, such an extreme remedy is not required in this case." Ibid.

Petitioners also rely on cases that hold that a witness's assertion of the privilege against adverse spousal testimony may be overcome if the government promises the spouse immunity from direct and derivative use of the testimony. See *In re Grand Jury*, 111 F.3d 1083, 1088 (3d Cir. 1997); *In re Grand Jury Subpoena of Ford*, 756 F.2d 249, 252 (2d Cir. 1985); see also *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.) (a witness could not be compelled to give testimony over a claim of that privilege where the government declined to provide derivative use immunity to the spouse), cert. denied, 459 U.S. 1015 (1982). Those cases are unlike this one because neither petitioners nor the therapists were compelled to testify about privileged conversations. No issue arose in this case as to the scope of any immunity that would have to be granted in such circumstances. Indeed, the court of appeals cited such cases approvingly in "agree[ing]" with petitioners that "*Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege." Pet. App. 25a.[11] Petitioners suggest (Pet. 12 n.2) that the court of appeals drew "a distinction without a difference" between this case and cases involving grants of immunity. But the fact remains that petitioners cite no decision that squarely places a bar on derivative use of the contents of a communication covered by a non-constitutional privilege absent an order compelling testimony. And there is no reason to conclude that, in a case in which the government seeks to compel testimony from a witness invoking such a privilege, the Fourth Circuit would reach a result contrary to the Second and Third Circuits.[12]

c. The question that petitioners present for the Court's review has a somewhat hypothetical quality. There is no reason to conclude that the government has, as petitioners assert (Pet. 13), "use[d] the information contained in [privileged communications] to build a criminal prosecution."

Petitioners speculate that the FBI's Behavioral Analysis Program Team relied on information gleaned from the two conversations to prepare its report analyzing Squillacote's emotional vulnerabilities. But the record undercuts such speculation. Both conversations were relatively brief and undetailed. See Pet. App. 119a-128a. The government acquired essentially identical information from FISA-authorized interceptions of unquestionably non-privileged conversations between Squillacote and her friends or family members.[13] The two government agents who contemporaneously learned the contents of the conversations-the analyst who transcribed the conversations and a supervisor-both declared in sworn affidavits that the conversations were not used in preparing the Behavioral Analysis Program report.[14]

Thus, even if the question presented by petitioners -whether the government "is entitled to make derivative use of [privileged] communications" (Pet. (I))-otherwise warranted review, such consideration should await a case in which there is reason to believe that the government actually did so. Here, even if the Court were to hold that the government could not make derivative use of privileged psychotherapist-patient communications and remand the case for the *Kastigar*-type hearing that petitioners have sought, there is little, if any, prospect that petitioners would ultimately be entitled to any relief.

2. Petitioners next contend (Pet. 14-21) that the court of appeals erred in sustaining the jury instruction on the term "relating to the national defense." The court of appeals' decision is consistent with this Court's

decision in *Gorin v. United States*, 312 U.S. 19 (1941), and does not conflict with any decision of any other court of appeals. Petitioners' challenge merits no further review.

The espionage statutes under which petitioners were convicted prohibit an individual from obtaining, taking, or copying documents "connected with the national defense," 18 U.S.C. 793(b), or from transmitting, conspiring to transmit, or attempting to transmit documents or information "relating to the national defense," 18 U.S.C. 794(a) and (c), where such activity is engaged in "with intent or reason to believe that [the information] is to be used to the injury of the United States or to the advantage of a foreign nation."

At trial, petitioners presented evidence that some, but far from all, of the information in the documents that Squillacote took from the Department of Defense, and subsequently turned over to the undercover agent, was similar to information available to the public in, for example, newspapers or trade publications.[15] Petitioners argued that, if the information in the documents was in the public domain, the documents were not "relat[ed] to the national defense" or "connected with the national defense." Pet. App. 58a. To that end, petitioners' proffered a jury instruction that stated, in pertinent part, that those terms apply only to "information relating to our national defense which is not available to the public at the time of the claimed violation," and thus not to information that "is lawfully accessible to anyone willing to take pains to find, to sift, and to collate it." J.A. 1645.

The district court refused to give petitioners' proffered instruction. Instead, over petitioners' objection, the court gave the following instruction:

> The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.
>
> To prove that documents, writings, photographs or information relate to the national defense, there are two things that the Government must prove. First, it must prove that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States.
>
> And second, it must prove that the material is closely held by the United States government.
>
> Where the information has been made public by the United States government and is found in sources * * * lawfully available to the general public, it does not relate to the national defense.
>
> Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

J.A. 1434-1435. The court of appeals subsequently approved that instruction. Pet. App. 57a-66a.

Petitioners contend (Pet. 15-16) that the jury instruction improperly expanded the definition of "national defense" information to include information that is "freely available to the public." They argue that the district court thereby "stripped petitioners of their ability to present th[e] defense" that the information for which they were prosecuted was available from public sources.

Contrary to petitioners' assertions, the jury instruction is not "inconsistent with this Court's case law." Pet. 14 (capitalization omitted). This Court has never held that information in classified government documents ceases to "relat[e] to the national defense," within the meaning of the espionage statutes, whenever such information may be found somewhere in the public domain. Nor has any court of appeals made such a holding. And, in any event, because the jury was required to find that "disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States," petitioners were not deprived of the opportunity to defend on the ground that the material could not have that effect because it was already publicly available.

a. Petitioners purport to find support for their position in a single sentence in this Court's decision in *Gorin*. See Pet. 16-17. But petitioners read too much into that sentence.

In *Gorin*, the Court considered the construction and constitutionality of Sections 1 and 2 of the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217-219, which contain nearly identical language to that in Sections 793 and 794. The Court defined the statutory term "national defense" as a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." 312 U.S. at 28 (internal quotation marks omitted). In concluding that such a definition was

not unconstitutionally vague, the Court noted the "obvious delimiting words in the statute * * * requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'" Id. at 27-28. The Court explained that such language establishes a scienter element, which "requires those prosecuted to have acted in bad faith." Id. at 28. In light of the scienter requirement, the Court concluded that the statutory language was "sufficiently definite to apprise the public of prohibited activities" and "consonant with due process." Ibid.[16]

In the course of holding that the scienter requirement defeated a vagueness challenge to the espionage statutes, the *Gorin* Court observed: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." 312 U.S. at 28. It is that sentence upon which petitioners seize in claiming that the jury instruction is inconsistent with this Court's case law. They construe that sentence as holding that "'[w]hen there is no occasion for secrecy' * * * the 'information' at issue cannot give rise to espionage." Pet. 16 (quoting *Gorin*, 312 U.S. at 28).

But that is not what the Court said. Rather, the Court stated that the separate scienter element of the espionage statutes "in all likelihood" would not be satisfied if the information had previously been published by the United States government; in other words, the defendant probably could not be found to have acted with the requisite "intent or reason to believe that the information * * * [was] to be used to the injury of the United States, or to the advantage of any foreign nation" if the United States had already published the information. *Gorin*, 312 U.S. at 27-28. The Court did not even suggest, let alone hold, that the information would automatically cease in those circumstances to satisfy the "relating to the national defense" element of the offense. Much less did the Court address the character of information that had *not* been "published by authority of Congress or the military departments," but that had instead reached the public domain by unofficial (and perhaps unauthorized) channels. *Gorin* is thus of no assistance to petitioners.

b. Petitioners also rely on one court of appeals decision, *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946), to support their position that the espionage statutes have no application to publicly available information. See Pet. 17. But that case involved material quite different from the material here.

In *Heine*, the defendant, in 1940 and 1941, provided a German company with reports about the aviation industry in the United States. Unlike petitioners, the defendant did not obtain or transmit closely held government documents. Rather, the defendant merely "condensed and arranged" information that "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it," including "ordinary magazines, books and newspapers," "technical catalogues, handbooks and journals," communications with airplane manufacturers and their employees, and "exhibits, and talks with attendants, at the World's Fair." 151 F.2d at 815. The court noted that "no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes- even including those made for the services-should withhold any facts which they were personally willing to give out." Ibid.[17]

The Second Circuit reasoned that, just as the espionage statutes are not violated by the dissemination of "information about weapons and munitions of war which the [U.S. armed] services had themselves made public," the espionage statutes are not violated by the dissemination of "information which the services have never thought it necessary to withhold at all." *Heine*, 151 F.2d at 816; see also ibid. ("[t]he services must be trusted to determine what information may be broadcast without prejudice to the 'national defense,' and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter"). Thus, in stating that the defendant in *Heine* could not be convicted under the espionage statutes for providing the German company with information that had "once been made public, and ha[d] thus become available in one way or another to any foreign government," id. at 817, the Second Circuit simply meant that a defendant does not violate those statutes merely by condensing, arranging, and disseminating information that he has lawfully obtained from public sources. The Second Circuit did not hold, as petitioners suggest, that a closely held government document ceases to "relate to the national defense," for purposes of the espionage statutes, whenever the information in the document may be found in the public domain.

As the court of appeals recognized (Pet. App. 63a), a case such as *Heine*, which involved the dissemination of information that is not obtained from, or attributed to, government sources, is quite different from a case such as this one, which involved the dissemination of classified government documents. The court of appeals explained that "there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy," because such estimates "carry with them the government's implicit stamp of correctness," which "in and of itself is a fact that would be highly valuable

to other countries." Ibid. The Second Circuit itself has recognized the distinction between the dissemination of publicly available information, as in Heine, and the dissemination of classified government information. See *United States v. Soblen*, 301 F.2d 236, 239 ("[t]he fact that the source of the information was classified as secret distinguishes this case from United States v. Heine"), cert. denied, 370 U.S. 944 (1962).[18]

c. The court of appeals' affirmance of the district court's jury instruction does not, as petitioners suggest (Pet. 18), mean that "the public availability of information [is] irrelevant" in an espionage prosecution involving government documents. As noted above, this Court recognized in *Gorin* that the public availability of information may be relevant to whether the defendant disseminated the information with the intent to damage the United States or to assist a foreign power. See 312 U.S. at 28.

Here, moreover, the district court instructed the jury that, "[t]o prove that documents, writings, photographs or information relate to the national defense," the government must prove, inter alia, that "the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States." J.A. 1435. Such an instruction permits a defendant to argue that, because the material at issue is already in the public domain, its further dissemination could be of no appreciable harm to the United States or benefit to a foreign power.[19]

Finally, if the government had to bear the burden of proving that the information on which an espionage prosecution is based "was not lawfully available in the public domain" at the time of its dissemination, as petitioners urge (Pet. 15 (emphasis omitted)), the government's ability to bring such prosecutions would be severely impaired. The government would effectively be required "to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information." Pet. App. 64a. As the court of appeals recognized, "[r]equiring that kind of 'proof of a negative' would unduly hamper the government's ability to protect sensitive information and would render successful prosecutions in cases involving closely-held documents nearly impossible." Ibid. No court has suggested that the government must bear such a burden.

3. a. Petitioners contend (Pet. 22-25) that the FISA applications and related materials should have been disclosed to them. They are mistaken.

Under FISA, the government may obtain a court order authorizing electronic surveillance or a physical search of an "agent of a foreign power." To obtain such authorization, a federal officer, after receiving the Attorney General's approval, must submit an application to one of seven district judges appointed by the Chief Justice to serve on the Foreign Intelligence Surveillance Court. 50 U.S.C. 1804(a), 1823(a); see also 50 U.S.C. 1803(a). The application must contain, among other things, the identity of the target; a statement of the reasons to believe that the target is an agent of a foreign power; a statement of the procedures to be employed to minimize the acquisition and retention of nonpublic information; and a certification from a high-level Executive Branch official that the official "deems the information sought to be foreign intelligence information" that "cannot reasonably be obtained by normal investigative techniques." 50 U.S.C. 1804(a), 1823(a).

A judge of the Foreign Intelligence Surveillance Court may enter an order authorizing electronic surveillance or a physical search after making specific findings that, inter alia, there is probable cause to believe that the target is an agent of a foreign power, the proposed minimization procedures are proper, and the application contains all the required certifications. If the target is a United States person, the judge must also find that the certifications are not "clearly erroneous" on the basis of the information before the judge. 50 U.S.C. 1805(a), 1824(a).

In the event that the government attempts to use evidence derived from a FISA warrant in a criminal proceeding, the "aggrieved person" against whom the evidence is offered may move to suppress the evidence on the ground that the evidence was "unlawfully acquired" or that the surveillance or search "was not made in conformity with an order of authorization or approval." 50 U.S.C. 1806(e), 1825(f). In adjudicating the motion to suppress, the district court must review the FISA application and related materials "in camera and ex parte" if the Attorney General files an affidavit stating that "disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. 1806(f), 1825(g). The court may disclose portions of the FISA application materials, under appropriate protective procedures, only if disclosure is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. 1806(f), 1825(g).

Petitioners suggest that the FISA provisions authorizing ex parte and in camera review are improper because, in virtually all other warrant circumstances, the government's application for a warrant must be disclosed to the defendant for purposes of adjudicating the legality of the surveillance. That view

disregards the sensitive national security interests involved in foreign intelligence surveillance, which require the adoption of different procedures for the protection of individual privacy. As the District of Columbia Circuit has observed, "[i]n FISA the privacy rights of individuals are ensured not through mandatory disclosure, but through its provisions for in-depth oversight of FISA surveillance by all three branches of government and by a statutory scheme that to a large degree centers on an expanded conception of minimization that differs from that which governs law-enforcement surveillance." *United States v. Belfield*, 692 F.2d 141, 148 (1982); see *United States v. United States Dist. Court*, 407 U.S. 297, 317 (1972) (commenting, in ruling on the authority of the government to conduct electronic surveillance in internal security matters, that constitutional rights are best preserved "through a separation of powers and division of functions among the different branches and levels of Government"). In that way, FISA "reconcile[s] national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights." S. Rep. No. 701, 95th Cong., 2d Sess. 16 (1978). Thus, "all courts that have considered the constitutionality of such an in camera, ex parte examination have held such examinations proper." *United States v. Isa*, 923 F.2d 1300, 1307 n.8 (8th Cir. 1991) (citing cases); *United States v. Ott*, 827 F.2d 473, 476-477 (9th Cir. 1987) (no due process violation); *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (no Fourth Amendment violation); see *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (per curiam) (adversary proceedings and full disclosure were not necessarily required "for resolution of every issue raised by an electronic surveillance").

Petitioners contend (Pet. 24) that the lower courts had "no legitimate justification" to deny petitioners access to the FISA application materials. They are wrong. The Attorney General filed an affidavit explicitly stating that disclosure of the FISA application materials would harm the national security of the United States. See Pet. App. 14a. The affidavit provided ample justification for the refusal to disclose the materials. See 50 U.S.C. 1806(f).

Petitioners further contend (Pet. 24-25) that the FISA application materials should have been disclosed because petitioners allegedly raised serious questions about the lawfulness of the surveillance and the accuracy of the government's representations. The record does not support petitioners' claim. The district court specifically acknowledged that disclosure would be appropriate if its initial review of the materials revealed "potential irregularities" including "indications of possible misrepresentation of fact." J.A. 308 (quoting S. Rep. No. 701, supra, at 64). The district court found, "after review," that there was "no basis for discovery or an adversary hearing." Ibid. The court of appeals came to the same conclusion. It refused to disclose the materials because "the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance." Pet. App. 15a. In conducting an ex parte and in camera review of the FISA application materials, the courts here acted "in keeping with the procedures contemplated by Congress when it enacted FISA." *Belfield*, 692 F.2d at 147. FISA "clearly anticipates that an ex parte, in camera determination is to be the rule," and "[d]isclosure and an adversary hearing are the exception, occurring only when necessary." Ibid. Accordingly, there is no basis for further review of the lower courts' considered determinations on that sensitive and fact-specific question.

b. Petitioners ask this Court to review whether each of the FISA applications established probable cause to believe that petitioners were agents of a foreign power at the time that the application was made. See Pet. 25-29. As petitioners concede (Pet. 25), reviewing determinations of probable cause is a fact-specific inquiry. That inquiry has already been conducted several times over in this case.

As the district court observed, "[e]ach FISA application in this case was expressly certified by Attorney General Reno or Acting Attorney General Gorelick as satisfying the criteria and requirements of the FISA statute," and "the surveillance and searches were authorized by eight FISA Court Judges who determined that the government's applications met all the requirements of the FISA statute, including that there was probable cause that the targets were 'agents of a foreign power.'" J.A. 305-306; see also J.A. 292 ("Eight different judges of the FISA Court determined that the applications satisfied the requirements and criteria of FISA, including a specific finding that the targets were the agents of a then-existing foreign power."). Moreover, on petitioners' motion to suppress evidence, the district court reviewed each application and found that all of the requirements of FISA were satisfied. J.A. 306. On appeal, three additional federal judges "reviewed de novo the relevant materials, and likewise conclude[d] that each FISA application established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted." Pet. App. 14a.20 Particularly given that not one judge has expressed any doubts about the sufficiency of the probable cause showing in this case, no further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[NOTES]

[1] Clark, after obtaining a master's degree in Russian, also sought jobs that would give him access to classified information. He worked for a private company and later for the United States Army in positions that required him to obtain a security clearance. He succeeded in obtaining, through friends at the State Department, and delivering to the HVA many classified documents relating to the national defense. Pet. App. 4a; Gov't C.A. Br. 16.

[2] "Connection" was a term used by the conspirators to refer to potential espionage partners. J.A. 1859.

[3] FISA establishes a special Foreign Intelligence Surveillance Court, composed of seven federal district judges appointed by the Chief Justice, to review applications for authorization of electronic surveillance and physical searches aimed at obtaining foreign intelligence information. See 50 U.S.C. 1803. Each application to that court must be approved by the Attorney General. 50 U.S.C. 1804(a), 1823(a). The application must contain, among other things, a statement of reasons to believe that the target of the surveillance is a foreign power or an agent of a foreign power and a certification from a high-ranking executive branch official that the information sought is "foreign intelligence information" that cannot be obtained by other means. 50 U.S.C. 1804(a), 1823(a). See Pet. App. 12a.

[4] A "false flag" operation is ordinarily one in which an FBI undercover agent poses as a representative of a foreign intelligence service. See Gov't C.A. Br. 28.

[5] The four documents underlie most of the charges against petitioners.

[6] As the court noted, one of the conversations at issue was between Stand and one of Squillacote's therapists. The court assumed that the conversation between Stand and the therapist was privileged, and, for convenience, referred to both conversations as having taken place between Squillacote and her therapists. Pet. App. 22a-23a n.7.

[7] The court of appeals also rejected other claims raised by petitioners. Although petitioners do not specifically renew their entrapment defense before this Court, petitioners continue to suggest (Pet. 6) that the government induced them to commit the charged offenses by tailoring a sting operation to "exploit[] [Squillacote's] unique psychiatric infirmities." As the court of appeals explained, that argument is "legally irrelevant," given the "overwhelming" evidence of Squillacote's predisposition to commit the crimes. Pet. App. 46a-48a; see id. at 48a (noting that Squillacote obtained one of the four classified documents before her first meeting with the undercover agent and concluding that "[c]learer evidence of predisposition is difficult to imagine").

[8] This claim is relevant only to Squillacote. Stand does not have standing to challenge any violation of a privilege between Squillacote and her therapists.

[9] We assume for purposes of this discussion, as did the court of appeals (see Pet. App. 22a-23a n.7), that the conversation between Stand and Squillacote's therapist was privileged.

[10] Other courts of appeals have suggested, consistent with the Fourth Circuit here, that a breach of a non-constitutional evidentiary privilege is not subject to the "fruit of the poisonous tree" doctrine. See, e.g., *Nickel v. Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) ("declin[ing] to apply the 'fruit of the poisonous tree' doctrine to the possible breach of attorney-client privilege" in a state habeas case where state law did not require exclusion of all evidence derived from a breach of that privilege), cert. denied, 520 U.S. 1106 (1997); *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (observing in dictum that "no

court has ever applied [the 'fruit of the poisonous tree'] theory to any evidentiary privilege," such as the marital communications privilege at issue there, and "we have indicated we would not be the first to do so"); *United States v. Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir.) (rejecting contention that marital communications privilege was "constitutionally grounded" and consequently expressing "doubt" that information derived from a violation of that privilege "would in any way be 'tainted'"), cert. denied, 449 U.S. 824 (1980).

[11] In *Kastigar*, the Court upheld the constitutionality of the use immunity statute, 18 U.S.C. 6001 et seq., which permits the government to obtain a court order compelling testimony from a witness who invokes the Fifth Amendment privilege against self-incrimination, provided that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." 406 U.S. at 448-449 (quoting 18 U.S.C. 6002). The Court reasoned that, because the statute provides a witness with "immunity * * * coextensive with the privilege" against self-incrimination, the statute "suffices to supplant" the privilege. Id. at 462. The Court observed that the government would bear the burden of proving that all evidence proposed for use in any subsequent criminal prosecution of the witness was derived from sources independent of his compelled testimony. Id. at 461-462. *Kastigar*, in contrast to this case, involved a constitutional privilege; *Kastigar* is also distinguishable in that it arose in the context of whether, or in what circumstances, a witness's testimony could be compelled.

[12] There are significant differences between this case and the compelled testimony cases. Where a witness invokes a privilege against testifying in a judicial proceeding, the grant of immunity serves to extinguish the witness's right to refuse to testify. See *Grand Jury*, 111 F.3d at 1087 (noting that such a grant of immunity "nullifies any claim of privilege"). But Squillacote's right to assert a privilege has not been extinguished. Moreover, in circumstances where the government must choose whether to provide direct and derivative use immunity in order to obtain a witness's testimony, the government's attorneys are able to assess, at a time when the applicability of the privilege has been recognized, whether the benefits of obtaining the testimony in the present proceeding outweigh the costs (e.g., the inability to use the testimony against the witness or the spouse in another proceeding). The government is not in a similar position where, as here, its investigators come upon possibly privileged material during an investigation.

[13] In the first conversation, Squillacote informed the therapist of a family history of depression, inquired about medications for depression, and was referred to a psychopharmacologist. Pet. App. 125a-128a. In the second conversation, the therapist told Stand that Squillacote was depressed and did not feel safe with herself, that she had been started on an antidepressant medication, and that Stand should watch over her until the medication became effective. Id. at 119a-124a. Squillacote discussed the same subjects in many recorded telephone calls with friends and relatives that were unquestionably non-privileged. See Gov't C.A. Br. 93 & n.41 (citing examples from the record of conversations in which Squillacote discussed, among other things, her depression, psychiatric vulnerability, therapy, and treatment with antidepressants).

[14] Specifically, the FBI agent who supervised the surveillance attested that "[n]o information from the two telephone calls" with the therapists "was provided to the individuals who worked on and wrote the [BAP report]." J.A. 354. The FBI agent who listened to and transcribed the conversations attested that his only role with respect to that report was filling out a personality assessment test on Squillacote and that "[n]othing that [he] learned in either telephone conversation * * * affected [his] answers." J.A. 357.

[15] Contrary to petitioners' suggestion (Pet. 19), the record demonstrates only that "snippets" of information contained in the documents were available to the public. Pet. App. 58a; see J.A. 1362 (district court finds that "there is no evidence in this case that all of the information that was put out here was in the public domain"); Gov't C.A. Br. 65 n.26.

[16] Petitioners do not dispute that the district court properly charged the jury on the scienter element of Sections 793 and 794. See J.A. 1430-1433, 1436, 1438-1439, 1442-1443.

[17] *Heine* thus involved the sort of information that, under the district court's jury instruction in this case, would not "relate to the national defense" under the espionage statutes. It was a case "where sources of information are lawfully available to the public and the United States government has made no effort to guard such information." J.A. 1435.

[18] Petitioners suggest (Pet. 18) that the Fourth Circuit's decision in this case conflicts with its decisions in *United States v. Morison*, 844 F.2d 1057, 1071-1072, cert. denied, 488 U.S. 908 (1988), and *United States*

v. Truong, 629 F.2d 908, 918 n.9 (1980), cert. denied, 454 U.S. 1144 (1982). But the court of appeals reconciled its decision in this case with those prior decisions. See Pet. App. 64a-65a. And, even assuming arguendo that any tension exists between this case and either *Morison* or *Truong*, that tension would properly be resolved by the Fourth Circuit, not by this Court. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

[19] Petitioners also err in suggesting (Pet. 21) that the court of appeals held, "as a matter of law," that the dissemination of government documents falls within the prohibitions of the espionage statutes. Petitioners' argument ignores key portions of the instructions given by the district court and affirmed by the court of appeals, including that the jury must find that the information was "closely held" by the United States, that the information was "potentially damaging" to the United States or "useful to an enemy of the United States," and that the defendants disseminated the information with the intent to harm the United States or to assist a foreign power. See J.A. 1430-1443.

[20] The court of appeals declined to elaborate further in the interests of national security. Pet. App. 14a-15a. We adopt the same course.

Source Text: Government's Reply (in PDF Format)

In the Supreme Court of the United States

[date stamped: March 27, 2001]

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition For A Writ Of Certiorari to the
United States Court Of Appeals
for The Fourth Circuit**

REPLY BRIEF FOR PETITIONERS

[Table of Authorities not included here; see PDF version]

REPLY BRIEF FOR PETITIONERS

In opposing petitioners' request for review of the question whether the government is permitted to make derivative use of information protected by a non-constitutional, common law privilege, the government implicitly concedes that a conflict exists, but insists that it is not a sufficiently "square" one to warrant this Court's review. The government's effort to blur the conflict is unavailing. This important question of federal law has deeply divided the circuits and is plainly ripe for determination by this Court. In addition, the government's half-hearted defense of the court of appeals' construction of the espionage laws underscores the need for this Court to make clear that information may not "relat[e] to the national defense" if that same information has been made public by non-governmental sources, and that the question of whether such publicly available information is the "same" as disseminated classified information is a question for the jury, not the court. Finally, the government's mantra that several federal judges already have reviewed the sufficiency of the FISA applications exparte does not relieve this Court of its obligation to conduct its own review, where petitioners have been denied any meaningful opportunity to challenge the FISA authorizations and the voluminous record in this case is bereft of any evidence that petitioners were agents of an existing foreign power at the time of the initial FISA authorization.

1. a. The court of appeals, sustaining the trial court, held that petitioner Squillacote was not entitled to an evidentiary hearing at which the government would have to shoulder the "heavy burden" of establishing that its evidence had not been derived from the privileged psychotherapist-patient communications it concededly intercepted in this case. In the court's view, "suppression of any evidence derived from the privileged conversations" would be improper because "the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a. As we explained in the petition (Pet. 10-12), the circuits are deeply divided on the question whether the government is free to make derivative use of information it obtains in violation of such non-constitutional testimonial privileges.

The government challenges that contention (Opp. 13-16), but its efforts to distinguish case law from the Second, Third, and Seventh Circuits are largely makeweight. With respect to the Second and Seventh Circuit cases involving the attorney-client privilege, the government merely observes that the attorney-client privilege, in contrast to the psychotherapist-patient privilege, "serv[es] constitutional values" (Opp. 15) (citing *United States v. Schwimmer*, 892 F.2d 237,243 (2d Cir. 1989)). But that is beside the point. Whatever penumbra-like "constitutional values" the government now finds in the attorney-client privilege, the fact is that this privilege, like the psychotherapist-patient privilege, is merely an "evidentiary"

protection; it is not constitutionally ordained. See 8 J. WIGMORE,EVIDENCE § 2290 (McNaughton rev. 1961). Indeed, the Second Circuit in *Schwimmer* made that very point in a passage immediately preceding the one quoted by the government in its opposition. See 892 F.2d at 243 ("[T]he rule affording confidentiality to communications between attorney and client endures as the oldest rule of privilege known to the common law."). There is no suggestion that the Second Circuit ruled as it did in *Schwimmer* because it regarded the attorney-client privilege as "constitutionally based." And the Seventh Circuit in *United States v. White*, 970 F.2d 328 (7th Cir. 1992), expressly recognized the attorney-client privilege as "a testimonial privilege without constitutional footing." Id. at 336. Nevertheless, the court stated that "[t]he proper remedy" for a violation of this merely "testimonial" privilege "would be exclusion of derivative evidence at trial." Id.

The government contends (Opp. 14), however, that the Second and Seventh Circuit decisions may be overlooked because none of those cases "squarely held that all evidence derived from a violation of the attorney-client privilege must be suppressed." Perhaps it depends on what the meaning of "squarely" is. In *Schwimmer*, the Second Circuit ordered an extensive hearing on whether the government had obtained derivative evidence from its breach of the attorney-client privilege; the court of appeals ultimately sustained the defendant's conviction, but only because the government managed to carry its burden to "demonstrate that the evidence it use[d] to prosecute [the defendant] was derived from legitimate, independent sources." *United States v. Schwimmer*, 924 F.2d 443,446 (2d Cir. 1991). That, of course, is the very remedy that petitioners sought in this case but were denied because there was no "constitutionally based" right at stake. As for the Seventh Circuit's decision in *White*, it is certainly true, as the government observes (Opp. 15), that "the court of appeals determined that the government had *not* introduced evidence at trial that 'stem[med] directly or indirectly' from evidence obtained in violation of the attorney-client privilege." But why did the Seventh Circuit address such "direct and indirect" use in the first place? It did so because, in its view, "It]be proper remedy" for the breach even of "a testimonial privilege without constitutional footing" is "exclusion of derivative evidence at trial." 970 F.2d at 336. The Fourth Circuit flatly rejected that very proposition.

As we noted in our petition (Pet. 11-12 (citing cases)), the Fourth Circuit's constitutional/non-constitutional distinction is also in conflict with decisions from the Second and Third Circuits regarding the privilege against adverse spousal testimony. The government does not pretend that this privilege likewise "serv[es] constitutional values" (Opp. 15). Instead, it contends that in the present case, unlike in the spousal privilege line of cases, "neither petitioners nor the therapists were compelled to testify about privileged conversations." Opp. 15. That is truly a distinction in search of a rationale. In the cases involving adverse spousal testimony, the courts have generally held that granting "use-frnits" immunity is "co-extensive" with the protections of the privilege, and thus required to extinguish the underlying right. See, e.g., *In re Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249, 255 (2d Cir. 1985) ("'use-fruits' immunity granted by the government to [the witness] is fully co-extensive with the scope of the privilege against adverse spousal testimony"); *In re Grand Jury Matter*, 673 F.2d 688,692-94 (3d Cir. 1982) (where the government declined to grant a witness derivative use immunity protecting against the use of the witness's testimony against the spouse, trial court correctly refused to compel testimony over a claim of adverse spousal testimony privilege). Thus, it was not, as the government suggests, the act of compulsion, but rather the scope of the spousal privilege that was dispositive in determining that derivative use may not be made of information obtained in breach of that privilege. Indeed, the Second and Third Circuits just as easily could have concluded that the spousal privilege could be overcome with a promise only to avoid *direct* use of the compelled testimony. Instead, those circuits require such a broad immunity precisely because they believe, unlike the Fourth Circuit, that the violation of merely "testimonial" privileges should be remedied by suppressing derivative evidence.[1]

[1] The government insists that "there is no reason to conclude" that the Fourth Circuit would not suppress evidence obtained in violation of a non-constitutional privilege "in a case in which the government seeks to compel testimony from a witness invoking such a privilege." Opp. 16. In fact, there is good reason to suspect otherwise. Although the Fourth Circuit suggested that "*Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege" (Pet. App. 25a), in the very next breath it added that suppression of the evidence in this case would in any event be improper "given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a. And in the paragraph concluding this section of its opinion, the court of appeals identified the non-constitutional nature of the underlying privilege as a free-standing reason to sustain the trial court's refusal to suppress evidence derived from the interception ofSquillacote's conversations with her psychotherapists. See Pet. App. 27a.

b. Having failed to distinguish the conflicting authority, the government next contends that the question presented "has a somewhat hypothetical quality" because "[t]here is no reason to conclude that the government has * * * 'use[d] the information contained in [privileged communications] to build a criminal prosecution,'" Opp. 17. But that is both untrue and irrelevant.

First, there is a substantial basis for believing that the FBI's Behavioral Program Team did, indeed, capitalize on its interception of the privileged communications. For one thing, the transcribed conversations, far from being "relatively brief and undetailed" (as the government now suggests (Opp. 17)), were in fact richly revealing of Squillacote's array of psychiatric disabilities -- including her current mental condition (the very object of the behavioral profile), her family's medical history, her use of medication, and her suicidal ideations. See JA2173-80. The same FBI employee who intercepted and transcribed these communications (Thomas Chmelovski) was then assigned the job of providing critical information regarding Squillacote's personality characteristics to the BAP team, which crafted the psychological profile based in part on his input. In particular, Chmelovski completed a personality assessment test that was used by a Ph.D. psychologist to identify the psychiatric "vulnerabilities" that could be exploited by the FBI in the sting operation. See JA262-263; JAl173-1174. And Katherine Alleman, the case agent who developed the sting, had also been exposed to the privileged conversations. JA354. What is more, much of the most sensitive information contained in the privileged psychotherapist conversations (e.g., Squillacote's mother's tendency toward depression, Squillacote's medication, and her suicidal ideations) also found their way into the BAP profile after first appearing in Chmelovski's transcription of the privileged communications.

And all of that, it need hardly be added, is the record we developed *without* the hearing that would have been granted in the Second, Third, and Seventh Circuits. The government insists that, were we to prevail on the question presented, "there is little, if any, prospect that petitioners would ultimately be entitled to any relief" (Opp. 18); but surely it is a bit too early for the government to declare victory and leave the field. If, as petitioners contend, a defendant whose psychotherapist-patient privilege has been breached is entitled to an evidentiary heating, the government will be required at that heating to bear "'the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.'" *United States v. Harris*, 973 F.2d 333,336 (4th Cir. 1992) (quoting *Kastigar v. United States*, 406 U.S. 441,461-62 (1972)). Perhaps the government will ultimately bear that "heavy burden" -- although to do so it will not suffice simply to submit a pair of self-serving affidavits by "[t]he two government agents who contemporaneously learned the contents of the conversations" (Opp. 17). See *Harris*, 973 F.2d at 337 ("the government's mere representations" that it did not use privileged material "are generally insufficient to carry its burden"); *United States v. Hampton*, 775 F.2d 1479, 1485 (1 lth Cir. 1985) (same). But petitioners are at least entitled to hold the government to its burden,[2] Because the court of appeals believed-- in accord with the Ninth and Tenth Circuits, but in conflict with the Second, Third, and Seventh Circuits -- that the breach of a non-constitutional privilege does not prevent the govemment from making derivative use of any information it obtains, it declined even to grant petitioners a hearing. That decision is wrong and warrants further review.

[2] The government's derivative use of these communications prejudiced Stand as well given petitioners' uniform defense at trial.

2. The government asserts that petitioners' proposed "national defense" instruction would have required the prosecution "'to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information.'" Opp. 25 (quoting Pet. App. 64a). Petitioners' proposed instruction, however, imposed no such burden. On the contrary, the proposed instruction -- taken directly from 1 Sand, Siefert, Loughlin & Reis, MODERN FEDERAL CRIMINAL JURY INSTRUCTIONS (CRIMINAL) ¶ 29.01 (1997)-- would have called upon the jury simply to consider whether, based upon all of the evidence, the disclosed information was "available to the public at the time of the claimed violation." See Pet. App. 57a (quoting JA1645). Such an instruction would have permitted the government to argue to the jury that information appearing in trade publications is inherently different from similar or identical information in classified government documents because the latter "carry with them the government's implicit stamp of correctness." Pet. App. 63a. And that instruction would have had the advantage -- contrary to the jury instruction given in this case-- of being faithful to this Court's holding in *Gorin v. United States*, 312 U.S. 19 (1941), that the espionage statutes do not prohibit the dissemination of information "[w]here there is no occasion for secrecy." Id. at 28. At the government's urging, however, the court of appeals disavowed *Gorin*'s fundamental teaching and held, as a matter of law, that the public availability of information -- at least where the information has been made public by sources other than the government-- is irrelevant to whether the information "relat[es] to the national defense" within the meaning of the espionage laws. Pet. App. 63a.

Notably, by holding that information contained in "an official document closely held by the government" is never equivalent to the same information in public sources (id.), the Fourth Circuit effectively converted the espionage statutes into a fiat prohibition on disseminating *classified* documents to a foreign power. Absent evidence that the government has voluntarily released a piece of classified information at some other time prior to disclosure, the practical effect of the court of appeals' holding is that, as a matter of law, any classified document "relates to the national defense." But that plainly contravenes the plain language of the statute, which speaks of "information relating to the national defense," not "classified information." Compare 18 U.S.C. § 794(a), with 18 U.S.C. § 798(a) (unlawful to "transmit[]" certain types of "classified information").

What is more, the Fourth Circuit's gloss on the "national defense" element of the espionage statutes ignores the internal regulations governing the Department of Defense, which require the government to evaluate whether information should remain classified after such information "[a]ppear[s] in the public domain." 32 C.F.R. § 159a.15(j). As the government's own expert, Admiral Dennis C. Blair, conceded at trial, the declassification review for open publication is triggered whether or not the government was the source of the public disclosure of information. Tr. at 714-15. Moreover, as that same expert acknowledged, information that should be declassified on account of widespread public availability can, and often does, remain classified as a result of bureaucratic inaction. Tr. at 729-30. Thus, while it is undisputed that information may be improperly classified at any given time on the basis of "open publication" by sources other than the government, under the Fourth Circuit' s reading of the law a jury may not even consider such "open publication" in determining whether the espionage statutes cover such information. [3] Such a reading cannot be squared with Gorin or the plain language of the espionage laws.

[3] The government argues that the trial court's instruction in this case did perrmt thejury to take account of publicly available information from non-governmental sources since it required the government to prove that the disclosure was "potentially damaging to the United States or might be useful to an enemy of the United States." (Opp. 25 (quoting JA1435)). Such a claim is disingenuous, at best, since the government took the extraordinary step at trial of submitting a revised jury instruction on this element (ultimately adopted by the trial court) for the express purpose of foreclosingjury consideration of such evidence. See JA1534. And the trial court plainly understood its instruction as precluding any defense based upon information placed in the public domain by sources other than the government. See JA2398.

3. The government's response to petitioners' FISA challenge mirrors the Kafkaesque nature of the statute itself. "Sure, you can challenge probable cause," the government tells us; "you just can't look at the affidavits that purport to establish it." "Sure, there must be sufficient evidence that petitioners were 'agents of a foreign power' at the time the FISA authority was granted -- but you have to take our word for that." "And after all," the government concludes, "'eight FISA Court Judges,' backed by the district court and the court of appeals, all agreed that we met our burden -- even though not one of them heard an opposing point of view from the defense."

In America, this Court sits to accord both sides of a dispute the opportunity to be heard. Particularly when the stakes are this large, and the risks of error so substantial, this Court should review the FISA applications -- which have been tendered to the Court -- to ensure that an appropriate legal standard was used (both for determining the need for disclosure and the elements of agency under FISA), and that probable cause was established. Perhaps the requisite probable cause showing was made, though the marvel of it is that nowhere -- not in a 100- page search warrant affidavit, in 550 days of surveillance tapes, or in two full weeks of trial -- did the government string together even two sentences (much less probable cause) of an agency relationship with Russia (the only plausible contender).[4] Further review is essential to the vindication of petitioners' basic constitutional rights.

[4] Specifically, there is not a stitch of evidence in the thousands of pages of surveillance transcripts and investigative materials that petitioners *knowingly* conspired with or aided and abetted any other person (whether it be alleged co-conspirator James Clark, their alleged East German "handler" Lothar Ziemer, or anyone else) with the specific intent to engage in *clandestine intelligence gathering activities* on behalf of Russia. See JA009 (item # 53 at 7 n.4, 8 n.5) (government relied on "clandestine intelligence gathering" and "conspiracy" and "aiding and abetting" provisions (50 U.S.C. §§ 1801(b)(2)(A) and (E)) in obtaining authorization under FISA). Indeed, the record (including classified material) is so utterly devoid of evidence suggesting any agency relationship between petitioners and Russia at the time of the original FISA authorization that if this case does not warrant disclosure of the underlying affidavits (see 50 U.S.C. §§ 1806(f), 1825(g)), no case ever will.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 2001

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Ser TJC/024
9 March 2001

From: CDR James P. Winthrop, JAGC, USN
To: Commander Naval Air Force ITS Atlantic Fleet

Subj: RECOMMENDATION OF THE INVESTIGATING OFFICER IN THE CASE OF UNITED STATES V. CTR1 DANIEL M. KING, USN

Ref: (a) COMNAVAIRLANT ltr 5800 Ser N02L/300 of 20 December 1999

1. In reference (a) you directed me to conduct a pretrial investigation in the subject case. As the investigating officer it is my duty to investigate the charges impartially and to recommend an appropriate disposition of those charges. Although I recognize this is an extraordinary step in light of the fact that the investigation is not complete, I am compelled to recommend that you dismiss the charges in this case now. I do not make this recommendation lightly, as I recognize the serious nature of the charge of espionage and the other offenses. Nonetheless, when balancing the government's severe difficulties in preparing and presenting its case, the nature of the case against the accused, and the accused's lengthy period of pretrial confinement, I believe dismissal is warranted in the interests of justice.

2. I want to emphasize at the outset that it is not my intention or desire for this recommendation to direct blame at any specific government personnel, as there is plenty to go around. I too have made errors. When this case is over I strongly recommend that government participants review the case and determine the lessons learned from the case so the mistakes committed will not be repeated.

3. It has become apparent to me over the past five months, however, that the government has not been able to effectively prosecute this case. I make this statement based on my participation in the case over that period, understanding, of course, that the government had this case for eleven months prior to my involvement.

a. For the past two months we have been engaged in the second Grunden hearing to determine what portions of the trial may be closed to the public. This hearing began on 4 January 2001. The first Grunden hearing occurred on 4 October 2000 and was subsequently overturned by the Navy-Marine Corps Court of Criminal Appeals. To date, an entire examination of a single witness has yet to be completed. Five of six of those witnesses have failed to complete their testimony and the government is searching for replacements. One of the five declined to participate further for health reasons. The substitute witness for that witness was inadvertently provided a critical portion of the prior witness's testimony and was disqualified, and yet another witness could not adequately identify the basis for classifying certain information as required by Grunden. The fourth witness was not able at the time to testify in the level of detail I believe is necessitated by Grunden. The fifth witness lacked the necessary technical expertise to adequately explain her classification decisions. Finally, the sixth witness has been on extended travel. Thus, the Grunden hearing portion of the investigation is no farther along than it was five months ago.

b. The future course of the Grunden hearing is not a clear one. The government is having significant difficulties finding replacements for these witnesses. Additionally, the government is requesting other evidentiary hearings to determine the relevance of some of the defense evidence. These hearings take time and will further impede the progress of the Grunden hearing. Finally, the government is having difficulty locating what appears to be relevant information involving risk assessments from analagous cases. This information will have to be located, reviewed, and, most likely, litigated, before it can be reviewed as part of the Grunden process. At this point, the completion of the Grunden hearing appears weeks away. Of course, the Grunden hearing is merely preliminary to the actual Article 32 hearing, which will undoubtedly be lengthy given the proposed witness lists.

c. The difficulties in conducting the Grunden hearing are, in large part, due to the government's problems completing a classification review in the case. The government has apparently undertaken at least three, and perhaps as many as four, classification reviews of the relevant documents in this case. The classification review of the documents in a national security case is required by security regulations and is a prerequisite to a successful Grunden hearing. The second review, which was not completed until mid-October 2001, after the first Grunden hearing, contributed to undermining that hearing when it was discovered that some key documents had conflicting classifications. The most recent classification review was undertaken in mid-January 2001, in the middle of the second Grunden hearing, after errors in the second classification review were discovered. Classification discrepancies continue to plague this case as recent discoveries regarding some videotape evidence revealed that at least two tapes were under-classified. It is these classification problems, combined with the difficulties in presenting successful Grunden witnesses, that has ultimately caused the delay in this case and rendered futile attempts to set a schedule for the proceedings.

4. Any recommendation must include my evaluation of the government's case against the accused. Although, I have not reviewed all the documents in the case, I have reviewed many in the course of the Grunden proceedings, to include the key government exhibits. Although the evidence may surmount the low threshold of an Article 32 investigation, and that is by no means certain, I don't believe the government evidence on any of the charges in this case is strong. On the other hand, the defense evidence in extenuation and mitigation is significant.

a. The wrongful disclosure allegations, and the related charges involving dereliction of duty and wrongful communication, are exemplary in this regard. The alleged violations occurred while the accused was on duty in a Sensitive Compartmented Information Facility (SCIF) in the presence of fellow servicemembers with high level clearances. Each allegation is based on the recollection of one witness of events that occurred six and four years ago, respectively. Thus, on the merits, the government has one witness who will be required to rely on memory for events that occurred several years ago. With respect to extenuating and mitigating circumstances, it must be emphasized that the alleged disclosures occurred in secure areas to personnel that otherwise had high level clearances, but not access to the specific program in question. Thus, the threat to national security from these alleged violations was minimal. Furthermore, one witness did not take the disclosure seriously, while the other witness considered the information helpful in performing her job. It appears in both cases that the accused was disclosing the information to assist others in performing their duties. These facts constitute strong extenuating and mitigating evidence.

b. Although the espionage charge is a very serious one, the government's evidence does not appear to be significantly stronger. It is based exclusively on a confession that the accused subsequently contradicted on several occasions. Additionally, the defense clearly intends to attack the voluntariness of that confession and it appears that such a claim is colorable. The defense contention is bolstered by considerations of the accused's mental state both before and during the weeks-long period where conditions were placed on his liberty. Furthermore, and most importantly, the confession lacks strong corroborating evidence. In order to admit a confession into evidence, the government must introduce independent evidence, either direct or circumstantial, to corroborate the essential facts of the confession in order to ensure the confession is true. Although corroborating evidence need only be "slight," the evidence I am aware of barely, if at all, reaches that threshold. The investigation in this case has apparently not revealed any direct evidence to corroborate the accused's confession. Of course, direct evidence is not required, but the circumstantial evidence that the government possesses is not extensive, consisting of a computer printout of a daily log and an additional admission by the accused. First, with respect to the latter admission, the Military Rules of Evidence prohibit the use of other uncorroborated admissions to supply the independent evidence required for corroboration. Second, I question whether the mere existence of the daily, log provides independent evidence of an "essential fact" of the confession, i.e., the act of espionage. Frankly, I am not confident a military judge would find the confession sufficiently corroborated. Finally, even if the military judge were to find that sufficient corroborating evidence existed, the members would then determine what weight they would give to the confession, thus giving the defense another opportunity to vigorously attack the confession and its corroborating evidence. Although I recognize that you may refer a charge based on weakly corroborated, or even an uncorroborated confession because of the Article 32 investigation's "reasonable belief standard, I do not believe that would be prudent in a case of this magnitude.

Even if the alleged act occurred there are several fundamental extenuating and mitigating facts relevant to this charge. First, by all accounts, the accused allegedly committed only one act of espionage. Second, the alleged offense occurred over six years ago and would therefore be barred by

the statute of limitations were it not pleaded as a capital offense. Third, there is no allegation or even an indication that any money changed hands. Finally, the accused's difficult personal life and his solid military record bear consideration.

5. In the meantime, as of today, the accused has spent 498 days in pretrial confinement. That total is even higher if the defense's contention that the conditions on the accused's liberty are found to be tantamount to confinement as they contend. Of course, as indicated by the Navy-Marine Corps Court of Criminal Appeals, roughly 300 of those days are attributable to the defense. Nonetheless, the fact remains that the accused has spent a considerable amount of time in pretrial confinement. I do not believe that it is unrealistic to estimate that the time the accused has already spent in pretrial confinement would be on the low end of any sentence of confinement he might receive if convicted of some, or all, of the offenses at a court-martial.

6. Frankly, while I would like to propose alternative remedies, I cannot recommend any that would not extend these proceedings further and to no apparent end. Perhaps I was remiss in not communicating these concerns sooner, but I was, and remain, very sensitive to my obligation to remain impartial in this case, and I was concerned that any such communication could have been viewed as implicit advice to the government on how to proceed with their case. Thus, at this late date, continuing these proceedings further, after considering all the facts I have discussed, seems contrary to the interests of justice from the perspective of both the accused and the United States Navy.

J.P. WINTHROP

Copy to:
CDR Jowers
Professor Turley
LT Bailey
LT Freedus

PREPARED STATEMENT OF

JONATHAN TURLEY
LEAD DEFENSE COUNSELFOR PETTY OFFICER DANIEL M. KING

SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Thank you, Mr. Chairman.

Mr. Chairman, members of the Subcommittee, my name is Jonathan Turley. I currently represent Petty Officer Daniel M. King and I served as the lead defense counsel for Petty Officer King during his prosecution for alleged espionage. I am also a professor at George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law.

I greatly appreciate your invitation to discuss the King case. As a defense attorney and an academic in the national security field,[1] I have never encountered a more troubling case. My co-counsel and I were formally invited to testify late last week and have attempted to assemble a comprehensive presentation of the facts in this case over the weekend. Each of our statements today will isolate different aspects of these facts. Like my colleagues, I wish to associate myself with their formal statements as part of our unified presentation. After discussing the charges and basic evidence in the case, my comments will focus on the areas previously identified by the Committee as the subject of today's hearing. LT Matthew Freedus will then offer a detailed presentation of the facts in this case and the course of the investigation and prosecution. LT Robert Bailey will then detail the specific violations and abuses that have been identified and made part of the record. We understand that your time is limited and, with the consent of the Committee, we have submitted three formal statements. I apologize for the length but we find ourselves in the same position as Blaise Pascal when he apologized for the length of a letter because he lacked the time to write it shorter.[2]

[1] I previously served as an employee with the National Security Agency (NSA) and I have worked as both a litigator and an academic in the national security field. I have been a criminal defense attorney for over a decade and I teach constitutional criminal procedure as well as litigation courses. My past national security cases include the Nicholson espionage case in Virginia, the nuclear courier case in Tennessee, the Area 51 case in Nevada, and other related cases, including consulting roles on prior espionage cases. As an academic, I have written a variety of articles in the constitutional, surveillance, and national security law areas. See, e.g., Jonathan Turley, Through a Looking Glass Darkly: National Security and Statutory Interpretation, 53 Southern Methodist University Law Review 205-249 (2000) (Symposium); Jonathan Turley, Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege, 60 Maryland Law Review 205-248 (2000) (Symposium); Jonathan Turley, "From Pillar to Post": The Prosecution of Sitting Presidents, 37 American Criminal Law Review 1049-1106 (2000); Jonathan Turley, The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies, 77 North Carolina Law Review 1791-1866 (1999); Jonathan Turley, Reflections on Murder, Misdemeanors, and Madison, 28 Hofstra Law Review 439-471 (1999) (Symposium); Jonathan Turley, The Not-So-Noble Lie: The Nonincorporation of State Consensual Surveillance Standards in Federal Court, 79 Journal of Criminal Law and Criminology 66-134 (1988); Jonathan Turley, United States v. McNulty: Title III and the Admissibility in Federal Court of Illegally Gathered State Evidence, 80 Northwestern University Law Review 1714-1752 (1986).

[2]BLAISE PASCAL, LETTRES PROVINCIALES 114 (Paris, Fain 1830) ("I have made this [letter] longer than usual, only because I have not had the leisure to make it shorter").

While we have been prevented by the Navy from submitting a full account of this case, including the full scope of unlawful conduct by Navy officials,[3] my statement today contains unclassified information that establishes a number of facts that should be alarming for anyone who values the rule of law and our constitutional guarantees. First, these facts establish (as found by the military judge in this case)[4] that there was never any compelling evidence of espionage against Petty Officer King. To the contrary, the sole direct evidence was a statement signed by Petty Officer King that the military judge found unreliable and possibly coerced. The constitutional violations by the NCIS in this case made it virtually impossible for this statement to be admitted as evidence in any trial. Moreover, audio tapes discovered by the defense shortly before the dismissal of the case show that this statement was contemporaneously contradicted. These tapes reveal that Petty Officer King repeatedly denied the truth of the statements and stated that he was signing statements to simply give the NCIS what it wanted to end the interrogations. There was no corroborating evidence supporting any act of espionage despite the fact that such evidence would normally be available. Ultimately, in a case where a sailor was held for 520 days without a charge, the military judge found that the evidence did not support a probable cause belief that a crime was committed or that Petty Officer King committed any such crime. He found that there was no need to continue the Article 32 proceeding in light of the lack of such evidence and called upon the Navy in the interests of justice to dismiss all charges.

[3] On Friday, I sent a letter to Senator Shelby on the continuing failure of the Navy to return the classified defense notes and materials to prepare this submission to the Committee. Earlier, the Committee responded to a defense request for such access after the Navy repeatedly refused to turn over our material to prepare a report on violations in the case. The Committee was told by the Navy that such access would be given to the defense. At 4:40 p.m. on Friday evening, the Navy called my office to say that access would be given to the defense. Obviously, with our testimony due Monday afternoon, such access is meaningless. Accordingly, the defense has asked the Committee to leave the record of this case open to allow for a classified submission after the defense is given (1) its classified material, (2) access to a SCIF and a cleared computer, and (3) assistance of our security expert. We have asked for ten days to submit such testimony.

[4]A copy of Judge Winthrop's recommendation for dismissal has been attached as Appendix A to this testimony.

Second, these facts establish a range of serious national security violations committed by Navy officials and NCIS agents in this case. Government witnesses admitted to "serious" violations of national security and made false statements under oath. Third, the facts of this case establish a range of constitutional violations that independent observers have described as unseen in this country for decades. The most frightening aspect of this case was never the alleged act of espionage but the unlawful conduct of the Navy in its blind pursuit of an espionage case.

It is common for our political leaders to condemn nations that are justifiably viewed as undemocratic or authoritarian. In the last week, U.S. politicians have denounced the treatment of Chinese detainees held without formal charges after a scientist was held for 26 days without a charge by China. See, e.g., Rowan Scarborough, Beijing Holds U.S. Boy 26 Days, The Washington Times, March 22, 2001, at A1. Petty Officer King was held for 29 days of interrogation[5] without a charge, even a preferred charge.[6] Petty Officer King was held for 520 days without a formal charge before his case was dismissed upon the recommendation of a military judge due to a lack of evidence to support even the minimal probable cause standard. Two appellate decisions established that Petty Officer King was in custody from October 2, 1999. From October 2, 1999 until his release on March 9, 2001, Petty Officer King drained the entirety of his funds to support his family's expenses. He was also unable to be present for the birth of his grandson or for the final days of his mother's life. Yet, when the Navy dismissed the case within hours of the recommendation of the military judge, the Navy issued a formal statement attacking this sailor as a "traitor." As will be shown below, the Navy then released public statements that included demonstrably false information in the case to the media.

[5] King was held for 26 days by the NCIS for such interrogation before being placed in the brig at Quantico. However, as is noted in the last section, the NCIS continued to interrogate King in the brig despite the public statements to the contrary.

[6] In the military, a preferred charge is akin to a formal allegation. A person is not charged in the constitutional sense until after the completion of an Article 32 investigation. The Article 32 investigating officer determines if the evidence is sufficient to support probable cause for a formal charge. The "convening authority" then "refers" a formal charge to a military judge who hold the military equivalent to an arraignment.

What happened to Petty Officer King is alien and antithetical to our system. For that reason, it is essential for the transcript of the proceedings in this case to be completed and for the unclassified evidence to be made public. This evidence and testimony shows high-level government officials admitting to the commission of unlawful acts in the case, including admissions of prior false statements under oath and serious national security violations. The Navy would prefer to have the dismissal of this case portrayed as merely bad lawyering but the truth is far more serious and unsettling. In the name of protecting our constitutional system, the Navy violated the most basic guarantees of that system. It became the very thing that it was created to protect against. Unfortunately, such violations are not uncommon in the military and particularly in the Navy. While politicians often speak of wanting the very best for our men and women in uniform, service personnel are treated as second-class citizens when it comes to their constitutional rights. Some of this disparate treatment is due to archaic and unequitable rules governing military prosecution. However, the greatest single contributor is the consistent and notorious violations of the Naval Criminal Investigative Service (NCIS). I am not alone in my appraisal of the Navy or the NCIS. In my opinion, the NCIS is the most abusive police organization in this country. After numerous scandals and congressional inquiries, the NCIS continues to routinely violate the rights of sailors and Marines and continues to operate outside of the restrictions of either constitutional or professional standards. This case is perhaps the most egregious example of the NCIS culture and practices. However, it is not unique.

Ironically, the unconstitutional and abusive tactics used by the NCIS in this case not only undermined any legal case but defeated any legitimate search for the truth. After triggering an espionage investigation, NCIS agents found that they had no evidence and no spy. Rather than admit to a colossal blunder, these agents continued to interrogate a sailor for 19 and 20 hour sessions for 29 days. When no evidence was available to support their catastrophic misjudgment, They sought to create evidence. The NCIS manufactured a theory of espionage without foundation and then took steps to compel statements to support that theory. The tapes and evidence secured by the defense in this case reveal agents seeking a trophy not the truth.[8]

[8] This trophy-seeking was more than evident when Special Agent Stuart Wilson actually had fellow agents videotape his delivery of Petty Officer King to the brig in Quantico, Virginia.

There are numerous questions in this case that warrant congressional investigation. First, the record establishes abuses in interrogation and investigation that should not occur in any country with even a pretense of observing the rule of law. This is a case that should never have been submitted for prosecution. It is a case that should have been investigated in a professional manner without use of crude third-degree tactics and exhaustion techniques. The tapes in this case show an effort to get a confession at all costs - an imperative for NCIS agents who started a full-fledge espionage investigation without any evidence to support their efforts. The NCIS has a long and controversial history of such abusive interrogation and a confession-centric approach to criminal investigations. The NCIS' overwhelming emphasis on confessions is an anachronism abandoned by professional police organizations after the 1960s. Had Petty Officer King been given a lawyer as he requested, it is likely that the Navy would have received cooperative statements without the marathon interrogations and sleep deprivation. The NCIS adopted an approach that made any statements legally inadmissible and factually suspect. The rule of law and good investigative techniques are not inherently in conflict. To the contrary, by denying Petty Officer King basic protections and rights, the NCIS created conditions that made any statement highly suspect and ultimately produced a series of conflicting and rambling statements of little evidentiary value. While NCIS agents appear to romanticize the role of the spy-catching interrogator breaking a suspect spy, modern police organizations have long abandoned such an emphasis in favor of independent investigative techniques.

Second, the evidence in this case establishes a series of confirmed illegal acts committed by Navy officials and NCIS agents. These acts include admitted acts of perjury, serious national security violations, and knowing false statements given to the court, the Congress, and the media. For example, the Navy has insisted that it had little choice but to attempt to prosecute Petty Officer King for two alleged national security violations. These alleged violations concerned the disclosure of program information to unauthorized individuals. In King's case, the alleged violations involved disclosures to individuals with Top Secret/Sensitive Compartmented Information (TS/SCI) clearances in a Sensitive Compartmented Information Facility (SCIF), including one disclosure to an individual who was scheduled to be read into

the program the following week. The Navy describes these violations as "serious" and worthy of jail time. However, the record in this case shows literally hundreds of more serious violations by NCIS agents and Navy officials, including the disclosure of program information to unauthorized individuals with no clearances and the playing of a videotape with TS/SCI information in a hotel room on a standard VCR to an audience of uncleared individuals. The defense repeatedly raised such violations but Navy officials steadfastly opposed taking corrective actions and allowed the further compromise of program information. The transcript in this case, if completed, will show a pattern of such violations.

Finally, there are significant questions over the competency of program officials and the Navy's ability to perform basic tasks related to program security. Various witnesses from program offices were called in this case. This testimony revealed shocking incompetence and lack of knowledge. For example, the first expert witness called in this case, Mr. Ed Glenn of the defense liaison division, was found by the military judge to be incompetent to discuss programs on which he is assigned. One government witness, Mr. William McKinney, testified that Mr. Glenn's testimony on these programs was "appalling" and that he was incompetent to answer questions on the programs. Another witness, Ms. Mary Rose McCaffrey, Mr. Glenn's supervisor, was also found incapable of giving knowledgeable testimony on programs under her supervision. Ms. McCaffrey could not identify what information fell into particular programs; did not understand basic national security regulations; admitted to serious national security violations; admitted to submitting false information under oath; and admitted that she could not even distinguish between classified and unclassified terms that she had repeatedly reviewed for classification. Another witness, NCIS agent Ron Bell, was dismissed after giving testimony that was facially absurd as to the meaning of basic classification rules. Mr. Bell, for example, claimed that the fact that an agent had used Yahoo! as an internet search engine was a classified "source or method." Not a single government witness was able to make it through cross-examination in the case on their knowledge of the areas in which they worked. Moreover, neither the Director of Naval Intelligence (DNI) nor his underlings took steps to protect program information when dozens of on-going violations had been identified by the defense. Ms. McCaffrey testified at the end of the case that no inquiry had been made by the DNI to ascertain and to correct violations that are now established on the record. After the defense raised such violations for more than a year, no one from the DNI or any office has contacted any member of the defense team for information on these violations or the individuals responsible. The DNI was personally informed of these violations and failed to take appropriate steps to protect program information in the case or impose minimal security safeguards.

I. THE LACK OF EVIDENCE OF ESPIONAGE IN THIS CASE.

Since the dismissal of all charges in this case, the NCIS and the Navy have attempted a variety of explanations for why a sailor was held for 520 days without a formal charge on evidence that a military judge found to be insufficient to even support a probable cause determination. It is time to distinguish fact from fiction.

This case is based on a single signed statement. Courts have historically looked with disfavor on such confession-based prosecutions. It is widely accepted that false confessions occur in this country and that confessions without corroboration are insufficient to initiate a criminal prosecution, let alone support a charge for a capital punishment offense. While most police departments moved away from a confession emphasis in investigations after Miranda, the NCIS continues to place an inordinate emphasis on interrogation and continues to engage in heavy-handed techniques to trick or coerce confessions from sailors and Marines. As discussed below, NCIS agents are trained in interrogations with the use of a manual that construes virtually any response to a criminal allegation as evidence of guilt. According to the interrogation manual for the NCIS, an individual who denies an allegation or expresses a concern over his future is viewed by the NCIS as indicating guilt and beginning a confession. The King case is a text-book example of the abusive and counterproductive use of interrogations to shape evidence to fit the preordained judgment of agents. Faced with a common "no opinion" result on a polygraph examination, NCIS agents immediately framed the case as an espionage investigation and continued to hammer a sailor until he justified their initial decision.

When Petty Officer King took a routine polygraph on September 29, 1999, the polygrapher recorded a "no opinion" result. This is an extremely common result that simply means that the test cannot be read to establish truth or falsity. The test results should not have caused alarm. Rather, the test should have been repeated under conditions compatible with polygraph examinations. It was not necessary to start an interrogation on espionage, which would only increase the anxiety of the individual and serve to elevate his response to later questions on espionage. A routine "no opinion" glitch on a polygraph was allowed to mutate into an espionage investigation from the very first day.

The NCIS isolated facts that vaguely reinforced a theory of espionage such as fantasy accounts and prior unhappiness with the Navy. Rather than simply administer additional polygraphs to determine if this result was just a glitch, the NCIS agents framed the investigation in espionage terms and lied to this sailor by telling him that he failed the polygraph and was under suspicion for espionage. No one has suggested that additional polygraphs were not warranted after a "no opinion" result. Rather, the criticism of the NCIS is that it quickly degraded the value of polygraphs and interrogations by immediately framing the matter in espionage terms and engaging in abusive interrogation techniques that destroyed the reliability of such examinations.

It is important to remember that this investigation did not begin with any suggestion of espionage or deception on a polygraph. Petty Officer King simply had a "no opinion" polygraph like thousands of people every year in this country. Rather than simply scheduling a follow-up polygraph for the next day and telling the subject that the examination could not be read, NCIS agent Robert Hyter chose to interrogate Petty Officer King about espionage. It was the NCIS, not King, that raised espionage as if it were the natural progression from a "no opinion" polygraph. Notably, the two detailed military defense counsel in this case also had "no opinion" results on their polygraph examinations. The NCIS, however, did not begin an interrogation on espionage but simply stated that such results are common and require additional testing. In dealing with Petty Officer King, however, the NCIS took a disastrous leap of judgment and began to create a record that would become a self-perpetuating process.

On the first day after the "no opinion" polygraph result, Agent Hyter specifically pressed King for any "fantasies of espionage." King readily admitted that he had such prior fantasies in his 20-years of intelligence work. Ironically, in a recorded deposition by the defense, Hyter later admitted that he also had such espionage fantasies as did anyone working in this field.[9] Hyter recorded these fantasies in a typed statement and had Petty Officer King sign the statement. Hyter also had King attest that there were times years earlier when he was angry with the Navy. The NCIS now had a statement that elevated espionage as the central issue in the investigation despite that fact that in this September 29, 1999 statement, King expressly stated that, while he had had such fantasies, he never engaged in such conduct. Within twenty-four hours, therefore, the NCIS had created statements that supplied a justification for continued espionage investigation. The "no opinion" polygraph now had a sinister look due entirely to the chosen emphasis of the interrogator. The NCIS had created a damning context for reviewing any polygraph examinations: an angry sailor who fantasized about espionage.

> [9] Certainly, there are points in these interrogations where NCIS agents appear to yield to fantasies of their own. These interrogations appear to come directly out of Le Carre novels as opposed to professional interrogation manuals. Agents appear to revel in the use of safe houses and espionage terms (often used incorrectly). It is telling that when Petty Officer King challenged Special Agent Hyter about his clearance and access for some of the information, King recounted how Hyter became agitated and incorrectly stated that he is "cleared for everything." In fact, most NCIS agents have relatively low clearances.

On the second day, interrogations were increased with a heavy emphasis on espionage. Between such interrogations, Petty Officer King was put through a series of polygraph examinations with new questions beyond those used for a CSP examination. Once again, the results came up indeterminate on the first polygraph examination of the day and was further interrogated. In later polygraph examinations, the NCIS recorded signs of deception. However, in three of the five polygraph sessions, Petty Officer King continues to register "no opinion" results. The agents again had Petty Officer King sign a statement about his fantasies. Petty Officer King once again denied that he ever committed espionage or had foreign contacts.

Within a couple of days, the NCIS had begun a full-fledge espionage investigation. Agents were flown to Guam from around the country. Teams proceeded to do tag-team interrogations and Petty Officer King was taken into custody and moved from safe house to safe house. In these safe houses, the lights were left on at night while agents blared the television or ringed the telephone every couple of minutes as King tried to sleep. Interrogations would last 15 hours to 20 hours at a stretch. King would be interrogated for 29 days. On October 2, 1999,[7] King continued to deny any espionage in a written statement. However, the NCIS has added specific facts surrounding his anger with the Navy. Once again, the NCIS was creating a narrative that justified its emphasis on espionage while continuing to polygraph a sailor who is now terrified of the implications of these examinations. Professional police organizations are careful to avoid such self-fulfilling investigations and DoD regulations prohibit such practices. The NCIS, however, was now looking for a spy and never looked back to determine whether it had artificially framed the case.

[7] The Navy-Marine Court of Criminal Appeals wrote two opinions that found that Petty Officer King was confined since October 2, 1999. The NCIS and the Navy have repeatedly told media that this sailor was not confined until he was actually placed in the brig despite the fact that he was under 24-hour guard and was told that he would be shot if he tried to run. What is troubling is that these statements continue to be made after a court repeatedly denied the Navy's theory of confinement and the Navy did not contest the finding that Petty Officer King was in custody from October 2, 1999 in the later appeal to the Court of Appeals for the Armed Forces.

On October 5, 1999, Agent Stuart Wilson, first stated that King had sent a disk to the Russian embassy. King had never mentioned any disk being used in any act of espionage. He had consistently denied any espionage. King asked to speak with a lawyer. Wilson told him that "he would not get away with that" and stated that he ate "JAG lawyers for breakfast." As will be shown below, written documentation proves that King requested a lawyer at least twice but the NCIS refused and continued interrogations and polygraph examinations. The interrogation continued for more than 19 hours. At the end of the session, King signed a statement at 3:30 a.m. on the morning of October 6, 1999. He had been interrogated for 30 out of the prior 39 hours. This was this statement that the government used as the basis for the espionage charge in this case.

As noted by Judge Winthrop, this statement was the only direct evidence offered by the Navy to support espionage. The lack of corroborating evidence was repeatedly raised in the proceedings. This issue would come to a head near the end of the case. CDR Mark Newcomb had told producers at CBS Sixty Minutes that the case against Petty Officer King was supported by corroborating evidence. I immediately wrote to CDR Newcomb on March 8, 2001 and asked him to identify the corroborating evidence. The evidence in the case had been exhaustively reviewed during the proceedings to date and no corroborating evidence had been offered. I objected that either CDR Newcomb's statements to the media were false or he was withholding evidence. CDR Newcomb wrote back and confirmed that no corroborating evidence has being withheld in the case and that all of the relevant evidence had already been given to the defense. The defense also raised this issue in the closed proceedings shortly before the dismissal. CDR Jowers could not identify any corroborating evidence except a single document that did nothing but confirm facts known by Petty Officer King from his position. When King was asked what type of material could have been on such a disk, King simply recounted information from his work. This document, a log, merely showed that such information did exist and Petty Officer King could recall material that was contained on classified disks.[10]

[10] Such "corroborating evidence" would exist in any such case. This was akin to asking a bank employee suspected in a bank robbery to give the details of the inside of the bank or material reviewed in her capacity. When faced with an allegation of a false confession, such a document does nothing more than corroborate that the individual possessed classified information.

Given this record, it is highly disturbing to read public statements that the evidence in this case was "strong." Judge Winthrop specifically rejected statements that the evidence in this case was "strong." He stated in his opinion that "I don't believe the government evidence on any of the charges in this case is strong. On the other hand, the defense evidence in extenuation and mitigation is significant." Notably, Judge Winthrop was not speaking of the evidence needed to convict in this case. He was speaking of the minimal evidence needed to bring a charge.

The function of an Article 32 hearing is to determine if the evidence in a case is sufficient to meet the minimal standard of probable cause to support a formal charge. Judge Winthrop stated that the evidence in this case fell short of this standard and that there was no need to continue the proceedings in light of the lack of sufficient evidence. He specifically noted that the signed statement in the case was contemporaneously contradicted and that there was merit to defense arguments that the statement was coerced and inadmissible. Judge Winthrop further noted that such a statement would require corroboration to be admissible - even if it were not barred on the basis of interrogation abuses by the NCIS. He noted that no substantive corroborative evidence was offered in the case. Judge Winthrop noted the reliance of the government on the log and said that such corroborating evidence did not even meet a "slight" corroboration standard to consider a confession as evidence. Judge Winthrop expressed doubt that, even if the statement was found to be voluntary, "I question whether the mere existence of the daily log provides independent evidence of an 'essential fact' of the confession, i.e., the act of espionage." See Appendix A.

The most troubling aspect of this case is the fact that no one at the NCIS or in the Navy had the integrity or courage to admit that this case was wholly unsupported. Instead, the Navy leaked false information on the evidence in this case and, in the case of CDR Newcomb, repeatedly tried to suggest the existence of evidence that the military judge expressly refuted. After billing this case as a counterintelligence coup

during the Wen Ho Lee period, the Navy discovered that it had no evidence to support its claim. Petty Officer King then became a terrible inconvenience and a professional danger for Navy and NCIS officials responsible for this case. To this day, the Navy and NCIS continue to release demonstrably false statements in this case to excuse their own willful misconduct at the expense of this sailor and his family. [11]

[11] Some of these statements are quoted in the final section of this statement.

II. THE MISCONDUCT OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE.

A. NCIS and its Long-Standing Pattern of Abusive and Unprofessional Conduct.

One of the issues that that the Committee asked us to address in this hearing was the conduct of the NCIS. The NCIS has long been the focus of controversy. Both the NCIS and its predecessor organization, the Naval Investigative Service (NIS), are routinely accused of the violating the rights of sailors and Marines as well as undermining important cases through sloppy and abusive techniques. It is impossible in the short period of time before this hearing to full recount the history of controversy surrounding this police organization. I ask only that the members of the Committee review articles, congressional hearings, and cases referring to the NCIS and NIS.

The media stories alone reveal two immediately apparent facts. First, the NCIS and NIS are the subject of the vast majority of the stories on abuses in military investigation - not the Army and not the Air Force. It is the Navy that is the virtually exclusive subject of allegations of abuse by witnesses, military officers, attorneys, and investigative reporters.[12] See, e.g., Gaylord Shaw, Methods of Interrogators Under Fire in Sex-Spy Case, Los Angeles Times, June 14, 1987, at 1 (quoting descriptions of the Navy investigators as "running amok," "using Gestapo tactics," "heavy-handed," and fabricating statements."). Second, these stories contain an astonishing degree of uniformity in detailed allegations of long interrogations, abusive use of polygraph examinations, biased interrogations, botched investigations, and procurement of false statements from witnesses and suspects. What is also interesting is that after some of the most notorious investigations, such as the investigation of the U.S.S. Iowa explosion, the Navy released statements virtually identical to the one in this case: proclaiming that its investigators did a professional and thorough job.

[12] 131 Cong. Rec H 9872, November 6, 1985 ("The Naval Investigative Service is operating without respect or professionalism.") (statement of Congressman Bates on introduction of the "Naval Investigations Reorganization Act of 1985").

It is important to consider some of these cases[13] because they reveal the same modus operandi that is evidenced in the King case. A brief review of the various areas of NCIS and NIS abuses and bias is warranted as background.

[13] As noted by LT Freedus, the NCIS operates in military courts with effective immunity. According to military judges, NCIS cannot be held in contempt for misconduct in military courts. Thus, unlike every other police organization, the NCIS knew that no military judge has authority over them in discovery abuses, false testimony and other areas.

1. *Interrogation abuses*. The NCIS places heavy emphasis on both interrogations and polygraph examinations. Allegations of abuses in both areas are rampant. Even witnesses to sexual assaults have recanted statements given to Navy investigators and charged that interrogations by the Navy were so abusive that they resulted in a re-victimization. Female Sailors Re-Victimized in Navy Rape Cases, San Diego-Union Tribune, October 23, 1990, at A1. Witnesses and independent Navy personnel have repeatedly denounced NCIS for "Gestapo tactics" and third-degree techniques. These accusations often come from witnesses and independent Navy personnel removed from any personal interest in particular cases. See Glenn F. Bunting, Gave Federal Agencies Little Help in Breaking Big Espionage Cases; Navy Investigative Unit Has Reputation of Weakness, Los Angeles Times, Sept. 2, 1985, at A1 ("one Navy commander said that he could not believe 'the witch hunt' employed by NIS agents . . . 'They remind a lot of people around here of the KGB.'"); id. ("A Navy master-at-arms investigator said that during a recent three-year assignment on the aircraft carrier Ranger he watched with amazement whenever NIS agents interrogated sailors . . . '[when] the NIS agent gets you in that little room, it can get nasty . . . I tried to look the other way sometimes. They'd threaten to ruin a sailor's civilian life by putting information in his files that he was a thief.").

The NCIS continues to place an alarming emphasis on interrogation and confessions. Most of the agents in this case were trained with a manual, still in circulation, on the "art" of interrogation. This manual certainly explains some of the misconduct in this case and the initial blunders made by NCIS agents in Guam. The Navy tells its agents that

> Frequently, during interrogation a suspect declares, "I would never do that, I'm trusted, I have a good record, I wouldn't jeopardize 16 years service, etc." Actually the suspect is subconsciously confessing.

Apparently, a denial is not the only way that the NCIS will register a confession in interrogation. The manual also tells its agents to look for a statement like "'What's going to happen to me?,' because the suspect is beginning a confession." With such training, it is certainly understandable why a "no opinion" result on a polygraph examination could mutate into an espionage investigation.

What is interesting is that the NCIS does instruct its agents of the danger of producing false confessions. The NCIS states in the manual that "a person will make false admissions" in some interrogations and agents are told to "avoid coercion, unlawful influence, and unlawful inducement, such as promises or threats of any kind, either expressed or implied. An interrogation which in point of time [sic] is prolonged so as to deny a suspect reasonable opportunity for mental relaxation, food, drink, use of toilet facilities, etc is prohibited."

It is an accepted fact that false confessions occurred every year in this country and that perfectly innocent people have confessed to crimes that they did not commit.[14] From the time of Blackstone, courts have looked with disfavor on out-of-court confessions due to their notorious unreliability and connection to interrogation abuse.[15] False confessions can occur as an attempt to escape a coercive interrogation (the so-called "stress-compliant" false confession) or when " a suspect has no memory of a crime, yet he readily admits that he committed the crime and adopts a sincere belief that he is guilty," (the so-called "persuaded false confession").[16] The NCIS appears to create the very circumstances that have been identified as magnifying the chances of false confessions in their use of long interrogations, psychological pressure tactics, and its heavy emphasis on polygraph examinations as part of the interrogation process.

> [14] For example, individuals like Robert Moore confessed in 1995 to felony murder in a case that was billed as a death penalty prosecution until it became obvious that the confession was entirely false. See generally, James R. Agar II, The Admissibility of False Confession Expert Testimony, 1999 Army Lawyer 26 (1999). Experiments with innocent individuals have shown that they could be forced to confess under the right circumstances. Id. at 28 (discussing study with 75 college students). Sixty false confession cases were detailed in Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of False Confession, 16 STUD. IN L. POL. & SOC'Y 189 (1997)
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> [15] 4 WILLIAM BLACKSTONE, COMMENTARIES, at 357 (stressing that "hasty, unguarded confessions . . . ought not to be admitted as evidence" in treason cases). Blackstone refers to out-of-court confessions as "the weakest and most suspicious of all testimony; even liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence." Id. (discussed in George C. Thomas III, The End of the Road for Miranda v. Arizona?: On The History and Future of Rules for Police Interrogation, 37 Am. Crim. L. Rev. 1, 5 (2000)).
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> [16] Richard J. Ofshe & Richard A Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Den. U. L. Rev. 979, 999 (1997), see also Agar, supra (discussing these studies).

One of the central purposes of compelling the government to "take the arrested person without unnecessary delay before the nearest available magistrate"[17] is to deter the use of long periods of interrogation.[18] The Supreme Court has emphasized that the requirement of the federal rules are to prevent a suspect from being "taken to police headquarters in order to carry out a process of inquiry that lends itself . . . to eliciting damaging statements." Mallory v. United States, 354 U.S. 449, 454 (1957) (discussed in Thomas, supra). The Navy-Marine Court of Criminal Appeals held twice that Petty Officer King was in confinement (the military equivalent to custody) from October 2, 1999. The NCIS, however, did what the federal law and the Supreme Court expressly forbid: it moved King from safe house to safe house as he was interrogated for weeks.

[17] FED. R. CRIM. P. 5(a).

[18] See generally George C. Thomas III, The End of the Road for Miranda v. Arizona?: On The History and Future of Rules for Police Interrogation, 37 Am. Crim. L. Rev. 1 (2000).

The specific dangers sought to be avoided by prohibiting holding individuals in custody for interrogation is the abuse of the individual's constitutional rights and the real danger of false confessions. The courts have repeatedly found interrogations that were less egregious than the King interrogations to be per se abusive and the resulting confessions to be coerced.[19] For example, in Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944), the Supreme Court threw out a confession as involuntary after 36 hours of interrogation without sleep.[20] King was interrogated for 29 days and, when he signed the statement in this case at 3:30 a.m. on October 6, 1999, the NCIS had interrogated him for 30 of the previous 39 hours.

[19] Blackburn v. Alabama, 361 U.S. 199, 211 (1960) (finding a confession coerced when police interrogated a mentally unstable individual for nine hours in a closed room); Spano v. New York, 360 U.S. 315, 321 (1959) (eight hour interrogation without counsel violated the Fourteenth Amendment); Payne v. Arkansas, 356 U.S. 560 561 (1958) (use of mental or physical coercion found to violate constitution); Fikes v. Alabama, 352 U.S. 191, 197-98 (1957) (holding that, even in the absence of physical abuse, the interrogation of an incompetent individual for hours at a prison made his statement involuntary); Watts v. Indiana, 338 U.S. 49, 55 (1949) (excluding as involuntary confession of man obtained after six days of interrogations from 5 p.m. to 3 a.m.); Malinski v. New York, 324 U.S. 401, 410 (1945) (confession obtained after holding and interrogating an individual for four days after arrest was inadmissible). These cases and others are discussed in Thomas, supra, at n. 21.

[20] It is notable that, even in its failed congressional effort to supplant Miranda, Congress mandated that the voluntariness and admissibility of any out-of-court statement be determined with a consideration of "the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment" and "whether or not defendant was without the assistance of counsel when questioned and when giving such confession." 18 U.S.C. §3501 (1994).

2. *Polygraph abuses.* The NCIS has been repeatedly criticized for the abusive use of polygraph examinations in the course of interrogations. See e.g., Gaylord Shaw, Marines Drop Charges of Spying Against Bracy; Cite Insufficient Evidence Against Corporal Who Served as Guard at Embassy in Moscow, Los Angeles Times, June 13, 1987, at 1. The use of polygraph examinations in interrogations can be a highly coercive factor in compelling an interrogation. Notably, one of the common factors in studies of false confession is the heavy use of polygraph examinations as part of interrogations. See Ofshe & Leo, supra, at 1008-88. While polygraph examinations are not viewed as reliable or admissible in federal courts, they can be used as effective interrogation techniques. However, these tests are only as reliable as their polygraphers. There is a powerful interpretative element to finding the line between "no deception" and "no opinion." The defense has been denied access to the original readings of these examinations by the NCIS and has not been allowed to have the original results reviewed independently by polygraph experts.

As shown in the final section of this testimony, the NCIS clearly violated DoD regulations in the administering of the polygraph examinations to Petty Officer King. The NCIS used polygraph examinations in this case to pressure Petty Officer King to confess. DoD Polygraph Program, DoD Directive 5210.48-R, January 1985 at 3-3 ("The polygraph instrument shall not be utilized as a psychological prop in conducting interrogations."). NCIS agents repeatedly lied to King that he had failed polygraph examinations when he only registered a "no opinion."[21] The examination were facially ridiculous.[22] NCIS agents would interrogate King with affirmative statements of his guilt and then strap him into polygraph examinations to see if he registered any elevation when espionage was mentioned.[23] It is astonishing that so many of the tests came up "no opinion" under these circumstances. King was given at least five polygraphs in a single day during his interrogations by the NCIS.[24] He was not only lied to about his results but lied to about the meaning of these results. NCIS agents told King that these results indicate that something did happen. In this sense, the polygraph examinations were used in combination with the NCIS insistence that King write down his fantasies. NCIS agents convinced King that these results indicated that his fantasies were simply suppressed memories. The impact of this tactic is evident in the videotaped interview from October 19, 1999 in which King says that he had no memory of the espionage facts where he retains a clear memory of other facts. King tells Dr. Michael Gelles that he needs hypnosis to determine if these were just fantasies. The reason that King gives for his uncertainly is that, despite the

lack of any memory of the events, the polygraph results show that "I have something inside me." Neither Gelles[25] nor Agents Wilson or Sherry disabuse King of this false assumption.

[21] Once again, the defense has been denied these print-outs for independent review. Accordingly, it is not clear that these tests were properly viewed by these same agents as "no opinion" as opposed to "no deception."

[22] It is notable that the agents never detailed King's use of various weight-lifting, weight-loss, and medical drugs that might have an effect on these tests. Despite the fact that many of these drugs were seized in his room, the NCIS was wholly unconcerned that they might have had an impact on King's results.

[23] As noted below, the agents never asked King to detail his use of a variety of muscle-building, weight-loss drugs as well as medical drugs seized in his room. Some drugs can have a pronounced effect on polygraph examinations and can exaggerate responses to stressful questions. U.S. Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A Review and Evaluation - A Technological Memorandum, reprinted in 12 Polygraph 198, 217 (1983). Some drugs like meprobamate, a common tranquilizer, are widely recognized as incompatible with such examinations while others are considered inconsistent with reliable testing. DoD regulations states clearly that "polygraph examinations shall not be conducted if . . . the examinee is mentally or physically fatigued [or if] the examinee is unduly upset, intoxicated, or rendered unfit to undergo an examination because of excessive use of sedatives, stimulants, or tranquilizers." DoD Polygraph Program, DoD Directive 5210.48-R, January 1985 at 3-4.

[24] While this is the maximum allowable polygraph examination under DoD regulations, it does not mean that this was good practice in this case. In fact, the regulations specifically prohibit the use of prolonged interrogation in conjunction with polygraph examinations.

[25] Dr. Gelles has already been notified of our intention to file formal charges against him with the American Psychological Association. Dr. Gelles has refused to give licensing information to the defense or to respond to allegations of violation of basic canons of professional conduct as a licensed psychologist. Dr. Gelles is on the videotape telling an individual with stated suicidal thoughts to return to interrogation and that the agents are not only his close friends but that they would stand with him "forever." Dr. Gelles specifically tells King that, if he offers "corroborating" evidence to the NCIS, he might be able to give King the hypnosis that he seeks.

It is notable that, in the absence of corroborating evidence, the NCIS continues to argue publicly that King's failure on polygraph examinations justified its conduct in this case. As shown below, these public statements are rife with demonstrably false information. The NCIS never reveals in its public statements that King did not fail the first polygraph, but that it agents simply recorded a "no opinion" result. The NCIS never reveals the administration of multiple polygraph examinations during periods of interrogation or King's repeated complaints that he could no longer tell the difference between fantasy and reality. The NCIS never reveals that King was examined during long abusive periods of interrogation and after they concluded that he was unstable and possible suicidal. id. at 3-4 ('Polygraph examinations shall not be conducted if . . . the examinee is mentally or physically fatigued [or if] the examinee is unduly upset, intoxicated, or rendered unfit to undergo an examination because of excessive use of sedatives, stimulants, or tranquilizers."). Obviously, if someone is struggling with such confusion and has been lied to about prior tests, the results on these examinations are highly unreliable. It is difficult to believe that any polygrapher would administer tests under these conditions, let alone find these tests to be reliable. One can only conclude that the tests were simply interrogation ploys that continued to reduce the resistance of the suspect.

3. *Bias.* The bias of the NCIS and NIS against woman and homosexuals is a continuing scandal. After the Tailhook scandal, the NIS was forced to address findings of clear bias in the handling of sexual offenses and the treatment of women. See generally Andrea Stone, Navy's 'Good-Old-Boy System Shook Up, USA Today, September 25, 1992 at 10A("The report . . . shows that investigators were 'not really keen on having women in the Navy, didn't like taking on admirals, and their whole goal was to get rid of this thing.") (quoting Rep. Patricia Schroeder); Female Sailors Re-Victimized in Navy Rape Cases, October 23, 1990, at A1 (noting that the Navy admitted that its investigative agents needed "sensitivity training" on issues of bias); see also Gaylord Shaw, Methods of Interrogators Under Fire in Sex-Spy Case, Los Angeles Times, June 14, 1987, at 1 (NAACP accusations of abuses of bias by Navy investigators). The bias of the NCIS against homosexuals is a continuing controversy. While the attempt of the NIS to pin the explosion of the

U.S.S. Iowa on a gay sailor is the most notorious example, the NCIS continues to face widespread allegations of homophobia and anti-gay practices. See generally Roberto Suro, Navy Agents Into Gay Bars; Rights Groups Call Drug Trafficking 'Sting" Operations Unfair, The Washington Post, June 17, 2000 (noting that NCIS Director Brant denied that gay bars were targeted but NCIS agents in testimony "could not cite any heterosexual establishments that were targets of NCIS surveillance.").

More relevant to the instant case is the NCIS and NIS reputations for engaging in biased investigations.[26] Navy investigators are notorious for prematurely jumping to conclusions and proceeding to exclude all information that is inconsistent with the chosen theory. This criticism has not only been made by congressional figures, attorneys, and journalists but by NCIS agents. For example, in the U.S.S. Iowa explosion case, an NCIS agent admitted that, after they came up with the idea of an unhinged homosexual sailor, "they chose to ignore other possibilities."[27] Rehabilitating the Navy's Police, The National Journal (Government Executive), February 1995. In congressional hearings, various witnesses found that the Navy investigators chose to ignore information not consistent with their theory and did not conduct a professional, objective investigation.[28] Another Navy agent leveled the same accusation at the service in a separate review: "I believe that they start out with a theory that they presume to be truth, and they fight to make it truth." Bucking the System, ABC News Day One, Jan. 3, 1994.

[26] Agent Sherry was the defendant in one such controversial case where a witness filed suit after Agent Sherry conducted a search on his apartment to obtain evidence of homosexual contact and HIV tests in his relationship with Petty Officer. Agent Sherry seized the witness's two-page HIV report showing that he was HIV-positive on the basis that the Navy was preparing to prosecute the Petty Officer. The Bivens action ultimately failed. No charges were ever brought by the Navy against the Petty Officer. See Roe v. Sherry, 91 F.3d 1270 (9th Cir. 1996).

[27] It is noteworthy that in the past the DoD Inspector General (who has been asked to look into this case) has not proven viewed as especially aggressive in investigating NIS and NCIS abuses. In the U.S.S. Iowa explosion, the DoD IG proclaimed the investigation "thorough, complete and expeditious." The Iowa investigation ultimately became a national disgrace and congressional investigators criticized the investigations as flawed and incomplete. Rehabilitating the Navy's Police, The National Journal (Government Executive), February 1995. The IG also cleared the NIS over the mysterious disappearance of pages in the NIS final report that happened to reveal the presence of former Navy Secretary H. Lawrence Garrett III at the Tailhook conference. Id. But see A Botched Probe; Tailhook Investigators Failed Responsibility, the San Diego Union-Tribune, Sept. 25, 1992, at B-14 (discussing the IG's finding that the Navy "badly botched" the Tailhook investigation."). The Navy has been repeatedly accused of shielding high-level officials while relentlessly pursuing enlisted personal. The greatest example was the virtual cover-up of the theft of automatic weapons by a navy Admiral and the shielding of a son of a high-ranking Navy official. See Glenn F. Bunting, Gave Federal Agencies Little Help in Breaking Big Espionage Cases; Navy Investigative Unit Has Reputation of Weakness, Los Angeles Times, Sept. 2, 1985, at A1 (in a case in which an admiral kept 24 Soviet-made AK-47 rifles captured in the invasion of Grenada, the Navy decided "no further investigations were necessary because Vice Adm. Joseph Metcalf had 'accepted responsibility' for taking the weapons. Metcalf was reprimanded while several lower-ranking soldiers and Marines face courts-martial.")

[28] See, e.g., U.S.S. Iowa Investigation, Hearing of the Subcommittee on Investigations of the House Armed Services Committee, December 21, 1989 ('[T]he collection by NIS was not in my mind an objective or thorough analysis . . . insufficient data was collected . . . [the process] was not objective . . . Contradictions that were raised in the materials in my opinion were not attended to, and in brief it is my conclusion that the date is qualitatively and quantitatively weak.") (testimony of Ronald S. Ebert, Senior Forensic Psychologist) (emphasis added); id. ("There are major problems with the way the Naval Investigative Service collected its data, leading to tremendously biased sorts of information that are passed on to the FBI . . . a number of competing hypotheses appear not to have been investigated in any depth.") (emphasis added) (testimony of Dr. Alan Berman, Professor of Psychology).

Witnesses in criminal investigations have repeatedly come forward to object to the conduct of Navy investigators and their resistance to any information that does not fit a predetermined theory. Peter Cary, Navy Justice, U.S. News & World Report, Nov. 9, 1992, at 46 ("NIS targets from admirals to seamen complain that agents often make up their minds in advance about a person's guilt or innocence, then build a case to support their theories."). A former prosecutor who worked with the NIS explained the Navy technique of investigations: "What they do is they interview 15 people. And if the potential witnesses have

something favorable to say, they won't reduce it to a sworn statement; they will just produce a memo that the person has nothing to offer. So you end up with a pile of evidence on a guy that does not have anything favorable in it, and people are accused where they should never be accused in the first place." Id. Witnesses have come forward to object that agents materially changed their statements to add incriminating facts that they expressly denied. Id. (quoting a witness in a case, later dismissed, that "'I told the [agent] that wasn't how it went . . . but they just kind of blew me off.' When [the witness] continued to object . . . the agent told her 'This is just - I need it for my records. It's just a statement.'"). Such cases are too numerous to relate in this statement. See generally Peter Cary, Navy Justice, U.S. News & World Report, Nov. 9, 1992, at 46 (describing various cases).

The King case is only the most recent example of this problem. On the first day, NCIS agents followed a simple "no opinion" polygraph result with questions directed toward espionage. King should have been simply scheduled for a new polygraph examination before creating fear or anticipation of the questions on espionage. By focusing on espionage and lying to King that he had "failed" his first examination, the NCIS proceeded to create emotional distress that would inevitably be registered on later tests. This is particularly the case when King is told to write down fantasies of espionage and formally sign them as confessions. King repeatedly denied any espionage in these early days but the NCIS was unrelenting in pushing its espionage theory. It is very possible that, if King had simply been told the truth that his test had registered a common "no opinion result" and rescheduled, it is very possible that he would have passed. We will never know. The agents proceeded to confront this sailor with allegations of espionage, lied to him about results on the examinations, and then re-tested him to see if he elevated on questions in that area. Not only did the NCIS prematurely adopt of theory of espionage but they preordained the results of the examinations. It is notable that, even when reports were completed showing a lack of corroborating evidence and indications that King could not have physically performed the alleged act, the NCIS never wavered. As in other cases, agents in the King case had begun a high-profile investigation for espionage and no one was willing to admit to the possibility that it might have been the NCIS agents and not King who pushed the case into this area.

4. *Procuring False Statements.* Navy investigators have been repeatedly accused of telling suspects to write down false statements or fantasies that were later introduced as evidence. For example, in the bungled NIS espionage investigation involving the Moscow embassy, the Navy admitted that one of its agents told Marine Sgt Clayton Lonetree to "tell us a lie, tell us anything" in getting signed statements in the case. See Nicholas C. McBride, Lonetree Appeal Will Challenge Fairness of US Military Courts, The Christian Science Monitor, Sept. 2, 1987, at A3. The Navy has a long-standing history of engaging in abusively long interrogations and documenting fantasies as facts.

Consider the similarity of this account from a witness in the Moscow Embassy investigation" to the facts in the King case:

> Williams . . . says that he was interrogated during three days in April by the NIS . . . "This kept up for hours and hours . . .the agents continued to harass me, trying to get me to say that I had knowledge of the fact that Bracy received $35,000. We went over and over this fact. They kept saying that if I had this knowledge I would later be charged for withholding evidence, that I would go to jail and that I could be relieved or my career would be ruined. They would not accept the truth . . . . Williams said that his interrogation "did not finish until I agreed with their so-called case scenarios . . . . All day long, I kept arguing with them about what could have happened and their changing around what I was saying. They asked me to speculate. When I told them what could have happened they documented it as fact.

Gaylord Shaw, Methods of Interrogators Under Fire in Sex-Spy Case, Los Angeles Times, June 14, 1987, at 1. In this same investigation, the Navy investigators gave another Marine a polygraph examination in a hotel room and then proceeded to "question[] him during the next two days for more than 16 hours, giving him five lie-detector tests." Id. Another Marine kept in another hotel room and subjected to "20 hours of questioning over the next two days [and] . .. five lie-detector tests." Id. As in the King case, the agents finally got one Marine, Cpl. Arnold Bracy to sign an incriminating statement that he insisted was coerced. The charges against Bracy were later dropped and the Navy was charged with "shabby and unethical conduct" in the interrogations and "improperly us[ing] lie-detector tests to coerce a confession from the Marine." Shaw, supra, at 1.

Once again, the King case contains strikingly similar facts. In his 29 days of interrogation, King was questioned for 19 and 20 hour sessions and repeatedly given polygraph examinations as part of the interrogations. The audiotapes discovered by the defense show agents forcing King to write down accounts that he states are merely dreams or fantasies. King is heard on the tapes objecting that none of these

accounts are true. The agents, however, persist in getting signed statements of dream sequences. Agents also admit to telling King to write down how he might have hypothetically committed espionage.

Ultimately, the agents succeed in destroying any ability of Petty Officer King to distinguish between fantasy and reality. Yet, none of this confusion is included by the agents in the signed statements. While King is contemporaneously stating that he did not believe that events actually occurred, the agents still have him sign the statements as fact. As in these other cases, the NCIS simply wanted a confession and would leave it to others to sort out the truth. Moreover, the tapes show agents actively raising the interrogation of King's two young daughters and dragging his family into the case, if he did not confess. Cf. Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (investigators violations the constitution by threatening the custody of suspect's children to obtain confession); Rogers v. Richmond, 365 U.S. 534, 535-36 (19610 (invalidating confession made after police threatened to arrest the suspect's wife). Agents continue to lie to King when he comes up "no opinion" on polygraph examinations and tells him that his guilt is obvious. At points, King is saying "Oh my god, oh my god" when he hears (falsely) that he had failed another test.

All of these techniques are directed at one overriding interest of the agents: to get a statement that would show that they had succeeded in catching a spy. King's state of mind is obvious on the videotape on October 19, 1999 when he is seeking hypnosis to find out the truth and is stating that a polygraph examination shows that he must have done something. The tapes are pathetic not because of what the NCIS did to this sailor but the willingness of agents to use such crude tactics to secure signed statements at any cost.[29]

> [29] The Supreme Court has long held that the very "concept of justice" bars a prosecution based solely on an out-of-court confession and demands corroboration. Opper v. United States, 348 U.S. 84 (1954). This rule is designed to prevent precisely the type of abusive interrogation and prosecution that we saw in this case. The fact that Judge Winthrop found no such compelling corroborating evidence in this case only magnifies the abuse of holding a sailor for 520 days of confinement without a charge. Let alone bringing a capital punishment charge on that basis.

5. *Sloppy techniques and unprofessional investigations.* There is a common misunderstanding that the blunders and abuses of the NCIS in this case and other cases are merely the result of their haste to determine the truth. Certainly, the Navy has suggested this as a factor in public statements in this case emphasizing the urgent need to protect national security. The heavy-handed and abusive tactics of the Navy routinely result in damaging cases beyond recovery. In fact, if one searches the term "botched" in the same sentence as NCIS and NIS, a virtual flood of examples and cases is produced. While the NCIS has consistently given itself high-marks and even referred to itself as one of the premier law enforcement agencies, independent assessments are far more damning. Otto Kreisher, Navy's New Top Cop Says Media Give His Crew a Bum Rap, San Diego Union-Tribune, April 19, 1994, at A9 ("Law enforcement experts and civil rights advocates outside the Defense Department have been critical of NIS agents for overly aggressive and intimidating tactics and too much reliance on lie detector tests in their investigations."); Glenn F. Bunting, Gave Federal Agencies Little Help in Breaking Big Espionage Cases; Navy Investigative Unit Has Reputation of Weakness, Los Angeles Times, Sept. 2, 1985, at A1 ("[T]he NIS has developed a reputation inside and outside military circles as a weak agency that does not aggressively pursue investigations, according to dozens of interviews with Navy officials, enlisted personnel and congressional sources.").

The King case is the ultimate example of how the NCIS can quickly destroy any legal or intelligence value of interrogations with a suspect. For days, Petty Officer King repeatedly denied any espionage. As in other cases, the NCIS forced King through a ludicrous series of interrogations, polygraph examinations, and renewed interrogations. Given the "no opinion" result, there should have been some recognition that the agents might be creating an artificial record and self-perpetuating results. Certainly, there should have been an increasing concern that interrogations might be elevating responses on the polygraph examinations. Instead, the agents continued to interrogate for 29 days despite indications that the suspect was potentially suicidal and was experiencing obvious problems in distinguishing fantasy from reality. King was the only clear way of determining the truth. Forcing him into 20 hour interrogations and to repeatedly recount fantasies would serve only to destroy the clarity and competence of the suspect. If the only desire was to get a statement at any cost, certainly this approach was successful. However, if the interest is determining the truth, the NCIS could not have adopted a more disastrous approach.

Petty Officer King was never a spy and there was never any disk. However, it is important to note that, regardless of the underlying facts, the NCIS guaranteed that the results of these interrogations would never see the inside of a courtroom. In this way, the NCIS succeeded in destroying a critical source for counterintelligence information while also destroying any legal basis to sustain a charge in this case. If one

looks at other national security investigations, no competent agency has engaged in this type of gum-shoe antics. Notably, after a series of prior bungled investigations, one of the areas that congressional committees sought to exclude from NCIS jurisdiction was "counterintelligence work." Art Pine, Naval Investigative Service to be Revamped; the Agency Has Come Under Attack Since the Bungled Inquiry into the Tailhook Sex Abuse Scandal, Los Angeles Times, Sept. 26, 1992, at A15. King's case demonstrates the obvious inability of the NCIS to perform any investigative role in this sensitive area. Ultimately, the NCIS proved a defense attorney's dream in destroying any chance for prosecution in this case. Fortunately in this case a military judge found that there was never any compelling evidence that a crime ever took place. The more alarming prospect is the chance that the next case could involve a serious espionage target like Jim Nicholson or Aldrich Ames.

In a recent interview, nationally renown constitutional scholar, Yale Kamisar of Michigan Law School stated that the misconduct of the Navy in this case has not been seen in this country for decades. Professor Kamisar stated that the closest case was from "1963 where the person was held--just questioned for 16 hours incommunicado just once and the court thought that made the confession involuntary and, therefore, inadmissible. So 26 days--I mean, you'd have to go way back to the 1930s to find a case that was that outrageous." Barbara Bradley, Navy Petty Officer Held for 500 Days on Suspicion of Spying for Russia Finally Released Without Being Charged, National Public Radio, March 28, 2001. I certainly concur in Professor Kamisar's judgment. The consistency of the facts of this case with past scandalous Navy investigations show that the NCIS continues to operate as a rogue organization that is undeterred by prior scandals, congressional investigations, and botched cases. To the contrary, the NCIS remains a virtual period piece of an investigative service. It continues to operate in a manner that should shock the conscience of anyone who believes in the rule of law. One can only imagine the outrage if a police organization outside the military interrogated someone for 29 days and held a person for 520 days without a charge. Such a case would be unheard of in the civilian world and viewed as virtually medieval. Yet, we allow this organization to continue to abuse suspects and witnesses simply because they are in the armed services. Our soldiers and sailors deserve better - as does our constitutional system.

B. National Security Violations by NCIS Agents.

Before addressing the conduct of the NCIS vis-à-vis Petty Officer King, it is important to note that this Committee has been previously informed of serious national security violations by NCIS agents in this case. These violations are wholly distinct from the constitutional and statutory violations discussed below. If completed, the transcript in this case will establish a myriad of actions considered to be "serious" violations by program managers. These violations include the disclosure of program information to unauthorized individuals, the improper handling of program information, the active solicitation and retention of program information without proper access, and the failure to protect program information upon notice of violations. Some of the documented violations in this case involve multiple violations. For example, the NCIS played a videotape containing program information on a standard VCR in a hotel room to an audience of uncleared agents. This violation, and others, were repeatedly raised by the defense. The NCIS and the Navy ignored our objections. Later, the Navy admitted that serious violations had occurred, including the videotape incident but failed to take any corrective action.

The seriousness of the NCIS violations can be easily ascertained from its own position in this case. In court papers and public statements, the NCIS refers to the two alleged national security violations by Petty Officer King as extremely serious and states that such violations had to be both investigated and prosecuted. The two alleged violations involved the disclosure of program information to individuals with TS/SCI clearances in SCIFs. The NCIS agents, however, revealed program information in hotel rooms, revealed program information to people without clearances, and retained program information on uncleared computer and in files cabinets. The alleged security violations by Petty Officer King pale in comparison to these wanton violations.

Without access to our classified notes and materials, we cannot supply a detailed account of all these documented violations. I have attached past letters describing some of these violations. See Appendix B. Once again, the defense asks for the opportunity to submit a classified supplement statement after our classified notes are returned.

III. THE MISCONDUCT OF THE UNITED STATES NAVY AND PROGRAM OFFICIALS.

The conduct of the Navy in this case has become a national outrage. In addition to scathing media coverage, various individuals have publicly called for investigations and apologies, notably including such calls from people in the Navy. See. e.g., Lionel Van Deerlin, Is the Navy Violating the Rights Its Swears to Protect?, San Diego Union-Tribune, March 28, 2001, at B-7 (former member of Congress noting that "in

the wake of other similar revelations, King's case suggests that the Bill of Rights may be a stranger to Navy justice."); Editorial, The Navy's Secret Mistake, The Navy Times, March 26, 2001, at 52 ("The King Case didn't rock just one sailor's faith in military justice. It poses a challenge to anyone's faith in the system. An open, complete and independent investigation is warranted. As is an apology to Petty Officer King."); Keith Taylor, Trampling Basic Rights in the Name of National Security, The Navy Times, March 12, 2000 (detailing prior Navy/NCIS abuses and warning of another "railroad job"); Vince Crawley, Navy Spying Case Pits Rights vs. Military Secrets, Navy Times, May 15, 2000 (discussing the Navy's restriction on confidential attorney-client communications).

A. Unconstitutional Confinement.

Petty Officer King was confined for the longest period in military history without a formal charge. The King case is rife with violations of core constitutional and statutory rights. Notably, Navy officials were aware of these violations and continued to hold this sailor without any legal basis. Ultimately a military judge found that they held this sailor without sufficient evidence to meet probable cause to bring a charge. One cannot claim to be protecting the Constitution from foreign threat by violating its most fundamental precepts. This is precisely what the Navy did in the King case.

One of the central concerns of the United States Constitution is the guarantee that the government could not hold a citizen without a formal charge or a prompt opportunity to prove his innocence. To this end, the Sixth Amendment of the Constitution expressly guarantees that in the United States all "accused shall enjoy the right to a speedy and public trial." U.S. Const., 6th Amend. The government is held responsible for administering an "orderly expedition" of charges against the accused. Smith v. United States, 360 U.S. 1, 10 (1959). The speedy trial guarantee is designed to protect an accused from a host of injuries-personal and legal-that result from prohibitively long delay. In that sense, the Sixth Amendment is not "primarily intended to prevent prejudice to the defense caused by the passage of time." United States v. MacDonald, 456 U.S. 1, 8 (1982). In fact, the Supreme Court "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." Moore v. Arizona, 414 U.S. 25, 26 (1973), citing Barker, 407 U.S. at 533.

While Congress did not have to expressly incorporate such a right into military regulations, it decided to afford even greater protection by making this right a prominent and express part of the Uniform Code of Military Justice (hereinafter "UCMJ"). Article 10 of the UCMJ states that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." The Court of Appeals for the Armed Forces (CAAF) interprets this language as providing protection greater than that afforded under the Sixth Amendment. United States v. Birge, 52 M.J. 209, 211 (CAAF 1999). The military further buttressed the Article 10 provision with Rules for Court-Martial (RCM) 707 requiring the trial of any accused within 120 days. These constitutional, statutory, and regulatory provisions create overlapping and heightened guarantees that no service member can be held without the benefit of a speedy trial. In this sense, the military sought to amplify, not abridge, the right to a speedy trial in its own justice system.

The period of incarceration in this case would shock the conscience of any observer [30] and has caused considerable controversy in the national media.[31] This is the longest known case of pre-referral confinement in the history of reported military cases. See, e.g United States v. Bray, 52 M.J. 659 (AFCCA 2000) (dismissed for 357 days of pre-trial confinement, but the court stated that 319 days of pre-referral confinement would have been excessive); United States v. Calloway, 47 M.J. 782 (NMCCA 1998) (dismissed for 131 days of pre-trial confinement); United States v. Longhoffer, 29 M.J. 22 (CMA 1989) (dismissed for 322 days of pre-trial confinement in a national security case involving classified information and security clearances for counsel); United States v. Pasciascio, 37 M.J. 1012 (ACMR 1993) (dismissed for 104 days of pre-trial confinement); United States v. Collins, 39 M.J. 739 (NMCCA 1994) (dismissed for 104 days of pre-trial confinement); United States v. Hatfield, 44 M.J. 22 (CAAF 1996) (dismissed for 106 days of pre-trial confinement); United States v. Schilf, 1 M.J. 251 (CMA 1976) (dismissed for 109 days of pre-trial confinement).[32]

[30] CTR1 King is held in "Special Quarters," the equivalent to maximum security lock-down condition in which he spends approximately 19-20 hours a day in his six-foot by nine-foot cell.

[31] See, e.g., Jim Oliphant, How Not to Prosecute a Spy, Part 2, Legal Times, December 11, 2000 at 3; Craig Timberg, Court Rules Spy Hearing Must Begin Again Publicly, The Washington Post, December 9, 2000, at B02; Laura Sullivan, Military Appeals Court Orders Navy to Restart Spying

Trial of Petty Officer, The Baltimore Sun, at 4A; Matthew Barakat, Navy Struggles with Spy Case, Associate Press, December 9, 2000; David E. Rovella, The Next Wen Ho Lee Case, National Law Journal, October 30, 2000, at A4; Matthew Barakat, Espionage Case Proceeds at Snail's Pace, Dayton Daily News, October 28, 2000, at 6B; Laura Sullivan, Government Gaffes Prompt Third Delay of Navy Spy Case Against Ex-NSA worker Cryptologist, The Baltimore Sun, October 6, 2000, at 13A; Sabrina Eaton, Dispute Over Security Lapse Delays Elyria Native's Spy Case, The Plain Dealer, October 6, 2000, at 17A; David Rovella, Defense in Spy Case Cries Foul, The National Law Journal, August 21, 2000, at A11; Jim Oliphant, Accused Spy Left Out in the Cold, Legal Times, March 20, 2000, at 1.

[32] These cases all deal with post-conviction appeals where the period of pretrial confinement is measured from the point of initial confinement until trial begins. In this case, charges have not been referred and CTR1 King has not appeared before a trial judge.

This Sixth Amendment violation in this case is obvious and deeply troubling. The instant case raises one simple reality. If the 520 days without a formal charge does not violate the Sixth Amendment, there would be no meaningful guarantee to a speedy trial in the military. The recognition and protection of that right cannot be discretionary or arbitrary. The right to appeal within the military courts, and ultimately to the federal courts, is designed to avoid the danger of such a diminished zone of constitutional rights in the military. In fact, Article 10 recognizes the practical effect of military exigencies and affords even greater protection than the Sixth Amendment right to a speedy trial.

Article 10 of the UCMJ requires the government take immediate steps to either try or release a person placed in pretrial confinement. Military courts apply a due diligence standard to this requirement. United States v. Kossman, 38 M.J. 258, 262 (CMA 1993). This standard is more stringent than the Sixth Amendment. United States v. Birge, 52 M.J. 209, 211 (CAAF 1999). Thus, even if the Navy were to argue that it somehow complied with the requirements of the Sixth Amendment, it could not argue that it complied with Article 10. As a result, the government has lost the ability to try Petty Officer King for these charges.

National security cases are routinely prosecuted in the federal system without the type of blunders and delays seen in Petty Officer King's case. There is no reason why Navy prosecutors could not perform the same minimal tasks as their federal counterparts. The Navy has sought to allow a "learning curve" for its prosecutors that exceeds any reasonable period for a speedy trial.[33] While the length of the delay has been the subject of considerable criticism in the media, the reasons for the delay were equally alarming to observers. As the Legal Times recently noted in a recent headline, this case has become the very symbol of "how not to prosecute [an alleged] spy." See Jim Oliphant, How Not to Prosecute a Spy, Part 2, Legal Times, December 11, 2000. See also David E. Rovella, The Next Wen Ho Lee Case, National Law Journal, Oct 30, 2000, at A4; Laura Sullivan, Government Gaffes Prompt Third Delay of Navy Spy Case Against Ex-NSA Worker Cryptologist, The Baltimore Sun, Oct. 6, 2000 at 13A. From the outset of this case, the Navy appeared entirely ignorant of how to prosecute a national security case and adopted a purely reactive approach by dealing with problems only upon objection to the defense. Moreover, while many delays were clearly the result of demonstrable incompetence, other delays can only be explained by acts of bad faith on the part of the FJA and the government counsel.

[33] What is particularly telling in the record is the failure of the trial counsel not simply to lay the foundation for a national security case but her failure to correct known problems during long stays issued by appellate courts. For example, the trial counsel failed to conduct a classification review or provide the required disclosure of evidence to the defense during these periods, leaving these issues to be addressed during the formal proceedings. Despite repeated defense objections, government counsel intentionally left these glaring problems unaddressed for weeks and months, an ill-advised decision that proved fatal to the presentation of its case. Moreover, the failure to provide evidence to the defense despite its availability and repeated defense requests manifests bad faith and assigns the burden for the delay to the government. United States v. Tebsherany, 32 M.J. 351, 354 (C.M.A. 1991).

Several facts establish that the delay in this case were due to a pattern of negligent, dilatory and vexatious practice by the government. First, the government maliciously interfered with the attorney-client relationship by imposing a monitoring agent. This unprecedented violation of the Petty Officer King's Sixth Amendment right to counsel necessitated a petition for extraordinary relief and a determination by CAAF that the government had failed to adopt "the least restrictive means of providing appropriate protection for classified information and appellant's right to counsel under the Sixth Amendment and Article 27, Uniform

Code of Military Justice, 10 USC § 827." See United States v. King, CAAF Crim. App. Dkt. No. 20000329, Order of May 8, 2000. Second, the government failed to follow proper security procedures prior to and during the Article 32 hearing despite running defense objections to government violations of federal regulations. The government routinely mishandled classified information and committed security violations that caused multiple delays. Third, the government resisted the repeated defense demands for a new Grunden[34] hearing until an extraordinary writ became necessary. At that point, when its actions were under judicial scrutiny, the government acquiesced to the defense demands and conceded the need for a new Grunden hearing. This Court then assigned constitutional error to the government and ordered an entirely new Article 32 investigation. Finally, the government refused to provide basic discovery while insisting that, absent an objection from defense, the Navy would begin Article 32 proceedings without affording defense counsel a chance to prepare or review the evidence. When the defense objected to proceeding without the opportunity to review evidence, the Navy immediately delayed and counted the time against Petty Officer King under RCM 707.

[34] A Grunden proceeding is held to establish the scope of exclusion of the public and media from the public Article 32 hearing and the review of evidence in a given case. United States v. Grunden, 2 M.J. 116 (1977).

A review of military cases shows the extreme nature of the violation in this case. The Court of Military Appeals (CMA) has stressed that "3 months is a long time to languish in a brig awaiting an opportunity to confront one's accusers. . . four months in the brig is even longer." United States v. Kossman, 38 M.J. 258, 261 (CMA 1993). Under this standard, over fifteen months awaiting a formal charge is unfathomable. It is undisputed that "[t]here must come a time when very long incarceration on a mere complaint deprives a prisoner of a constitutional right." Ex Parte Monti, 79 F.Supp 651, 654 (E.D.N.Y. 1948). In any legitimate legal system, 520 days of pretrial confinement, especially before an Article 32 investigation is completed, should be presumptively prejudicial. Cf. Hatfield, 44 M.J. at 24 (expressing shock that a service member could be confined for almost a month before his counsel was identified).

The government demonstrated a lack of due diligence with its delay in providing discovery, reviewing the classification levels of relevant evidence, completing the security clearance process, requesting detail of defense counsel, replying to discovery requests, obstructing attempts to remove barriers to Petty Officer King's constitutional rights, interviewing the accused before the assignment of counsel, and altering its positions on key issues only after the defense petitions the military appellate courts. The perplexing conduct of the government in this case made a mockery of the military justice system. In hundreds of national security cases, there is no recorded case with the type of bizarre errors and blunders that have been established in this case..

B. Misconduct of Individual Navy Officials.

LT Bailey is presenting some of these violations in his formal statement on behalf of the defense. For that reason, I will not dwell on these violations. Navy officials in this case committed a number of violations of federal and military law. Briefly, these violations include:

1. *Constitutional Violations.* In addition to the speedy trial violations, the Navy committed a number of constitutional violations. Before the dismissal of the case, the defense filed and won two emergency writs of mandamus based on constitutional violations. The first violation concerns the imposition of a monitoring agent for attorney-client communications. See generally Vince Crawley, Navy Spying Case Pits Rights vs. Military Secrets, Navy Times, May 15, 2000. When CDR Newcomb suggested this restriction, I informed him that it was entirely unconstitutional and that the Navy would lose any appeal. CDR Newcomb admitted that he knew of no precedent or authority for the action but proceeded to terminate confidential attorney-client communications anyway. Ultimately, the Court of Appeals for the Armed Forces ruled in favor of the defense and stayed the entire case until confidential communications were reinstated. The Navy eventually admitted that uncleared attorneys and staff could meet without a monitoring agent and abandoned CDR Newcomb's policy entirely. This resulted in a long delay of proceedings as did the belated action of the Navy to clear lead counsel and LT Bailey for program material.

The second constitutional violation occurred when the Navy failed to properly conduct proceedings necessary to exclude the public from the proceedings. Again, defense counsel repeatedly warned that the interpretation of the Grunden proceedings advanced by CDR Jowers was fundamentally in error. The Navy refused to correct the proceedings. The defense again filed an emergency appeal and again prevailed. The Navy-Marine Court of Criminal Appeals vacated the entirety of the Article 32 proceedings due to the violation of the Sixth Amendment and the Navy had to begin the case from the beginning.

What is troubling about these violations was the failure of CDR Jowers and CDR Newcomb to respond to the obvious constitutional errors identified by the defense. Ultimately, these and other violations cost the government essential time and prolonged the incarceration of Petty Officer King.

2. *Release of False and Prejudicial Statements to the Media.* As noted in the following section, various named and unnamed officials made false and prejudicial statements to the media in this case in violation of federal and military rules. These statements also included the release of personal, privacy-protected information[35] on Petty Officer King's private life, financial status and other intimate matters. Despite the fact that VADM Mobley, ADM Guter, and CDR Newcomb were informed of these violations, the Navy refused to investigate or act in response to the media articles. As discussed below, some of the misleading or false information was traced to CDR Newcomb and CDR Roxie Merritt.

> This included the release of polygraph results at the outset of the case. See DoD Polygraph Program, DoD Directive 5210.48-R, January 1985 at 2-3 ("polygraph examination technical reports shall not be disseminated outside the Department of Defense. Normally, these reports are exempted from release under the provisions of Exemption 7 of the Freedom of Information Act (see DoD 5400, reference (g).")

3. *False Statements Made to Counsel and the Court.* The transcript and record in this case also establishes false statements made to defense counsel and to the court. The defense repeatedly objected to knowing false statements by CDR Newcomb. This included his denial that the defense had asked for declassification of documents and a mandatory classification review - despite previous letters and communications produced by the defense. See Appendix C. The defense also documented numerous false statements made by CDR Jowers to the court, including statements that were directly contradicted on the record by government witnesses. These false statements will be documented in the transcript in this case. Witnesses also made false statements under oath. As noted above, this included Ms. McCaffrey who admitted to false statements under oath during her cross-examination.

4. *The Failure to Perform Adequate Classification Reviews.* As previously discussed, the Navy failed to properly perform basic classification review of material in this case. At least four such reviews were carried out by the Navy. Each review disclosed major errors and violations by the Navy. Program officials like Ms. McCaffrey further admitted in testimony that they could not perform such reviews or determine what material fell under their respective programs. What was particularly alarming was that CDR Newcomb and CDR Jowers did not complete a classification review during the long periods in which the case was stayed for appellate review. Instead, classification reviews were repeatedly performed in the midst of the Grunden proceedings - a ridiculous exercise that resulted in chaos and delay.

5. *Unlawful Withholding Exculpatory Information and Discovery.* The Navy openly and unlawfully withheld discovery in this case, including withholding exculpatory evidence in the form of audio and video tapes. The Navy was under an obligation to turn over these tapes in the beginning of the case. NCIS agents had previously denied that there were any tapes of questioning other than the actual polygraph examinations. Moreover, in December, 1999, the defense formally requested all such tapes. It was not until a few weeks before dismissal that these tapes were finally turned over to the defense. These tapes were discovered by LT Freedus by accident secreted in the NCIS locker. They represented some of the most exculpatory evidence in the case, including recorded conversations where King is repeatedly denying that signed statements were true. The audio and video tapes reveal a sobbing Petty Officer King asking for the interrogations and polygraphs to end. On the tapes, King repeatedly makes such statements as "I'm starting to make stuff up to please you to get through this" and stating that he was inventing facts "to say something to get through this so I can get back to my family." King later states that the long interrogations have destroyed any line between fantasy and reality and pleads "I don't know what I'm supposed to give you." The NCIS also videotaped a meeting requested by King with a Navy psychiatrist in which King is shown crying and pleading with the Navy doctor to put him under hypnosis or to give him sodium pentothal (truth serum) to show the NCIS that he didn't commit any act of espionage. King is shown stating that he is exhausted from the interrogations.

The Navy also withheld other significant information and material in a clear effort to hamper cross-examination of witnesses. The most obvious proof of this bad faith conduct was revealed after the dismissal. From the outset of the case, the defense requested the interrogation logs of the NCIS. The Navy withheld the logs from the defense discovery for hundreds of days. However, when CBS Sixth Minutes requested the logs, the Navy gave the logs to the media within four days. Accordingly, the Navy believes that a media organization has greater claim to evidence than a defense in an espionage case where the government was seeking the death penalty. The defense has obtained its copy of these logs from the media.

5. *Witness Tampering.* During the cross-examination of a government witness, the witness suddenly excused herself on the basis that the cross-examination was too stressful. When the cross-examination was terminated, the defense was in the process of showing that the testimony on direct examination was flawed and incorrect as to the classification of certain documents. This witness, like all witnesses, was placed under a sequestration order and told not to reveal her testimony to anyone. CDR Jowers then called a substitute witness who was not given the documents in question until the day before her testimony. It was clear that the witness was not competent to testify. As to the first document, the witness admitted that she could not even understand the document - despite her testimony on direct examination that particular words fell under a particular program. The judge agreed that she was not competent to testify as to that document. When the witness was then cross-examined on the second document, it became apparent that she was reading from a pre-marked document. I asked to see the document and immediately recognized that bracketed words matched the prior testimony of the earlier witness. Judge Winthrop confirmed that the witness had been sent a pre-marked copy of the document, indicating the previous testimony of the sequestered witness. The faxed copy had been sent from the office of CDR Jowers. Judge Winthrop dismissed the witness and called for an investigation into the witness tampering. This is also recorded as part of the still uncompleted transcript in the case. We are unaware of any steps that the Convening Authority took to investigate this issues, as requested by Judge Winthrop.

6. *Interrogation of the Accused Without Counsel.* In one of the most shocking violations in the case, it was revealed that CDR Jowers and another prosecutor, LT Mindi Seafer, interrogated Petty Officer King with the NCIS after he was placed into the brig. The prosecutors questioned King on his alleged guilt and possible motives without the benefit of defense counsel. Both CDR Jowers and LT Seafer insist that they cannot remember if they took notes and cannot find any notes. While Petty Officer King stated that he denied the espionage (and Mr. Rogers recalled such exculpatory statements), CDR Jowers and LT Seafer have claimed total loss of memory as to their unlawful and unethical interrogation of this sailor.

C. National Security Violations by Navy Officials.

As with the violations of national security rules by NCIS officials and agents, we cannot present a full account on the violations of Navy officials until the Navy gives us access to our classified notes, access to a SCIF, and a classified computer. However, it is important to emphasize that the transcript in this case contains admissions of national security violations by various Navy officials as well as admissions of giving false information and testimony under oath. It was Navy officials like VADM Mobley, CDR Newcomb, and CDR Jowers who refused to take steps to prevent the continued compromise of program information in this case. It was these same officials who refused to take minimal steps to protect information and correct violations. This led to extremely serious violations of national security rules. These violations are described in the attached unclassified letters.

Despite over a year of formal objections to these violations, the DNI and DCI have never contacted the defense or our security officer for details on these violations. Moreover, Ms. McCaffrey testified on cross-examination that the DNI had not conducted an inquiry. Ms. McCaffrey also admitted that (1) she had committed "serious" national security violations; (2) her staff had committed "serious" violations; (3) "serious" violations had not been disclosed as required by her staff; (4) she had submitted false information under oath in the case; and (5) she had given false testimony on direct examination in the case. CDR Jowers also admitted that serious violations had been confirmed in the case. The defense identified dozens of such violations in the case. Yet, while prosecuting the two alleged violations by Petty Officer King criminally, no one from the Navy or the DNI have made any contact with the defense on these violations that are far more serious than any allegation made against Petty Officer King.

In prior letters to the Director of the Central Intelligence Agency and the Navy, I have given notice of a variety of violations described below.

1. Failure to Investigate or to Inquire into the Allegations.

Various program and Navy officials have steadfastly opposed any formal review of the violations in this case due to their own professional and legal interests. For example, when the defense wrote to the NSA concerning violations by Navy LT Timothy Orr, NSA General Counsel Robert L. Deitz replied stating that no violations had occurred and that the allegations were meritless. Before reaching this conclusion, Mr. Deitz never contacted the complaining party. Accordingly, Mr. Deitz would have had to rely upon conversations exclusively with the accused party to reach such a conclusion. It is shocking that the general counsel for an intelligence agency would be so cavalier about allegations of security violations as not to make any independent inquiry with the complaining party. The failure of any intelligence official to contact the accusing party on these allegations speaks volumes as to the reluctance of responsible agencies to

acknowledge and respond to comprehensive violations by their own officials. Months have gone by without such an inquiry, an act of omission that itself constitutes a violation of national security regulations.

It is not possible to give details of the specific allegations of national security violations in this case in an unclassified letter. However, it is important to convey the scope and gravity of these violations. What is striking about these violations is that they involve virtually every possible failure to protect program and other classified information, including violations relating to (1) the physical facility for the discussion of classified material; (2) the marking, storage, and handling of classified material; (3) the disclosure of classified material to unauthorized personnel; and (4) the proper response to unauthorized disclosures and other national security violations. These violations are described with greater detail in Appendix B.

IV. A RESPONSE TO FALSE STATEMENTS MADE ABOUT THE KING CASE AFTER ITS DISMISSAL.

A variety of statements have been made in the aftermath of dismissal of charges in this case. Some of these statements by the Navy and the NCIS are manifestly false. Below are a few of those statements and brief responses to clarify the record in this case.

A. The NCIS Had No Choice But to "Investigate" These Allegations.

After the military judge found insufficient evidence to establish probable cause and questioned whether the signed statement was coerced, the NCIS director repeatedly stressed that the NCIS had an obligation to investigate. A statement was released to the media[36] stating the following:

> "[W]hen a Sailor with access to the U.S. Navy's most sensitive programs repeatedly states that he betrayed the Navy's most crucial secrets, the Navy has an obligation to investigate."

[36] This statement was released by various Navy and NCIS officials, including Commander Greg Smith, Director Media Operations, CHINFO, 703-697-5342 (smith.gregory@hq.navy.mil). These statements also parallel public statements by the Director of the NCIS to the media.

This widely disseminated statement is crafted to ignore the actual facts of the case. The NCIS did not start an investigation after Petty Officer King admitted to any betrayal. The record shows that it was not until eight days into the espionage investigation and after over 19 hours of interrogation that King signed any statement on espionage. The NCIS began this investigation after a "no opinion" result on a polygraph examination. It was the NCIS, not King, that probed fantasies of espionage and continued to interrogate exclusively on the subject of espionage. As noted above, the NCIS should have simply given this sailor another polygraph after a common "no opinion" result before triggering a full-fledge espionage investigation. The obvious misleading intent behind this statement is to suggest that Petty Officer King confessed immediately to such acts - a statement refuted on the record of signed statements, the audio tapes and other evidence in this case.[37]

[37] The Navy also told the media that Petty Officer King had "confessed early" and "within hours." After I was asked to respond to these statements, Navy spokespersons backed away and admitted that there was not reference to any espionage until eight days into the interrogations.

B. "[T]he navy could not responsibly have chosen to simply ignore Petty Officer King's inability to pass his polygraph and subsequent incriminating statements."

This statement was also part of the public release by the Navy after the dismissal of the case. As noted above, the statement does not mention that Petty Officer King did not fail his polygraph and did not make incriminating statements in triggering any investigation. Petty Officer King had a "no opinion" result on a polygraph and repeatedly denied any espionage. It was only after eight days of abusive interrogation that he signed such a statement. Both military detailed counsel in this case had "no opinion" results on their polygraph examinations and NCIS agents admitted that everyone in this field has a fantasy of espionage at some time in their career. The Navy chose to continue to interrogate this sailor for 29 days and eventually compelled a statement to justify its bizarre response to this polygraph examination.

C. "Petty Officer King also said he considered going to Russia to hurt the Navy by revealing sensitive information."

This statement was also part of the public release by the Navy after the dismissal of the case. This statement is also knowingly misleading and false. During the interrogations, King admitted that he had been angry with the Navy at points in his 20-year intelligence career and that he had fantasized of being a spy. However, in the first three statements that he signed, King expressly stated that he never engaged in such acts and they were just passing flights of fancy. Furthermore, NCIS agent Hyter admitted that everyone in this field has such fantasies. The Navy never mentions in its statement that this reference comes from what NCIS agents refer to as fantasies on the audio tapes. The Navy never mentions that Petty Officer King repeatedly emphasized that these were merely fantasies or that he expressly denied engaging in such conduct. The clear effort is to mislead at the cost of this sailor's reputation and the facts in the case.

D. "Petty Officer King also said . . . that he had committed serious security violations."

This statement is also part of the public releases by the Navy. Once again, the statement is clearly designed to mislead the public and Congress. The Navy brought two charges for national security violations distinct from the espionage charge. Both of these charges were summarily dismissed by Judge Winthrop as minor allegations that, even if true, should not have been submitted for prosecution. Judge Winthrop wrote:

> "Although the evidence may surmount the low threshold of an Article 32 investigation, and that is by no means certain, I don't believe the government evidence on any of the charges in this case is strong. On the other hand, the defense evidence in extenuation and mitigation is significant."
>
> "a. The wrongful disclosure allegations, and the related charges involving dereliction of duty and wrongful communication, are exemplary in this regard. The alleged violations occurred while the accused was on duty in a Sensitive Compartmented Information Facility (SCIF) in the presence of fellow servicemembers with high level clearances. Each allegation is based on the recollection of one witness of events that occurred six and four years ago, respectively. Thus, on the merits, the government has one witness who will be required to rely on memory for events that occurred several years ago. With respect to extenuating and mitigating circumstances, it must be emphasized that the alleged disclosures occurred in secure areas to personnel that otherwise had high level clearances, but not access to the specific program in question. Thus, the threat to national security from these alleged violations was minimal. Furthermore, one witness did not take the disclosure seriously, while the other witness considered the information helpful in performing her job. It appears in both cases that the accused was disclosing the information to assist others in performing their duties. These facts constitute strong extenuating and mitigating evidence."

The Navy brought no other charges of national security violations. Ironically, the defense has detailed over three dozen proven violations of national security rules in this case by Navy and NCIS officials, including the identical violations made against Petty Officer King. Some of these unauthorized disclosures occurred in unsecure locations, like hotel rooms, and involved entirely uncleared individuals. Ms. McCaffrey admitted under cross-examination that she had committed "serious" violations of national security rules as did her staff. CDR Jowers admitted that serious national security violations had been committed by NCIS agents when, in one such incident, agents played a tape containing program information on an uncleared VCR in a hotel room to an audience of unauthorized agents. Yet, no one with the DNI or the Navy or the NCIS have contacted the defense or our security expert for evidence of these violations. If the Navy and NCIS felt compelled to investigate and prosecute such charges, the failure to prosecute violations that are proven on the record belies their public claims.

What is clear is that, unlike the allegations against Navy and NCIS officials, the two alleged violations by Petty Officer King were facially ridiculous from the outset. One charge was based on a witness who twice denied any such disclosure and, only at the continued probing of the NCIS, stated that she had a vague recollection of Petty Officer King gesturing to a map in a way that might have implicitly revealed program information. This had occurred years before in a brief gesture in a SCIF. The witness in deposition admitted that she did not think it was a violation at the time and only came upon the incident after pressing by the NCIS. The other charge was based on a witness that the Navy refused to make available to the defense over months of requests. This witness was actually "read into" the program just a few days after an incident that occurred years ago. The witness stated that King had disclosed program information in a meeting. However, the Navy hid the fact that this witness had previously identified an entirely different program from the program alleged in the classified allegation. The NCIS simply blacked out the name of the program and never revealed to the defense that the witness gave a different account of the disclosure. The defense was able to prove the deception shortly before the case was dismissed when it came across an original copy of the statement with the original program named. No judge would have found this allegation credible and it was extremely unlikely, as noted by Judge Winthrop, that either of these charges would have survived motions to dismiss.

E. "CTR1 King failed multiple additional polygraph examinations, all of which were conducted in accordance with strict Department of Defense guidelines."

At no point in the numerous statements issued by the Navy or the NCIS is there an admission that Petty Officer King did not fail his first polygraph examination but had a common "no opinion" result. He continued to have such results on the second and third days of interrogation. The suggestion that these polygraphs met professional standards is laughable. First, the NCIS agents never inquired about King's use of various drugs, some of which were seized in his room. King was openly taking over-the-counter drugs for weight-lifting and weight-loss as well as drugs for medical conditions. These drugs can heighten responses and produce exaggerated responses to stressful questions. Second, the NCIS continued to interrogate King for hours while calling him a spy. He would be moved from highly prejudicial and stressful interrogations into these tests. The audiotapes in this case show King weeping and sobbing. He asks to go to sleep but is told to continue with the interrogations. For long periods, he cannot speak but has to listen to affirmative statements from agents that he is a spy and must come clean for the benefit of his family. Agents repeatedly emphasize that, absent a confession, his youngest girl, aged 15, would have to be dragged into this mess.[38] The agents lied to King and stated that he had failed polygraph examinations where he actually produced a "no opinion" result.[39] It is common for NCIS agents to lie to suspects as an interrogation technique. However, in polygraph examinations, such lies undermine the results. By telling someone falsely that they failed, you guarantee that the person will elevate on the questions in anticipation on later examinations.

[38] Ultimately, the NCIS questioned both daughters and resisted efforts of their mother to be present for the interview of Melissa, age 15. The NCIS lied to both girls and told them that this was merely a routine security update. The NCIS tried to get the girls to incriminate their father on any criminal act ranging from drug use to abuse.

[39] It is important to note that these "no opinion" results are merely the conclusion of the same agents who launched this investigation. I have handled polygraph cases in the past and I have asked for the original print-outs. The NCIS has refused to allow me to independently review these tests despite the fact that I hold a higher clearance than most of the agents who participated in the case.

Third, from the first day, the agents forced King to repeatedly repeat prior fantasies and dreams of espionage. The agents repeatedly had King write down the fantasies and sign them as statements. King is heard on these tapes having an increasing difficulty in distinguishing fantasy from reality. Deposed agents admitted that he appeared to be struggling with what was real and what was dream during the interrogations. Yet, while lying to Petty Officer King about failing polygraph examinations, the agents repeatedly polygraphed King on the subject of these recounted fantasies. The use of such examination in this context is absurd and would not meet any professional standard.

DoD regulations expressly state that, before any polygraph examination is administered, agents must "[e]nsure that the person to be examined has not been subjected to prolonged interrogation immediately before the polygraph examination." See DoD Polygraph Program, DoD Directive 5210.48-R, January 1985 at 2-1. The NCIS repeatedly violated this rule. The DoD regulations expressly state that an examiners should forego examinations if there is any doubt that the individual "is physically or mentally fit to be tested." Id. at 2-2. "In these instances, the examination shall be discontinued or postponed until appropriate medical, psychological, or technical authorities have declared the individual fit for testing." Id. NCIS agents admit that they believed King to be potentially suicidal and admitted that he was having difficulty distinguishing fact from fantasy. Nevertheless, they continued to give him multiple polygraph examinations without seeking an appropriate examination for his mental and physical fitness. This rule is repeated throughout the DoD guidelines:

> Persons who are not in sound physical or mental condition will not be subjected to a polygraph examination. Should the examiner or examinee have any doubt as to the physical or mental fitness of the examinee, the matter shall be referred to medical authorities. An examiner shall not attempt to make a psychological or physical diagnosis of an examinee.

Id. at 3-3; see also id. at 3-4 ('Polygraph examinations shall not be conducted if . . . the examinee is mentally or physically fatigued [or if] the examinee is unduly upset, intoxicated, or rendered unfit to undergo an examination because of excessive use of sedatives, stimulants, or tranquilizers."). The polygraph examinations in this case could not have been intended to measure truth. In both DoD guidelines, and those of other agencies, it is clear that these examinations are not to be used for interrogation purposes or ploys, including the use of lies as to the result of the tests. CF Id. at 3-3 ("The

polygraph instrument shall not be utilized as a psychological prop in conducting interrogations.") with 10 CFR 709.25 (2001) ("DOE . .. may not "[u]se a polygraph examination that reflects 'deception indicated' or 'no opinion' as a substitute for any other required investigation."). Over the course of 29 days of interrogation, false statements by NCIS agents, threats to family members, and fantasy reconstruction, these agents were able to produce predictable examinations showing elevation on espionage questions. The repeated reference to these later polygraph examinations is astonishing given the unprofessional and abusive conditions in which they were administered.

F. "The interviews were reasonable, relaxed, and many were at the request of CTR1 King."

This is also from the public statement of the Navy. This statement is knowingly false. The audio tapes in this case show King weeping and sobbing. During 19-hour interrogations, King asked to go to sleep but is told to continue. At times, King is shouting "I don't know what I'm supposed to give you" over and over at the agents as they press him for a signed confession. Moreover, it is noteworthy that King seeks the assistance of a psychologist for hypnosis on the videotaped interview with NCIS psychologist Dr. Michael Gelles. After his return to the United States, King was clearly trying to find a way to distinguish fantasy from reality. He told Gelles that he had no memory of the espionage facts but says that the polygraph examinations prove that he must have done something - a clear misconception that neither Gelles nor the agents correct.[40] King asked for hypnosis and truth serum to determine if this is merely a dream. Gelles told him that he might give King hypnosis if King goes back and gives the agents "corroborating" evidence. Gelles told King that he could trust the agents and says that the agents are clearly his friends, he had a "special relationship" with the agents and the agents "will be with you forever." Gelles virtually ignored the statement of King that he had suicidal thoughts when he left Guam - two days before the interview. Instead, Gelles told King to give corroborating evidence as a precondition for the hypnosis that King sought to clear his doubts as to any espionage.[41] These tapes show a sailor who is struggling with his total inability to remember any act of espionage while clearly accepting the false representation that, if a polygraph examination shows deception, he must have committed such an act. It is difficult to watch and listen to these tapes because they show a total disregard by the NCIS for any effort at determining the truth of these allegations as opposed to making a case at any costs.

[40] Gelles conducts the interview with King with Agents Wilson and Helen present. The interview is videotaped without consent of King. Gelles never reads King his rights to alert him of the videotape or that statement could be used against him, as is required by the Supreme Court. See, e.g., Estelle v. Smith, 451 U.S. 454 (1981); Brown v. Butler, 876 F.2d 427 (5th Cir. 1989). Instead, Gelles refers to himself as "the doc" and "not an agent."

[41] As noted earlier, Dr. Gelles has been notified that charges will be brought against him on the basis of this videotape with the American Psychological Association.

G. "CTR1 King never told NCIS he wanted a lawyer, and he never asked for a lawyer."

This is also part of the official statement released by the Navy and the NCIS. It is knowingly and demonstrably false. Petty Officer King asked for an attorney on October 5, 1999 in an interrogation by NCIS agents, including Stuart Wilson and Robert Hyter. Documents in the case establish at least two additional invocations of his right to counsel. On October 8, 1999, King signs a waiver of his right to remain silent but specifically invokes his right to counsel. King initials his statement that "I do wish to have my lawyer present during the polygraph examination." In a later waiver form, King again clearly asks for an attorney and again signed a statement (and initials an invocation), stating "I do desire to have my lawyer present during the polygraph examination." No lawyer was ever produced by the NCIS which continued to do polygraph examinations with long interrogations before and after the tests. Under Edwards v. Arizona, 451 U.S. 477 (1981), an attorney should have been supplied to King and interrogations suspended immediately when he asked for a lawyer on October 5, 1999. The forms on October 8, 1999 show King continuing to ask for an attorney, which was denied by the NCIS. The record shows that the Navy and NCIS simply denied this request and then lied to the public. Unfortunately, such "intentional ignor[ing]" of invocation is not uncommon, see e.g., Soffar v. Johnson, 237 F.3d 411, 457 (5th Cir. 2000), but the subsequent false public statements are shocking.

After the Navy and the NCIS issued these false statements, the defense released the documents showing invocations of counsel. The response of the Navy was that these were merely "typographical errors" despite the fact that King both signed the form and initialed the specific language added on the invocation. Nevertheless, the Navy has also insisted that all of the other forms signed by King during the 29 days of interrogation as accurate and sufficient to maintain a capital espionage case. In defense of its conduct in the

case, the Navy has repeatedly emphasized that "King reviewed each statement, made the changes that he wanted to make, and signed each statement . . . . He swore to the voluntariness and truthfulness of each statement." Vernon Loeb & Walter Pincus, Pentagon Probes Spy Case Navy Dropped Against Sailor, The Washington Post, March 29, 2001 (statement of LCDR Cate Mueller, spokesperson for the United States Navy). This statement is also part of the formal statement release by the Navy and the NCIS. Yet, when confronted with two contradictions on invocation, the Navy now insists that only those statements upon which it wishes to rely are accurate. Where statements contradict the Navy, they are to be dismissed as in error. Obviously, the Constitution takes a more reasoned approach. When an individual signs a written invocation of counsel, it is treated as an invocation not a typographical error. Otherwise, every invocation could be dismissed on such a ridiculous basis.

> H. "The Naval Criminal Investigative Service did not have further contact with CTR1 King after he was ordered into pretrial confinement on October 28, 1999."

This was also part of the public statement of the Navy and the NCIS. This statement was part of the argument that Petty Officer King was not in custody until he was placed in the brig. No one but the NCIS and CDR Jowers has accepted this argument. King was under 24-hour guard and moved from safe house to safe house in Guam. He was told that he would be shot if he attempted to escape. He was required to shower and go to the bathroom in the view of agents. However, putting aside the obvious elements of custody, neither the Navy nor the NCIS has ever revealed that military courts rejected this argument. The Navy-Marine Court of Criminal Appeals twice stated that Petty Officer King was in custody starting October 2, 1999, when he was placed in the first safe house. The Navy did not contest this finding in an appeal to the Court of Appeals for the Armed Forces. Yet, after appellate courts have already decided this issue, the Navy and the NCIS continue to release false information to attempt to mitigate their misconduct in the case.

What is equally disturbing is that even the affirmative statement regarding the cessation of NCIS interrogations or further contact is false. The defense has sign-in sheets from the Quantico brig showing that, after King was placed in the brig, interrogations continued. The log shows NCIS agent Kenny Rogers signing in for an interrogation of King on October 31, 1999, three days after he was placed in the brig. This interrogation was particularly outrageous because it was conducted by the prosecutors without defense counsel, with the assistance of the NCIS. Mr. Rogers accompanied CDR Jowers and LT Seafer and assisted them in an interrogation of Petty Officer King without counsel in violation of a host of fundamental constitutional and statutory rights. Mr. Rogers admitted in deposition that he participated in this interrogation in the brig and at times was alone with King during questioning.

> I. The evidence in the case was strong and the case was dismissed due to blundering and inexperience of the prosecution.

The description of the evidence in this case as "strong" is directly refuted by the military judge who reviewed the evidence and found that it did not even meet the standard of probable cause to bring a formal charge. Judge Winthrop stated that "I don't believe the government evidence on any of the charges in this case is strong. On the other hand, the defense evidence in extenuation and mitigation is significant." The only evidence in the case was a statement that was inadmissible, contradicted at the time by Petty Officer King, and found by Judge Winthrop to be uncorroborated and probably coerced. The Navy confirmed in the proceedings (and in writing to me on March 8, 2001) that it had turned over any and all possible corroborating evidence in the case.

The portrayal of the prosecution as inexperienced and outmatched belies the record. A week after Chairman Shelby criticized the investigation and prosecution for blunders, the Navy held a public awards ceremony for CDR Jowers on Friday, March 30, 2001. At the ceremony, CAPT James McPherson stated that "CDR Jowers is one of the preeminent practitioners of military justice in the JAG Corps." The award reads in part:

> The President of the United States takes pleasure in presenting the MERITORIOUS SERVICE MEDAL (Gold Star in lieu of the Third Award) . . .
>
> For outstanding meritorious service as Office in Charge, Trial Service Office . . .High-visibility, highly sensitive and complex cases, many involving direct congressional and flag-level interest, were the norm for Commander Jowers and her superb staff. . . . Commander Jower's [sic] exceptional professionalism, personal initiative, and total dedication to duty reflected great credit upon her and were in keeping with the highest traditions of the United States Naval Service.

This award was signed by Admiral V. E. Clark, Chief of Naval Operations and must have been submitted during the pendency of the case. See also Al Kamen, Mixed Messages, The Washington Post, April 2, 2001, at A17 (discussing the conflict between Senator Shelby's comments and the Navy award). Moreover, when this case was first assigned to defense counsel, the Navy selected two young lieutenants fresh from law school to handle a death penalty espionage case. With only months of experience, LT Bailey and LT Freedus were put up against one of the most experienced prosecutors in the Navy with over 150 trials to her credit. I was asked into the case shortly after their appointment and I agreed to serve as lead counsel. In the first oral argument before the Court of Appeals for the Armed Forces, the selection of inexperienced defense counsel to oppose a seasoned prosecutor was repeatedly criticized by the judges.

What is ironic is the suggestion that the Justice Department might have prevailed in this case given the common comparison of this case to the botched Wen Ho Lee case - a Justice Department prosecution. See, e.g., David Rovella, Spy Case is Sunk: The Navy had its own Wen Ho Lee locked up for 500 days, The National Law Journal, March 26, 2001, at A22; Jim Oliphant, How Not to Prosecute a Spy, Part 2, The Legal Times, December 11, 2000, at 3; David Rovella, The Next Wen Ho Lee, The National Law Journal, October 30, 2000, at A4. What is disturbing about any suggestion that the Justice Department might have produced a different result is that the fact that the military judge recommended dismissal on the basis of a lack of evidence. Judge Winthrop stated that the evidence in the case was so weak that it fell short of even a minimal probable cause level needed to bring a charge. The suggestion that the Justice Department might have secured a conviction on evidence less than probable cause is a frightening indictment of our system of justice. Obviously, there was glaring prosecutorial misconduct and negligence in this case. However, no prosecutor can create evidence where no evidence exists. Ultimately, this case failed because of the paucity of the evidence and not any inadequacy of the prosecution. Moreover, most of the errors committed by the prosecution in this case had little to due to any specialized national security procedures or rules but rather basic litigation issues like failure to properly prepare witnesses, opening the door on direct examination, and maintaining control over the schedule and material in the case. In the end, however, the military judge was left with nothing more than an unreliable, inadmissible statement and no corroborating evidence to support a charge of espionage.

J. The investigation was bungled in this case and, had the FBI been given the case, the result would have been very different.

Chairman Shelby has publicly criticized both the NCIS investigation and the JAG prosecution in this case as bungled and botched. I certainly do not disagree with that obvious assessment. As with the issue of prosecutorial negligence, however, it is important not to assume that more evidence of espionage would have been discovered by a competent investigative body. The NCIS conducted hundreds of interviews and sought corroboration in every possible form. They failed to find any corroboration because a disk was never sent to the embassy. The blunder of the NCIS was in the very outset of the case when it allowed a polygraph glitch to mutate into a full-fledge espionage investigation. After per se abusive interrogation techniques used over 29 days, the NCIS repeatedly found that statements coerced from this sailor were either untrue and unfounded. Rather than consider their own interrogation abuses as the most likely cause for the sharp disconnect, the agents simply pushed harder for more statements and the ever-illusive corroboration. Once the NCIS found that past statements were untrue or unfounded, they should have considered the possibility that their techniques had produced a hopelessly confused and unreliable suspect. This is a predictable result of having someone repeatedly writing and talking about fantasies and dreams for 29 days for interrogation session lasting 19 or 20 hours. NCIS agents further eradicated the line between fantasy and reality by repeatedly lying to King about his test results and convincing him that if a polygraph shows deception there must be truth to these fantasies. In the end, it was essential to prove that they had uncovered a spy rather than simply had broken a sailor.

There is no basis to believe that a competent investigative agency would have uncovered corroborating evidence in this case. It is enormously unfair to Petty Officer King and his family to allude to unknown evidence in some unexplored corner that would have proven guilty. Such suggestions could be made in any case where the government failed to prove guilt. It constitutes guilt by insinuation and undermines the very foundation for the rule of law. The NCIS spent copious amounts of time and money to defend its decision in this case and find evidence of espionage. No such credible evidence was found because none existed.

K. There was corroborating evidence in this case espionage.

As noted earlier, there was a torrent of leaks and false statements given to the media in this case. Named and unnamed officials set out to prejudice this case in the media from the outset with disclosures that clearly violate federal law and military regulations. See, e.g., Neal Thompson & Tom Bowman, Ex-NSA Expert Charged as Russian Spy; Navy Petty Officer Said to Admit to Passing Secrets, Baltimore Sun, Dec.

1, 1999, at 3A (detailing information from "a senior Pentagon official" and "another Pentagon official" about King's family difficulties, promotion problems, polygraph results, theory of the case, statements made in interrogations, King's bank records, alleged disk transfer, and CTR1 King's work for "the Naval Security Group at NSA's headquarters in Fort Meade"); Bell Gertz, Navy Petty Officer Charged With Passing Secrets to Russia, Wash. Times, Nov. 30, 1999, at A3 (quoting "officials" in detailing CTR1 King's work for "the Naval Security Group at Fort Meade, Maryland" with submarine surveillance; failed polygraphs, and statements made by the accused). All these facts were attributed to specific spokespersons or confidential sources "close to the investigation." As noted earlier, in March, I was asked to respond to a statement made by CDR Newcomb. With the case still pending, CDR Newcomb told CBS Sixty Minutes that there was actually an abundance of corroborating evidence of espionage in the case. I immediately wrote to CDR Newcomb on March 8, 2001 and demanded an explanation. Since no such evidence had been presented in the proceedings, the statement was either false or the government was again withholding evidence. CDR Newcomb wrote back to state that all possible corroborating evidence had been disclosed to the defense and the military judge. No corroborating evidence was being withheld. CDR Jowers also confirmed that any and all corroborating evidence had been disclosed. The only piece of evidence that the Navy could even offer as corroborating was a log that would be rejected in any court as corroborating evidence in this case. Yet, Judge Winthrop was extremely critical of the absence of corroborating evidence in the case and stated that such evidence did not seem to even meet the standard of "slight" evidence of corroboration. Judge Winthrop stated that, even if Petty Officer King's statement was found to be voluntary, "I question whether the mere existence of the daily, log provides independent evidence of an 'essential fact' of the confession, i.e., the act of espionage." In fact, the classified evidence in this case contains a great deal of exculpatory evidence including the audio tapes and investigative reports that find no evidence that Petty Officer King's account actually occurred.

CDR Newcomb's comments to the media were simply false and designed to create the false impression of supporting evidence. As one of the individuals most responsible for this debacle, CDR Newcomb had a personal interest to suggest that there was an evidentiary basis for bringing and maintaining this case. He simply ignored the personal and reputational damage that such false statements caused Petty Officer King and his family.

L. Petty Officer King is a "self-confessed traitor."

Perhaps the most shocking act of retaliation by the Navy occurred in the aftermath of the dismissal. In a public statement issued on behalf of the Navy, CDR Roxy Merritt called Petty Officer King "a self-confessed traitor." This personal attack occurred when there was no pending action against this sailor and after a military judge stated that the signed statement in the case was unreliable, contradicted, and possibly coerced. Yet, this high-ranking officer used this statement to personally attack an active duty enlisted man. This type of attack is reminiscent of authoritarian nations that do not respect the rule of law and seek to destroy individuals through propagandistic slurs and false statements. It is simply breathtaking to see the Navy strike out at a sailor after it failed to prove its case, including the truth and validity of the statement. Despite a letter calling for a retraction of this statement, the Navy has refused.

M. The dismissal of this case had nothing to do with the recommendation of the military judge.

Within one hour of the release of Judge Winthrop's recommendation of dismissal for lack of evidence, reporters were told that the case would likely be dismissed in light of the recommendation. Within hours of the recommendation, the case was dismissed. The Navy, however, had already begun to spin an alternative explanation to re-direct attention away from the decision of Judge Winthrop. The Navy insisted that the recommendation only hours before had nothing to do with its decision. Rather, the Navy insisted that it dismissed the case out of concern of the compromise of national security secrets in any trial. See, e.g., David Brown, 520 Days in Jail: No Charges Were Ever Specified; Could This Sailor's Ordeal Happen to You?, The Navy Times, March 26, 2001, at A1.

Most journalists treated this spin as laughable and reported the dismissal as the result of the judge's decision. Yet, it is astonishing how easy it is for the Navy to adopt a clearly false position in the media. Only the day before the dismissal, I received letters from the Navy concerning future proceedings and laying foundation for future government arguments in the case. The Navy scheduled witnesses for the following Monday. Moreover, the Navy (like the Justice Department) is not required to present any classified evidence in open court. Rather, the Navy had already presented all of the evidence in classified proceedings. All of the examinations and cross-examinations had occurred in a SCIF. The submission of such classified information is routine in espionage cases, including the on-going prosecution of Mr. Hanssen. Ironically, this is the same spin used by the Justice Department after its defeat in the Wen Ho Lee case. As a citizen, however, it is disconcerting to see the government so easily adopt knowingly false

statements to the public to protect the reputation of federal officials. No one seriously believes the Navy's justification but it is all the more troubling that no one expects anything better from the government in such a case.

V. CONCLUSION

My co-counsel and I have attempted to compile and present the extensive record of this case over the weekend in the hope that Congress will take action in this matter. Quite frankly, while we stand ready to cooperate with any investigation of the DoD Inspector General's office, we believe that an inquiry into this case should be conducted by Congress. Additionally, given the numerous alleged violations of federal law, a referral should be made to the Justice Department. It is clear from the public statements of the Navy and the NCIS that there is no hope of good-faith internal investigations. In the case of the Navy, it has already claimed that no violations occurred in this case without even consulting with the defense or seeking the transcript in the case. As for the NCIS, the director of the NCIS has already publicly cleared his own staff and appears unconcerned by signed invocations of counsel and allegations of abuse. Mr. Brant has indicated that he believes that these agents acted entirely appropriately despite the chorus of criticism from outside the NCIS. Given Mr. Brant's public position, these types of practices are likely to continue in future cases. Finally, the Director of Naval Intelligence failed to take any action to halt months of violations. Senior officials in the defense liaison division are involved in these violations and continue to perform their duties. The failure of Admiral Ellis to take any action is perplexing and alarming given the admitted violations of some of his staff. It appears clear that the interests of national security were knowingly supplanted by personal and professional interests in this case. Some witnesses in this case were formally given notice by the Navy that they were at risk of self-incrimination and should consider retaining counsel. Yet, the fact that this transcript is classified and these proceedings took place in SCIFs has created a useful screen for this misconduct.

There has been a concerted effort to avoid reviewing the transcript in this case as to the alleged violations or to allow the defense to submit a detailed classified report on our personal knowledge of national security violations. Numerous Navy and NCIS officials stand at risk from any substantive inquiry into the facts of this case. I must confess that I have little faith that a true and fair review will occur of the facts of this case. Absent congressional investigation, these violations will be buried to the collective relief of the DNI, NCIS, and Navy leadership. All interests will then be served except for the public interest. For myself and my co-counsel, I can only promise that, given the opportunity, we can support each of these allegations. Please give us that opportunity. Of course, no investigation will ever make our client whole for what the Navy did to him and his family. In addition to other financial, professional, and personal losses, Petty Officer King experienced a terrible loss while he was held unlawfully by the Navy -- his mother died in Ohio. Her last words were about her son and her uncertainty over whether he might be convicted and executed. She never doubted his innocence but went to her grave not knowing the fate of her son. As the person who had the duty to inform Petty Officer King of his mother's death, I can say that no lawyer and no congressional committee can lift that burden from his shoulders. Petty Officer King, however, is committed to clearing his family's name and honor. He also wants to guarantee that no other sailor or soldier is subjected to this Kafkaesque process. We are also committed to those objectives.

The focus of this statement has been the stated subjects given to the defense by the Committee in our formal invitation to appear. However, the various national security violations and Navy blunders should not distract the Committee from the enormity of the Navy's misconduct in holding a sailor for 29 days of interrogation and 520 days without a charge. Not only did this incarceration violate our constitution, it violated international norms of justice. In any other country, we would not hesitate to dismiss such medieval conduct as the trappings of some authoritarian power or petty despot. Thus, we can express outrage about China holding individuals for 26 days without a charge while studiously avoiding our 520-day incarceration of an American sailor. Such sharp conflicts in our public position and our actual conduct make our international pleas look like mere propaganda and our constitutional principles look like mere pretenses. The NCIS and the Navy in this case acted in the name of the American people in denying core constitutional rights to this sailor. Unfortunately, some of the greatest abuses are committed in the name of the loftiest objectives. This danger in a democratic system was best articulated by the great American jurist, Justice Louis Brandeis:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[42]

[42] Olmstead v. United States, 277 U.S. 438, 479 (1928).

I would be happy to answer any questions that the Committee may have on my testimony.

Appendix A: Memorandum from CDR James P. Winthrop, Investigating Officer, Recommending Dismissal of US v. Daniel M. King, 9 March 2001.

Appendix B: Letters to DCI George Tenet from Attorney Jonathan Turley re: U.S. v. King, March 6, 2001 and March 8, 2001.

Appendix C

September 21, 2000

By Facsimile Transmission and Overnight Mail

CDR Mark Newcomb, JAGC, USN
Force Judge Advocate
United States Atlantic Fleet
1279 Franklin Street
Norfolk, VA 23511-2494

Re: United States v. CTR1 Daniel M. King, USN

Dear Commander Newcomb:

I am writing in response to your recent correspondence denying that the defense has ever demanded a mandatory declassification of information in this case.

Unfortunately, given the course of conduct in this case, your letter should not come as much of a surprise. Yet, I must confess that your denial that you were ever asked for a declassification review of material has left military defense counsel and civilian counsel in total disbelief. From the beginning of this case, the defense has repeatedly demanded the declassification of material. As you noted, you were formally asked on January 4, 2000 for complete declassification of material in the case. The requested continuance of defense counsel was based on prior requests for such declassification. It was in fact the only subject of our first telephone conference on December 29, 1999. It was also the primary subject of our second meeting on February 23, 2000. The thrust of these meetings was that the Navy had no authority to keep all of the information in the case classified and that the continued classification of the material constituted clear abuse of military regulations and federal law. You have repeatedly assured the defense that a declassification review was underway. This issue was repeatedly cited before the Court of Appeals for the Armed Forces (CAAF) and this point was conceded in the Navy filings.

On August 23, 2000, I sent a letter specifically referring to the failure of the Navy to complete the requested review. This letter made specific reference to your past statements and our demand for declassification:

> "I must again ask you to disclose the steps taken to declassify information in this case and the names of the individuals who performed this task. My review of classified files has been nothing short of shocking that the Navy has maintained that these documents could not be unclassified or produced in minimally redacted form. The defense has been repeatedly delayed in our effort to secure a trial for our client by the insistence of the Navy that declassification of documents required additional time and effort. . . . it is clear that no meaningful effort was made to declassify these documents and that the past representations to the defense are facially absurd. Given the delays caused by this process, the defense is entitled to question those individuals responsible for past declassification decisions."

How you can now seriously deny such repeated past requests is beyond my imagination or experience. You have been repeatedly asked to comply with the governing military regulations and federal law in the declassification of material. As previously noted by the defense, this review is mandated under OPNAVINST 5510.1H. This obligation has not changed under OPNAVINST 5510.36 cited in your letter. You have actively participated in both meetings and correspondence on this question. Your failure to comply with these regulations is consistent with the failure to comply with other basic requirements in this

case, which played no small part in the stay imposed by CAAF in this case. However, your denial raises serious ethical questions of unethical and vexatious conduct on your part.

The defense has a long-standing demand for declassification of material under the governing military regulations, including OPNAVINST 5510.36. Your invitation to repeat these formal demands is a grossly improper tactic to excuse your failure to comply with these regulations. I am not competent to raise issues of the conduct of military officers. I can, however, object to possible unethical conduct as a lawyer. I demand that you immediately withdraw your denial of our past communications and correct the record as to prior requests for declassification.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel M. King

cc:
VADM Mobley
CDR Winthrop
LCDR Klant
LT Bailey
LT Freedus
CTR1 King

September 29, 2000

By Facsimile Transmission and Overnight Mail

CDR Mark Newcomb, JAGC, USN
Force Judge Advocate
United States Atlantic Fleet
1279 Franklin Street
Norfolk, VA 23511-2494

Re: United States v. CTR1 Daniel M. King, USN

Dear Commander Newcomb:

I am in receipt of your September 25, 2000 letter. I am personally disappointed by your refusal to withdraw your prior statements. The denial of a fact clearly established in both prior correspondence and conferences is an ill-considered choice for any attorney. Under the ethical rules, you have a "safe harbor" period in which to make such a correction and I certainly encourage you to re-consider your position.

Prior Requests and Objections Regarding Declassification

There is no question that the defense has repeatedly asked for all of the material in this case to be declassified. Given your denial, I would like to supply a more detailed history of these requests.

1. On December 29, 1999, our first telephone conference addressed two primary issues. First, I insisted that there was no reason why the evidence related to these charges remained classified and stated that the Navy should agree to such unclassified presentation of evidence. Second, you noted that you did not believe that I would be able to secure a clearance in this case due to conversations that you had had with unnamed governmental officials.

2. On December 29, 1999, LT Bailey and LT Freedus sent a written letter to the Staff Judge Advocate concerning the continuance of the Article 32 hearing. This letter also refers to prior communications over the classification of documents. The letter states that "the defense has never requested production of classified information and has been willing to accept redacted discovery from the inception of the case."

3. On December 29, 1999, LT Bailey and LT Freedus received a letter from CDR Jowers expressly stating that requested material "has been classified SECRET/NOFORN; however, I have requested that the material be declassified."

4. On January 4, 2000, LT Freedus sent a letter to the Staff Judge Advocate asking for a continuance "until such time as all the interested program managers review the classified material and release it in an unclassified manner." In this letter, the defense expressly repeats the demand that "[all] information . . . be completely declassified."

5. On January 6, 2000, LT Bailey and LT Freedus request declassification of all material in the case in a telephone conference with the Staff Judge Advocate.

6. On January 31, 2000, the Staff Judge Advocate told detailed defense counsel that he would try to have material declassified by two weeks before the February 28, 2000 hearing date.

7. On February 14, 2000, detailed defense counsel requested a status update from the Staff Judge Advocate on the progress of the promised declassification.

8. On February 22, 2000, the failure to produce the promised declassified evidence prompted another letter and another demand for declassification in a letter from LT Bailey and LT Freedus to the Staff Judge Advocate, a letter memorializing prior conversations on the subject of the defense request for declassification:

> CDR Newcomb indicated he would try to have an unclassified version of the relevant evidence available for review by CTR1 King's civilian counsel by 14 Feb 00. In an e-mail sent 14 February 2000, LT Bailey requested an update on this process. On the afternoon of 16 Feb 00, CDR Jowers informed the defense that she should have three statements in an unclassified form by the Article 32 hearing on 28 February 2000. Unfortunately, Mr. Turley has not yet had an opportunity to view these statements and detailed counsel has not been able to discuss the contents as the documents are still classified as secret. Even if the government is only able to provide unclassified versions of three documents, the defense team will need time to review, plan and discuss the material contained therein.

9. On February 23, 2000, the Staff Judge Advocate met again with the defense at a Starbucks coffee shop to discuss the case. At that time, defense counsel stated that there was no reason for the evidence in this case to remain classified and that standard unclassified information remained in the secret binders in violation of the Navy's obligations.

10. On March 10, 2000, Defense filed extraordinary writ to Navy-Marine Corps Court of Criminal Appeals regarding the monitoring issue.

[T]he convening authority and prosecution maintained facially abusive classification levels on virtually all material and documents in the case. This includes the refusal to provide redacted copies of facially unclassified documents or retaining a "For Official Use" classification to exercise control of unclassified material.

11. On March 13, 2000, defense counsel filed papers before the Court of Appeals for the Armed Forces (CAAF) alleging unlawful command influence, naming the Convening Authority and Staff Judge Advocate, including the allegation of "abusive use of classification procedures." This filing further alleges that King has been subject to "facially abusive classification decisions. For example, some material in this case has been reduced to the level of 'For Official Use Only', a non-classified status....Basic documents that should be easily redacted have been withheld at the secret classification level....The use of classification and administrative rules in this manner serves no purpose but to harass the defense and prevent any public release of information contradicting past public statements."

12. On March 24, 2000, CDR Jowers signed an affidavit for filing with CAAF stating:

> At the request of the Defense, LT Seafer and I considered presenting the Government's case in an unclassified manner. Doing so would require further redaction of the statement involved. . . . We requested that statements be reviewed and sought advice as to whether the statements could be sufficiently redacted such that they would not require classification. . . .The defense has also requested that I provide them with an unclassified version of the materials I have provided them thus far, which have been classified either SECRET or TS/SCI. I requested the programs concerned to review the material for the purpose of redaction.

13. On March 24, 2000, CDR Newcomb signed an affidavit for filing with CAAF stating:

> Although I was skeptical that an unclassified proceeding was possible, I explained that the government would continue to act on the defense request to redact all classified evidence relating to the charges - particularly Petty Officer King's statements - to create an unclassified version of the evidence, and emphasized that any stipulations would have to originate with the defense team." During [a conversation with LT Bailey on January 6, 2000], I explained that while the material was unlikely to be completely redacted into a de-classified format, the government would work to redact as much of the evidence as possible. I also stated that I would attempt to have the unclassified version of the evidence available to the defense no later than 14 February."

14. On April 19, 2000, defense files additional papers with CAAF stating:

> From the outset of the case, [King] has been subject to . . . facially abusive claims of classification of core unclassified documents under a "mosaic theory." The filing further noted that "Defense Counsel has asserted that facially unclassified material has been withheld by the Navy while the Navy has widely disclosed the same information to the media and the public. . . . Appellant has cited numerous examples of detailed information, claimed to be classified and withheld from defense counsel by the Navy, that has been widely disclosed by Navy officials to the media and the public."

15. On April 24, 2000, an affidavit is filed from LT Bailey as part of Appellant's Answer to CAAF's Show Cause Order. This affidavit states "I asked CDR Jowers whether the program managers had been able to cleanse the information down to an unclassified level, as promised."

16. On May 4, 2000, Professor Turley repeats allegations of abusive use of classification rules in oral argument before CAAF.

17. On August 7, 2000, Professor Turley sent a letter to the Staff Judge Advocate stating:

> Throughout this case, I have been told that none of the documents currently classified could be supplied in redacted form. When I told you that such redactions are common in national security cases and that this claim was highly dubious, you told me that I simply did not have access to the material or the necessary knowledge of its content. I have now reviewed some of this material. It is abundantly obvious that no serious effort at redaction was made. The suggestion that none of this material can be supplied in redacted form is frankly laughable. I would like to know who made the determination that this material could not be redacted.

18. On August 23, 2000, Professor Turley sent a letter to the Staff Judge Advocate specifically referring to CDR Newcomb's past statements and our demand for declassification:

> I must again ask you to disclose the steps taken to declassify information in this case and the names of the individuals who performed this task. My review of classified files has been nothing short of shocking that the Navy has maintained that these documents could not be unclassified or produced in minimally redacted form. The defense has been repeatedly delayed in our effort to secure a trial for our client by the insistence of the Navy that declassification of documents required additional time and effort. . . it is clear that no meaningful effort was made to declassify these documents and that the past representations to the defense are facially absurd. Given the delays caused by this process, the defense is entitled to question those individuals responsible for past declassification decisions.

19. On September 1, 2000, the Staff Judge Advocate responds to defense counsel that he is "continuing to collect information regarding the declassification process for evidence in this case and provide it to you as soon as it is available."

20. On September 20, 2000, Professor Turley again writes to the Staff Judge Advocate on the failure to declassify material in the case:

> [T]he defense has repeatedly demanded that material be declassified in this case and that the Navy give the names of individuals responsible for prior declassification reviews as well as the steps taken to respond to prior declassification requests. The defense first asked for declassification of this material at the outset of the case. I objected to the classification of information in the case in our first meeting. Under OPNAVINST 5510.1H, you were required to respond to this request within 30 days and supply this information. Now, we are again facing an Article 32 hearing with material that is facially unclassified and no response from the Navy. The only conclusion that defense counsel can reach is that the Navy is using the classification of this material for purely tactical and dilatory purposes.

21. On September 20, 2000, Professor Turley again writes to the Staff Judge Advocate in a letter concerning the scheduling of an Article 32 hearing, stating that "I will again note that the Navy has not met its obligations under OPNAVINST 5510.1H to declassify information in this case or supply information as to the refusal to declassify the information."

22. The Staff Judge Advocate claims that declassification was never requested by defense counsel.

The Staff Judge Advocate has Failed to Offer a Valid Explanation as to his Failure to Act on this Matter.

You have acknowledged in your last letter that in fact the issue of classification was discussed with counsel. You, however, insisted that a "formal" request for declassification was never made. As noted below, the suggested failure to properly ask for declassification is without support. However, even if your position were correct, you would still be guilty of flagrant dilatory conduct under the ethics rules. The defense has repeatedly asked for declassification but, under the best light, you have waited for these requests to be put into particular form. You have a duty to make evidence available and not engage in such vexatious conduct. Not only is this obligation found in the rules governing military prosecutions but it is further established in SECNAVINST 5510.36, which prohibits the classification of information "to prevent or delay the release of information that does not require protection in the interest of national security." You have allowed facially unclassified material to remain in the binders classified as secret, despite numerous defense objections, in clear violation of your obligations under SECNAVINST 5510.36.

The correspondence cited above establishes that you repeatedly discussed the requested declassification of this material and defense challenges to the classification assertions of the government. I question whether any lawyer would agree that the failure to act on such requests can be ethically or legally justified on this stated basis.

Moreover, you repeatedly stress a distinction between redaction and requested declassification. This distinction is irrelevant to the immediate issue for a number of reasons. First, there is no separate "redaction provision" in either the military or civilian rules. Rather, redaction is part of a declassification process. It is standard that classified documents will be initially produced in unclassified redacted form as part of a declassification review. Such a review necessarily identifies portions of documents that are unclassified and can be produced. These documents are then produced in redacted unclassified form pending further declassification. In fact, it is the redacted versions that are often used to show arbitrary classification as to remaining information. Your suggestions that a request for redacted material is somehow manifestly distinguishable from a classification challenge or declassification review is meritless.

Second, as demonstrated by the correspondence above, the defense in fact requested both redaction and declassification. As is routine in these cases, the defense challenged the classification assertions in this case by demanding redactions and demanding a review of the material for declassification.

Third, and finally, the defense repeatedly stated that only the content of the allegedly transferred document and related program information should be redacted or classified. From the outset, the defense objected that all other material cannot be properly withheld as classified or used as the basis for a classified trial.

The Defense Fulfilled its Obligations in Challenging the Classification Status and Asking for a Mandatory Declassification Review.

Your letters appear to confuse two relevant sections on the classification of material and further add requirements not contained in either section. The defense has been referring to your obligation to respond to the defense request within the 30 days established under OPNAVINST 5510.1H and its successor, SECNAVINST5510.36. This time period is set out under the provision for "Classification Challenges." Under this provision, the defense was only required to "contact[]" the Staff Judge Advocate once it had "reason . . . to believe information is improperly classified." It need only identify such information. In this case, the defense repeatedly challenged such material and identified all of the material in the secret binders as the subject of those challenges. This provision does not require any formal language nor does it require that the challenge be made in writing. Nevertheless, the defense did put these requests into writing and clearly challenged the classification of the material and clearly asked for declassification review.

Your September 25, 2000 letter clearly referred to a different provision, concerning the "mandatory declassification review." The time period for this review, referred to in your letter, is 45 days. Once again, there is no formal language required by the provision in requesting declassification review. Rather, under this provision, the defense was required only "describe[] the information with sufficient specificity to enable its location with a reasonable amount of effort." The defense demanded the declassification of

material contained in identified binders. There is no other formal requirement as to language or any requirement that this request be made in writing. Nevertheless, the defense repeatedly asked for the review of classified information for declassification in this case.

The defense clearly satisfied both of these provisions and the Navy clearly failed to fulfill its obligations within the respective 30 day and 45 day periods. After an entire year, it is clear that no credible effort was ever made to review this material despite defense requests. Nevertheless, your letter maintains that the Navy has already repeatedly looked at this material and found no material can be produced even in redacted unclassified form. This statement only demonstrates the manifest bad faith of the Navy since the file includes items such as a commercially available birthday card with the words "Love Daddy" as the only writing added by the accused. Other items ranging from standard bank forms and auto rental slips also remain restricted in the secret binders. There could be no clearer case of the use of classified status to delay the release of unclassified material.

The Demand for a New Defense Request.

Your demand for a new defense request for declassification review appears simply motivated by a desire to support your claims in this matter. It is obvious from the past letters that we have both challenged classification and asked for a mandatory declassification review. I will simply repeat the same demand made in December. We challenge the classification of all material in the case and we ask that all of that material be declassified.

In conclusion, I will remind you that this case involves a relatively small amount of material that has existed in these files for almost a year without any serious effort of declassification or release by the government. The failure to this act makes a mockery of the suggestion that the Convening Authority is acting in good faith and protecting the rights of the accused. This case has become an embarrassment of demonstrated bias and unlawful command influence in the pursuit of a conviction by the Navy. Ironically, with every failure, the Navy's own conduct makes any hope for a trial, let alone a conviction, an increasingly remote and unlikely prospect.

I object to any attempt to hold an Article 32 hearing without the completion of the review required by the defense's classification challenge and the mandatory declassification review in this case. Your failure to act in almost a year to review this material is hardly the fault of the defense and should be corrected as a prerequisite for the calling of any witness or the presentation of any evidence in this matter. It is my desire to move beyond a question of dilatory or unethical conduct in this matter and to address the implications of the Navy's failure to act for the purposes of the Article 32 investigation. However, in light of the documented requests cited above, your denial of any prior defense challenge of classification or request for declassification should be withdrawn immediately as facially untrue.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel M. King

cc:
VADM Mobley
CDR Winthrop
LCDR Klant
LT Bailey
LT Freedus
CTR1 King

PREPARED STATEMENT OF

ROBERT A. BAILEY

LIEUTENANT
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVAL RESERVE

DEFENSE COUNSEL FOR PETTY OFFICER DANIEL M. KING

Thank you, Mr. Chairman.

Mr. Chairman, members of the Subcommittee, my name is Robert Bailey. I currently represent Petty Officer Daniel M. King and served as a detailed military defense counsel during his prosecution for alleged espionage. I am currently serving on active duty in the Judge Advocate General's Corps, United States Naval Reserve. I was commissioned in February of 1998 while still in law school. I graduated with high honors from George Washington University Law School in May of 1998 and was admitted to practice law in the State of Washington in December 1998. Following my admission to practice I reported to my first duty station, the Naval Legal Service Office (NLSO) North Central, Washington, D.C., in January 1999. I started at the NLSO practicing civil law on behalf of service members. In September 1999 I was transferred to the defense section where I was assigned to represent service members in criminal trials.

Less than two months after I became a defense counsel, my chain of command assigned me to represent Cryptologist Technician (Collection) First Class (CTR1) Daniel M. King at his initial review hearing. This is a hearing to determine whether the accused should remain in confinement pending disposition of his case. Prior to the hearing the command had a vague notion of the nature of the offenses but was unaware of any actual charges. In conducting the hearing and speaking with CTR1 King, I quickly realized that I would not be able to handle this case alone. When I returned to the NLSO, I informed my command that I would require assistance and asked that they assign the most experienced defense counsel in our office at the time, LT Matthew Freedus, to act as assistant defense counsel. Although far more experienced than any other defense attorney in the office, LT Freedus had only been a defense counsel for 10 months.

I was assigned to act as CTR1 King's military defense counsel in November of 1999 and have served in that capacity ever since. It soon became clear upon review of the evidence that CTR1 King never engaged in espionage. However, the evidence of abuses and unconstitutional practices by the government was overwhelming. The Naval Criminal Investigative Service (NCIS) agents investigating the case engaged in constitutionally abusive practices with disturbing regularity. These abuses continued into the attempted prosecution and even after the case was dismissed. The abuses by government agents in this case shock the conscience to such an extent that in-depth investigation into the tactics employed by the NCIS and by military prosecutors is necessary to avoid such a travesty of justice befalling any other service member. Production of a verbatim transcript of the Article 32 proceeding in the case will establish many of these violations beyond question.

While LT Freedus will discuss the factual shortcomings of the government's case and Professor Turley will discuss the government's unwillingness to perform basic prosecutorial functions and the overall scope NCIS practices in this case and others, I will direct my comments towards the pattern of unconstitutional and abusive practices by the government. Additionally, I concur with the statements of my co-counsel in their testimony before this committee.

The abuses in this case essentially fall into two major categories: those committed by Naval Criminal Investigative Service during their investigation, and those committed by the prosecution and convening

authority during the attempted prosecution. These abuses were so pervasive and so serious that the actors were either completely oblivious to the standards of appropriate conduct, or felt they were not bound by the laws and Constitution of the United States. Investigation and intervention by this body is necessary to ensure that the rule of law is observed and protected by military prosecutors and investigators.

II. CONDUCT OF NCIS INVESTIGATORS

The conduct of NCIS agents in this case was nothing short of shocking. Independent reviewers have stated that their techniques were barbaric and hearken back to the unconstitutional abuses of the 1920s and 1930s. That such conduct occurred at the hands of NCIS is not surprising to one regularly involved in military justice practice within the Navy. Indeed, such conduct is predictable based on the training and guidance manual published by the NCIS. According to the NCIS Manual, Chapter 14 - Interrogations, any person who adamantly denies any wrongdoing and points to his clean record is "subconsciously confessing." If a confused suspect asks what is going to happen to him, the NCIS believes this is an indication that he "is beginning a confession." Additionally, agents are to convey the idea that they will "persist as long as required to resolve the issue under investigation" and that they "will not give up the interrogation." With this guidance in hand, the NCIS agents pursued CTR1 King with such unconstitutional vigor that King's only recourse was to confess to a crime he did not commit in the hopes that he would eventually receive a lawyer and the truth would come out.

The practices used by the NCIS can be broken into five distinct categories. First, the agents conducted polygraphs examinations and related interrogations in an unethical and prejudicial manner. Second, the interrogation techniques employed by NCIS agents over the course of almost a month of questioning were an unquestionable violation of CTR1 King's constitutional rights. Third, NCIS agents blatantly disregarded CTR1 King's repeated requests to stop the interrogations and repeated requests to obtain a lawyer. Fourth, the investigators abused their positions and engaged in unethical and illegal behavior during interrogations with CTR1 King's friends, family and coworkers. Finally, the NCIS continued to impede CTR1 King's attempts to prove he did not commit the acts alleged by overclassifying all evidence in the case, permitting its two lead agents to refuse to speak with defense counsel outside the presence of an attorney, and making false statements to the media.

A. Polygraphs

Public statements issued by the Navy have stated that all polygraph examinations performed on CTR1 King were conducted according to Department of Defense regulations. This is completely untrue. One of the Navy's statements indicates that recording the examinations is a requirement under the regulations. The first three days of exams were recorded in accordance with those regulations; the remainder were not. Perhaps agents stopped recording because they were aware that they were not conducting examinations in accordance with the regulations. Those examinations that were recorded demonstrate a sharp departure from the practices established in the Department of Defense regulations.

Immediately following the first polygraph examination, the polygrapher, Special Agent (SA) Robert Hyter, told CTR1 King that he had failed the exam. This was a lie. SA Hyter actually was unable to render an opinion on the chart produced by the examination. SA Hyter never went back and attempted to retest CTR1 King on those questions in an effort to get a more accurate reading. An indeterminate or "no opinion" reading on a polygraph is very common. Both LT Freedus and I had similar results with our first polygraph examinations following assignment to this case. The polygraphers simply reran our polygraph tests and obtained positive results. SA Hyter never took this important and logical step in his polygraph examination of CTR1 King.

By lying to CTR1 King and failing to retest him, SA Hyter created a situation in which CTR1 King would be more likely to show an elevated response to the relevant questions when they arose again. The NCIS Manual encourages agents to lie during interrogations, but Department of Defense regulation 5219.48-R prohibits using the polygraph as such a "psychological prop." Lying about polygraph results is sure to result in inaccurate results. CTR1 King undoubtedly experienced considerable anxiety regarding the relevant questions after being lied to regarding the prior results. Such anxiety can create a false negative or deceptive reading to these questions. See Benjamin Kleinmuntz & Julian J. Szucko, On the Fallibility of Lie Detection, 17 L. & Soc'y Rev. 85, 87 (1982); see David T. Lykken, The Lie Detector and the Law, Crim. Def., May-June 1981, at 19, 21 ("Any reaction that you might display when answering deceptively you might also display another time, when you are being truthful.").

As the polygraphs continued, NCIS agents further departed from regulations when they stopped recording the examinations and the interrogations that followed. SA Hyter received specific orders from his superiors

at NCIS headquarters to stop recording the examinations and interviews. SA Hyter felt that he had no discretion in whether or not to record interrogations. The NCIS Manual, however, states that the recording of interrogations is "strongly recommended." Despite more than three weeks of additional interrogations, no sessions other than a meeting between CTR1 King and an NCIS psychologist were recorded.

After the initial indeterminate results, the polygraph examinations continued intermittently over the next several weeks. CTR1 King would undergo five or more examinations in a single day with mixed results. The Navy has stated that he failed the polygraph examinations. In truth, the results were almost always indeterminate. The only time he registered deceptive results was after long sessions and days of constant interrogations, and under clearly impermissible conditions.

The NCIS agents skewed the results of the examinations by conducting them under conditions destined to produce inaccurate results. The examinations were regularly conducted when CTR1 King was fatigued or complaining about a lack of sleep. On the tape of the examination and interview on October 2, 1999, SA Hyter states that he recognizes that CTR1 King is very tired, operating on a lack of sleep and fatigued from the constant questioning. Nonetheless, he proceeded to administer a series of polygraphs which CTR1 King predictably failed to pass. Administering a polygraph examination under these conditions is improper and likely to lead to inaccurate readings, and is prohibited under Department of Defense regulation 5210.48-R. Nonetheless, SA Hyter simply told CTR1 King that he appreciated the fact that he was tired but that the polygraph would take place anyway.

In addition to conducting examinations under sleep-deprived conditions, the agents mingled polygraph examinations with abusive interrogations. The commingling of these techniques had the predictable result of elevating CTR1 King's reaction to the relevant questions and producing unreliable examinations. Specifically, CTR1 King was told that he was a spy. SA Hyter is heard telling CTR1 King during the October 2, 1999 interrogation that his inability to pass the polygraph examination indicates that he is a spy and has engaged in espionage. When CTR1 King is asked questions on to this subject in subsequent examinations, he experiences predictable anxiety over being labeled a spy and has physiological reactions that trigger a false reading on the polygraph.

This type of manipulation is the exact reason polygraph results remain inadmissible in court. Polygraph machines are notoriously unreliable and unethical examiners can manipulate the results. It is beyond question that NCIS agents engaged in unethical conduct in this case. The fact that this conduct extended to the administration of polygraph examinations should come as no surprise.

B. Coercive and Illegal Interrogation Techniques

The interrogation techniques utilized by NCIS agents to obtain a confession by CTR1 King were abusive, unconstitutional, and reminiscent of the practices from decades past that courts and experts have found tend to produce false confessions. The length of the interrogations make the confessions inherently suspect. The NCIS agents kept CTR1 King in a state of custody they have alternatively called "conditions of liberty," "close surveillance" and "loose surveillance."

The intrusive, threatening, and illegal form of custody employed by these agents placed CTR1 King in a coercive and inescapable environment in which he was essentially subjected to custodial interrogation 24 hours a day seven days a week for 26 days. He would spend every waking minute with NCIS agents. They would wake him up in the morning, monitor him while he took a shower, take him to breakfast, take him to their office for interrogations, take him back to a safe house in the evening, monitor him while he slept, monitor his phone calls to his family, require that he obtain permission to call his daughters or mail a letter, and then start the process over again the next day. One agent told CTR1 King that he would shoot King if he tried to run away. Agents prominently displayed their firearms whenever they took CTR1 King outside the safe house. Agents made notes of everything CTR1 King might say that they felt they could later use in a prosecution, including expressions of hopelessness or fatigue at the process. Thus, in one sense, CTR1 King was interrogated every waking minute of every day for 26 days. The only time he was not directly confronted with one of his interrogators and antagonists was when he was asleep. This would create a situation in which an individual would not be able to mentally or physically relax, thereby making it easy for interrogators to overbear his will.

The NCIS agents denied CTR1 King the important respite of sleep, perhaps because they recognized that sleep was the only time CTR1 King could escape their presence and questions. SA Hyter acknowledged CTR1 King's fatigue in one of the earlier interrogation sessions recorded by NCIS, but he insisted on pursuing the interrogations and polygraphs anyway. The sleep-deprivation techniques continued when NCIS took statements from CTR1 King. The best example of this technique and its results is the statement

signed by CTR1 King in the early morning hours of October 6, 1999. This was the statement Navy prosecutors felt established the crime of espionage and according to the prosecutor, Commander (CDR) Lara L. Jowers, was the only statement she ever intended to offer at the Article 32 hearing.

The uncontradicted facts are that the interrogation session leading to this statement began at approximately 8:30 a.m. on October 5, 1999, but the statement was not signed until 3:30 in the morning the following day - an interrogation period of 19 hours straight. This followed more than an entire day of interrogation the previous day from which CTR1 King did not return to the safehouse until 12:20 am on October 5, 1999. He was allowed to eat dinner between 12:22 a.m. and 12:26 a.m. (four minutes) before going to bed at 12:30, only to start the process over again at dawn on October 5.[1] CTR1 King denied the veracity of the October 6 statement at the next interrogation session and almost every subsequent interrogation. Military judge serving as investigating officer, CDR James Winthrop, evaluated the weight to be given this statement came to the only conclusion consistent with logic and Supreme Court precedence; that a confession obtained under these conditions is inherently suspect and probably the result of coercion. The confession was obviously CTR1 King's effort to say whatever it took to end the interrogation.

[1] The NCIS public affairs office apparently provided log sheets from the interrogations of CTR1 King to the media. These logs were never provided to defense counsel even though they reflect highly coercive techniques. The defense had been unable to obtain these documents despite numerous discovery requests going back almost 500 days. It took less than a week to provide the information to CBS News.

In addition to depriving CTR1 King of sleep, the agents would threaten him and his family. During one interrogation, SA Hyter learned that CTR1 King is very close to his family, especially his daughters. He then told CTR1 King that he must come up with an explanation for his inability to pass the polygraph examination, or NCIS agents would be forced to interrogate his family in the same manner in which they were interrogating CTR1 King. This caused CTR1 King to state that he committed a security violation. Clearly excited, SA Hyter then asked for details of the violation but CTR1 King had to tell the agent that he could not provide details because the incident did not happen. He went on to explain that he was just telling SA Hyter what he wanted to hear so they could finish the interrogation. This clearly angered SA Hyter, who launched into an insulting monologue in which he accuses CTR1 King of suffering from mental illness. At a later interrogation, SA Helen Sherry told CTR1 King the he must confess to espionage or "black operations" people would go after his family. She did not elaborate on this, but CTR1 King recognized the unmistakable threat.

Much has been made in various media reports regarding the NCIS forcing CTR1 King to make confessions regarding his dreams and fantasies. CTR1 King's earliest signed statements refer extensively to thoughts and fantasies but not actual criminal acts. In the taped interrogations and according to reports by the few NCIS agents who were willing to talk to defense counsel, it is clear that the agents encouraged CTR1 King to talk about dreams and fantasies. In an interview with defense counsel, SA Hyter relayed that he explained to CTR1 King that such fantasies and dreams of espionage were common among people who worked in the intelligence community. SA Hyter stated during his October 2, 1999 interrogation that if CTR1 King had thoughts or visions about something then they must have been true. After weeks of these tactics combined with an ongoing practice of sleep deprivation and constant questioning and monitoring, CTR1 King reached a point where he could no longer distinguish between fantasy and reality. CTR1 King requested hypnotism or drugs to establish whether the statements he had made to agents were fantasies or reality. He repeatedly complained that agents were pushing him into talking about espionage fantasies and that these thoughts were not true. The agents responded by pushing the discussion forward until they obtained an admission of guilt based on these fantasies. CTR1 King would then deny the admission in his next statement or interrogation session. This process continued with predictable regularity from the date he made his first statement, through the date of his final interrogation in the brig at the hands of NCIS agents and Navy prosecutors.

It is clear that NCIS agents were perfectly willing to take whatever steps necessary to secure an admission of guilt by CTR1 King. They agents were so desperate for an immediate confession that they completely ignored applicable national security rules and regulations and committed breaches of security there were ironically more serious than some of the offenses for which CTR1 King was eventually charged. Early in the interrogation process, CTR1 King expressed hesitancy over discussing classified information with his interrogators. Instead of taking the required steps to establish their clearance levels, the agents lied to CTR1 King and assured him they were appropriately cleared. The agents then insisted on proceeding. The agents do not seek to determine what programs CTR1 King is familiar with or what information might be disclosed in response to their questions regarding his work and his background. Rather, they insisted he

reveal Top Secret/Sensitive Compartmentalized Information (TS/SCI) in uncleared areas to uncleared agents. They then prepared statements and reports of these interviews on uncleared computers and distributed them to other uncleared agents.

Eventually, an agent familiar with the classified programs at issue in the case became involved, yet the NCIS still failed to take any steps to protect the information, and, in fact, continued to operate as if they were above the law. They engaged in serious breaches of national security regulations. One particular violation of national security law was especially flagrant, egregious, and very dangerous. SA Stewart Wilson and SA Helen Sherry showed a videocassette to CTR1 King as an investigative technique designed to get him to confess. The videotape apparently is a dramatization that involves detailed discussion of TS/SCI material from at least three different Special Access Programs. Under applicable law, the tape could only be played on cleared equipment in a SCIF certified by the applicable programs. Only one of the agents involved in the case had the clearance necessary to view the information contained on this tape. He was not even present for this exercise. Nonetheless, the uncleared agents somehow obtained the tape and decided to use it as an interrogation technique. They played this tape for CTR1 King in the Homewood Suites Hotel in Arlington, Virginia. The agents then insisted CTR1 King talk about the contents of the tape and sign a written statement about the tape typed up on an uncleared computer and printed in the same hotel room.

When defense counsel learned of the existence of the tape, we immediately told the government that it might contain program information, and if so was not being stored properly. This warning went unheeded for months. Only after repeated insistence did members of the program offices evaluate the tape and determine that it did in fact contain TS/SCI information.[2]

[2] When asked on cross examination if he knew about the existence of the tape, one program expert testified that he was sure he would know if such a thing existed and stated that one did not. He was confident that no one cleared for his program would make such a tape without permission and that he would never give that permission.

This pattern of abusive interrogation techniques combined with a blatant disregard for national security regulations reveals a rogue agency that considers itself above the legal and constitutional standards it was created to enforce and protect. Prior Congressional inquiry into NCIS interrogation practices did nothing to deter the agency from violating CTR1 King's rights on a daily basis for almost a month.

C. NCIS Disregarded CTR1 King's Invocation of Constitutional Rights

The Navy has tried to paint a picture of CTR1 King as a man who voluntarily waived all his rights and provided statements to his interrogators free of coercion or influence. This version of events ignores several important facts. First, it fails to comport with an application of simple logic to the uncontested facts. If CTR1 King actually waived his rights and cooperated to the extent suggested, why did agents need to interrogate him for an entire month? Once CTR1 King cooperated and gave a statement, that should have been the end of it. The only explanation is that CTR1 King was simply making statements in an effort to end the process, but when NCIS agents established that these statements were factually untrue or even impossible, they felt the need to get another statement.

Second, the agents ignored CTR1 King's assertions that he wanted the interrogations to stop. During the October 2, 1999 interrogation session, CTR1 King tells SA Hyter he is making things up to please the agent so they can get through with the interrogation. He attempts to tell SA Hyter that since he is not conveying truthful information the interrogation "should just st . . " SA Hyter cuts him off before he can finish the word stop. Whenever CTR1 King attempted to halt the interrogation, or expressed fatigue or a desire to be done, the agents would cut him off and not let him finish his complaint or request. When it became clear that the agents would not permit CTR1 King to stop the interrogations, he was left with no choice but to provide statements that would satisfy his antagonists, even though he did not believe them to be true.

Third, agents ignored CTR1 King's efforts to obtain an attorney. CTR1 King clearly asked for an attorney and the agents refused to let him have one. CTR1 King signed two polygraph rights warning forms on October 8, 1999. One of these forms states that CTR1 King earlier raised "the possibility of speaking with an attorney" but for some unexplained reason no longer wished to speak with one. [3]

[3] As this rights warning was signed first thing in the morning, this discussion regarding the attorney must have taken place during the previous interrogation session on the 5th and 6th of October, the date of the statement serving as the basis for the espionage. Indeed, that statement, which was prepared by SA Stewart Wilson contains a reference to CTR1 King's request for a lawyer.

Once a person subject to an interrogation raises his desire to speak with an attorney, all questioning must stop and he must be provided the opportunity to obtain one. Edwards v. Arizona, 451 U.S. 477 (1981). Raising the possibility of speaking with an attorney is equivalent to saying, "Can I talk to a lawyer?" This is an unequivocal invocation of the right to counsel. See Smith v. Endell, 860 F.2d 1528, 1531 (9th Cir. 1988) cert. denied 498 U.S. 981 (1990); see also Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999). Following such a statement the interrogators must not make any statement other than "yes" and provide the suspect the opportunity to speak with counsel. The interrogators may not try to discourage discussion with a lawyer.[4] The NCIS agents refused to comply with the request, thereby making all subsequent statements the product of coercion regardless of how many rights forms they forced CTR1 King to sign. See Arizona v. Roberson, 486 U.S. 675 (1988). An explanation of rights is of no value if the agents then fail to honor those rights.

[4] Apparently when CTR1 King asked if he could speak with a lawyer, SA Wilson responded, "the only way you are getting through this is through us. Besides what are they going to give you? Some [Navy] lieutenant or [Marine] Captain? I eat twenty of them for breakfast" or words to that effect.

Even if CTR1 King's first invocation of his right to counsel was not clear enough for the NCIS agents to comprehend, the written rights forms of October 8, contain two undeniably clear invocations of the right to have a lawyer present during questioning. The two forms signed by CTR1 King on October 8, 1999 both read "I do desire to have my lawyer present during the polygraph examination." Despite this unequivocal request, no lawyer was provided.[5]

[5] In the military system, CTR1 King should have been provided a lawyer at this juncture. Unlike the civilian system, there is no requirement that formal charges be filed against an accused before he is entitled to representation at government expense. All service members are entitled to representation by qualified military counsel immediately upon invocation of their counsel rights during interrogation. Had this invocation been conveyed to the local Naval Legal Service Office by the NCIS agents, a defense counsel would have been made available immediately.

Thus, CTR1 King's attempts to stop the interrogations had been denied earlier in the week, his attempts to speak with a lawyer were denied, and now his attempts to even have a lawyer present during questioning were denied. This left CTR1 King no option. He had been removed from his home and told he could not go back. He was held under armed guard and monitored 24 hours a day by his own government. CTR1 King's only possibility of ending his interrogations was to give the agents what they wanted in the hopes they would eventually transfer him to the custody of some other entity that would comply with his constitutional rights, allow him to speak with an attorney, and permit him to present the true facts to an impartial party.

D. Agent Actions Toward Other Witnesses and Family

The NCIS Special Agents continued to ignore the Constitution, national security regulations, and standards of ethical conduct even in their interviews and investigations outside the presence of CTR1 King. The agents would violate the law and blatantly lie to civilians and military personnel alike to gather any type of evidence they could against CTR1 King.

The practice of ignoring national security law and procedures continued throughout the NCIS investigation. Based on an assessment of the prepared reports, at least 65 NCIS agents participated in the investigation of this case. Despite the fact that at least one participating agent knew the nature of the programs involved and the level of classification of the information at stake, no steps were taken to ensure that other investigators who were likely to be exposed to information had the proper clearances. Agents were sent to interview coworkers regarding classified discussions they had with CTR1 King in the past. They demanded to know the substance of those conversations. They then classified this information as Secret. When security specialists from the various program offices finally looked at the reports and statements generated by the NCIS agents, they found hundreds of instances of misclassification. There were literally dozens of documents containing TS/SCI information that the NCIS had labeled Secret that were prepared and reproduced outside SCIFs on uncleared equipment. When the defense raised this issue with program officials during their Article 32 testimony, they stated they were unaware of any steps towards corrective action taken to address these violations. One witness simply stated it was the Navy's intent to wait until after the case was over to tie up these loose ends. This clear violation of national security regulations meant that uncleared persons have been in possession of TS/SCI information for 16 months without the Navy taking any steps to ensure that the information is not further disseminated. Some of these individuals no longer work for the federal government and have refused to speak with defense counsel or government representatives regarding their role in the investigation of this case.

In its dealing with witnesses, NCIS agents engaged in a pattern of reprehensible and unethical conduct. NCIS agents directed a considerable amount of this hostility towards CTR1 King's family. According to NCIS reports, agents interviewed CTR1 King's former wife, his two daughters, sisters, and his brother-in-law "under the pretext of a routine background investigation." This was an outright lie. Even more troubling than these lies are the attempts by agents to interview CTR1 King's minor daughter, Melissa King, outside the presence of her mother. This happened after CTR1 King had been placed in the brig. At the time, Melissa was only 15 years old and living with her mother in Virginia Beach, Virginia. Mrs. Jill King had made it very clear to the agent, SA Kelly Murphy, that she did not want Melissa to be interviewed without Mrs. King's consent and presence. SA Murphy was undeterred. She attempted to meet Melissa after school before her mother got home. Melissa said she did not want to talk. SA Murphy eventually gave up when Mrs. King told her she would be contacting a lawyer about the harassment.

The illegal practices of the investigating agents were not limited to attempts to intimidate children. In their never-ending but ultimately futile quest to obtain any type of independent evidence of wrongdoing by CTR1 King the agents ignored national security regulations. They would ask CTR1 King's former coworkers to relate conversations they had with him that the coworkers at times thought were outside their need to know or clearances. The NCIS agents found two former co-workers to make such statements, Lieutenant Junior Grade (LTJG) Mary C. Lewis, Nurse Corps, U.S. Navy, and Major (Maj.) Kathleen Heverly, U.S. Air Force. Each relayed a single instance years earlier in which CTR1 King may have made an obscure reference to something for which she was not cleared. The investigating officer found the evidence to support these charges to be remarkably weak and not worthy of pursuing at a court-martial.[6]

[6] The Investigating Officer found that the charges arising out of these incidents was not supported by the evidence and that memories of these two witnesses of a single event each from years earlier would not be terribly reliable. In addition, the defense never had an opportunity to cross-examine these witnesses or even determine the proper level of classification for the material they claim CTR1 King discussed. Had we been able to, we are confident we would have been able to establish that LTJG Lewis who was an enlisted cryptologist with a TS/SCI clearance at the time of the incident did, in fact, have the appropriate clearance level to hear the discussion. Maj. Heverly, who also had a TS/SCI clearance at the time, was CTR1 King's supervisor. She claimed that CTR1 King relayed information related to her job for which she was not cleared (a juxtaposition that we looked forward to exploring on cross-examination) by reading the expressions on CTR1 King's face.

The NCIS pursued these charges with tremendous vigor in the hopes of finally getting some outside evidence of wrongdoing by CTR1 King. Ultimately they failed, but in their zeal the agents completely abandoned the guidance of national security law. The appropriate course of action upon hearing that a coworker may have heard something for which she was not cleared would be to call in an agent cleared for the same Special Access Programs as CTR1 King. That agent could then ask LTJG Lewis or Maj. Heverly about the discussion. If it turned out the discussions did contain information for which either LTJG Lewis or Maj. Heverly was not cleared, then the agent would then have her sign a non-disclosure or inadvertent disclosure agreement to ensure the material was adequately protected. Instead, agents not cleared for any of the programs involved in the case elected to take a statement from the witnesses immediately. LTJG Lewis was not asked to sign any type of non-disclosure agreement regarding the information until the defense asked to see such an agreement before she testified and was subject to cross-examination about the information.

E. Continued Obstructionist Tactics Following Confinement and Preferral of Charges

Even after NCIS relinquished custody of CTR1 King and placed him in the brig at Quantico, Virginia, the agency continued its practice of violating national security laws and began a pattern of obstructing defense access to evidence in the case. NCIS agents continued their pattern of lying by providing false information to defense counsel, the investigating officer, and the public.

Once CTR1 King was placed in the brig and charges were preferred, NCIS provided reams of documentary evidence to the prosecution who in turn provided a copy to the defense. In a clear violation of national security law, NCIS agents decided to label every single document Secret. This blatant overclassification was either an attempt to prevent the public from ever hearing about their practices, or was a simple desire to avoid the time-consuming task of correctly labeling the individual documents. Either way, this overclassification violated national security rules and regulations. Overclassification is as serious a violation of law as underclassification. The documents provided by NCIS contained scores of examples of both.

A few examples will suffice to demonstrate the absurdity of the classification of this material. The Secret documents included a photocopy of a birthday card and envelope that CTR1 King sent his daughter while he was held at the safehouse in Guam. The card was made by Hallmark and contained the writing, "Love ya, Dad." The NCIS also classified an exact copy of CTR1 King's service record, an unclassified document seen by dozens if not hundreds of Navy personnel in administrative positions throughout CTR1 King's naval career. The contents of CTR1 King's wallet were photocopied and labeled Secret, to include his Blockbuster video card, his ATM Card, his Ohio driver's license, his military identification card, and a discount card for the Food Lion supermarket.

In addition to these examples of overclassification, the NCIS underclassified dozens of documents containing TS/SCI material as merely Secret. The failure to properly classify material led to months of delay in the proceedings as the parties were forced to evaluate every line of every document to determine its true classification level. Additionally, the underclassification led to unauthorized disclosures, improper storage, improper reproduction, and the potential compromise of far more TS/SCI information than CTR1 King was ever accused of disclosing.

This practice of arbitrary and reckless classification continued even into the Article 32 proceedings. An expert from NCIS testified at the Article 32 hearing regarding the proper classification of evidence under NCIS purview. His testimony was internally inconsistent and did not reflect the markings on the documents. He then refused to be cross-examined as to what information in a particular document was actually classified, and refused to return to the hearing to clarify inconsistencies between his prior testimony and the classification guidance manual. His testimony left such a degree of uncertainty as to the proper classification of the material that the investigating officer instructed his assigned security officer to contact NCIS to determine if several items marked unclassified were now considered classified. This included a videotape depicting a meeting between CTR1 King and NCIS psychologist Michael Gelles. The security officer relayed in the hearing that when she called NCIS on this issue, she was directed to speak with LT Mindi Seafer of the NCIS legal office who told her the tape was to be considered classified.[7] The defense objected to this change but secured its copy of the tape as required by the applicable regulations. We objected to LT Seafer's qualification to make this decision and demanded a review of this arbitrary decision. NCIS never informed the defense that the tape had returned to its original unclassified status. Instead, it simply released the tape in its entirety to the media. National security regulations require that all holders of information be immediately informed of a change in classification, either up or down. NCIS violated this provision as well.

> [7] By this point LT Seafer had left her position as a prosecutor to work as a staff attorney for NCIS. She remained on active duty in the Judge Advocate General's Corps but was serving as a legal advisor to an entirely civilian entity. She is not a security expert and is wholly unqualified and not authorized to provide guidance or make decisions on the classification of information. In addition, the investigating officer had already identified her as a witness for the proceedings based on the defense request to examine her regarding her unethical and unconstitutional interrogation of CTR1 King in which he made exculpatory statements.

Even after the dismissal of charges, NCIS has engaged in unethical and illegal conduct. First, NCIS Director Brant reportedly made statements to the media regarding this case that were blatantly false. He told reporters in a written statement that the polygraph examinations were conducted in accordance with Department of Defense regulations. As shown above, this was untrue. The examinations were often not recorded and were conducted under conditions likely to produce unreliable results. An even more troubling are the assertion by the Director that NCIS agents did not have any contact with or interrogate CTR1 King after he was placed in the brig on October 28, 1999. This is patently untrue. On October 31, 1999, SA Kenny Rogers accompanied the two prosecutors in the case at the time CDR L. Lynn Jowers and LT Mindi Seafer, to the brig to interrogate CTR1 King. SA Rogers is one of the supervisory agents in charge of the counterintelligence section. He personally questioned CTR1 King during that session and even briefly questioned him outside the presence of the two prosecutors. In an interview by defense counsel and witnessed by an impartial Lieutenant who is a staff member of the Navy Marine Appellate Review Activity, SA Rogers confirmed the existence of the interview and the fact that CTR1 King made exculpatory statements during this session. Indeed, he could not deny the meeting because defense counsel had obtained a copy of the brig visitor log-in sheet for that day indicating that SA Rogers, CDR Jowers, and LT Seafer had signed in to conduct an interview.

Finally, NCIS agents have engaged in obstructionist tactics preventing defense counsel from gaining access to evidence or witnesses. The two primary investigating agents in the case, SA Helen Sherry and SA Stewart Wilson, refused to talk to defense counsel except under very specific and bizarre conditions. SA

Wilson refused to answer any of Professor Turley's questions. He said he would only answer questions from me. This attitude was consistent with his earlier statements to CTR1 King when he asked for a lawyer that he eats 20 JAG lieutenants for breakfast. Moreover, the agents refused to talk with defense counsel outside the presence of their legal advisor, LT Mindi Seafer. At the time LT Seafer was uncertain of her own role in the case. She was not sure whether she was still a prosecutor or an attorney for NCIS agents. The defense was confident that if nothing else, her interrogation of CTR1 King at the brig in which he made exculpatory statements made her a witness. The defense obviously refused to question one witness in the presence of another and could not interview SA Wilson or SA Sherry.

In sum, the NCIS agents involved in investigating and formulating this case engaged in a series of illegal, unconstitutional and unethical practices. Had these violations been committed by an enlisted service member such as CTR1 King, they would surely face criminal charges. The agents apparently recognized they did not have a spy but were willing to bend or break whatever law or regulation got in their way to manufacture a case against CTR1 King. The scope of fraud, waste and abuse at hands of the NCIS that is revealed in the short supply of evidence provided to the defense is staggering. An indepth investigation of the agency and its practices is necessary to truly gauge the extent of its illegal and abusive practices. Actions must be taken to ensure this agency acts consistent with the U.S. Constitution and federal statute passed by Congress.

III. CONSTITUTIONAL VIOLATIONS AND ABUSES BY NAVY PROSECUTORS

Unfortunately, the constitutional violations and abuses did not stop when NCIS turned the case over to the prosecution. The government attorneys violated CTR1 King's rights in their investigatory tactics, in failing to take the steps necessary to conduct a meaningful hearing, in concealing exculpatory evidence from defense counsel, and in making false statements to military appellate courts, opposing counsel and the investigating officer. Professor Turley will address many of the issues related to the actions of the prosecution in this case. I will limit my discussion to the constitutional violations and abuses of authority revealed during the course of the proceedings. These violations fall into five areas: 1) violation of 6th Amendment rights to counsel; 2) concealment of evidence; 3) false statements to courts and opposing counsel; 4) tactics resulting in the denial of the right to a speedy trial for CTR1 King; and 5) violations of national security law and regulations.

A. Violation of the Right to Counsel

As established above, CTR1 King unequivocally requested counsel. Any further interrogation with CTR1 King's lawyer present, whether it was later the same day or weeks later, was unconstitutional. This is a simple, bright line principle of law that every practitioner of criminal law should know. The two Navy attorneys assigned to prosecute the case. CDR Jowers and LT Seafer, elected to interrogate CTR1 King themselves despite 26 days of interrogations by trained NCIS investigators.[8] In the company of an NCIS agent Rogers, CDR Jowers and LT Seafer interrogated CTR1 King regarding the alleged offenses and his confessions. This interrogation violated Edwards v. Arizona, and was unconstitutional as a matter of law.

[8] It is difficult to imagine why these two officers felt the need to take this extraordinary step. No matter what CTR1 King said at the interrogation it would probably require the two prosecutors to be witnesses at any subsequent trial, which would disqualify them from acting as prosecutors. If CTR1 King had made incriminating statements they would be called to testify regarding that statement. On the other hand, if, as actually happened, he made exculpatory statements, they would be called by the defense to testify to those statements.

The convening authority also violated CTR1 King's right to counsel by imposing a monitoring agent over defense communications. This agent was to monitor all communications between individuals with different clearance levels. Because we all had different clearances at the time, this meant the monitoring agent would monitor communications among counsel and between CTR1 King and his attorneys. The convening authority stated that the purpose of this requirement was to insure that no classified information would be revealed to unauthorized persons. However, the Court of Appeals for the Armed Forces found that this restriction was not the least restrictive means available for protecting classified information and forbade the government from proceeding with this barrier in place. The court found that tasking a government agent with reporting the contents of attorney-client discussions back to the convening authority was intolerable under the Constitution. The government then spent months obtaining security clearances for defense counsel instead of removing the monitoring requirement.

Once LT Freedus, Prof. Turley and I all had the same clearance levels, the convening authority removed the requirment without explanation. Any additional uncleared counsel or experts added to the defense team

would be able to communicate freely without a monitoring agent. This complete reversal in position demonstrated that the months of litigation surrounding the monitoring agent issue were a complete waste of time and that the government was not trying to protect information as previously argued. Finally, it is worth noting that the agent the government selected to monitor the defense conversations was a material witness to some of the underlying events at issue and would have a personal interest in the outcome of the case.

B. Concealment of Exculpatory Evidence

The weakness of the government's case is demonstrated not only by the lack of corroboration of CTR1 King's statement, but also by the existence of strong evidence indicating he did not commit espionage. Despite the existence of this evidence, the government pursued its case in the apparent hope that the defense would not find it. The prosecution in this case repeatedly failed in its affirmative duty to provide the defense with the exculpatory evidence in its possession. The Supreme Court imposes the duty on all prosecutors to immediately turn over all evidence that tends to negate the guilt of the accused as soon as that evidence comes into their possession. No request or demand for production is required by the defense. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bhutani, 175 F.3d 572, 576 (7th Cir. 1999). CDR Jowers and LT Seafer not only failed to provide the evidence of their own accord, but also failed to provide, or denied the existence of, exculpatory evidence when specifically asked for it.

The first such example of the failure to provide this evidence to the defense came from the interrogation between CDR Jowers, SA Rogers, LT Seafer and CTR1 King. SA Rogers confirms that CTR1 King made exculpatory statements at that session. CTR1 King apparently told the prosecutors that he could not remember committing the acts to which he had confessed and that he did not know whether it was reality or fantasy. Such denials following so closely after a signed confession and made to the first non-NCIS personnel he had spoken to in weeks is highly exculpatory. CDR Jowers and LT Seafer had an affirmative duty to immediately provide that information to defense counsel. SA Rogers told defense counsel of the exculpatory statements when interviewed weeks later, but when the investigating officer asked CDR Jowers about CTR1 King's statements, she professed an inability to remember them. Later still, CDR Jowers relayed that LT Seafer told her she also could not remember the statements in question.

On two other occasions, the government failed to provide similarly exculpatory and contemporaneous statements of CTR1 King. One is a video tape in which CTR1 King is asking an NCIS psychologist for truth serum or hypnosis to determine whether or not he committed the acts to which he confessed but, in actuality, had no memory of committing. The other is a series of audio tapes of the first of the polygraph examinations and interrogations of CTR1 King by SA Hyter. These tapes demonstrate that CTR1 King was simply telling the agents what he thought they wanted to hear so the interrogations would stop. LT Freedus discusses his discovery of this evidence in greater detail, but the obligation to provide the information to defense existed as soon as the government became aware of these items: in other words, as soon as the tapes were provided to the prosecution in December of 1999. When we learned of the tapes' existence, we immediately demanded production of the tapes in a form presentable to the investigating officer and at a public hearing. We did not receive them until February 9, 2001. We repeatedly highlighted the exculpatory nature of this evidence to the investigating officer and within a month he recommended dismissal of all charges.

C. False Statements to Courts and Opposing Counsel

The prosecutor and Force Judge Advocate (FJA) for the convening authority, CDR Mark Newcomb, repeatedly made false statements to courts, defense counsel and the investigating officer. The false statements undermined the justice process and caused unnecessary delay. There are far too many false statements to list them all from memory. I have documented all such statements in my classified notes and will provide them in detail once the defense is again provided access to our notes. Many of the statements and the supporting evidence will appear clearly in the record of the Article 32 proceedings. However, some examples of the false statements serve to illustrate how these tactics prejudiced CTR1 King and ultimately contributed to the dismissal of charges in this case.

First, both CDR Newcomb and CDR Jowers claimed in August of 1999 that the defense never requested a classification review of the evidence in this case. CDR Jowers made this statement orally to both LT Freedus and me, while CDR Newcomb made this claim in writing and refused to withdraw it even when it was submitted to the military appellate courts. The assertions by both were baffling as the defense had no less than 22 documented requests for declassification or reclassification of the overclassified evidence.[9] In fact, CDR Jowers acknowledged these requests in an affidavit she submitted to the Court of Appeals for the Armed Forces. She also stated as early as January 2000 that she had requested that the information be declassified. Later testimony by security experts established that no such request or effort was made to

reclassify the documents in the case until the Fall of 2000, a year after CTR1 King was taken into custody. [10]

[9] As Professor Turley discusses in his testimony, it is irrelevant whether or not the defense made such a request. Before the government could proceed with its case and the presentation of evidence it would have to make sure all the material was properly classified so all parties could know what could be discussed in open session and what would have to be kept in closed session. Even after 520 days the government never completed this process and was still unprepared to go forward with its case on the day charges were dismissed.

[10] This was part of a larger pattern in which CDR Jowers failed to act with due diligence in executing her duties as prosecutor in this case. She not only failed to ensure all the evidence in the case was properly classified prior to the commencement of hearings, she also failed to examine the evidence in her possession. She failed to review crucial evidence prior to launching an espionage case and informing NCIS that she would be able to prosecute CTR1 King. In an exchange recorded as part of the Article 32 hearing, CDR Jowers states that she had "never even seen" the log that the government would later claim served as the sole piece of corroborating evidence to support CTR1 King's confession. This exchange took place approximately one year into CTR1 King's confinement. Thus, CDR Jowers pursued a potentially capital case without any awareness of a single piece of corroborating evidence to support CTR1 King's confession. It is worth noting that the investigating officer found the log to be insufficient to meet even the slight level of corroboration needed to consider a confession as evidence.

Second, CDR Jowers responded to defense requests for potentially exculpatory evidence by stating that the evidence did not exist. On October 11, 2000, LT Freedus and I submitted a classified production request asking for, among other things, a copy of any risk assessments in the case. On November 1, 2001, CDR Jowers responded that no risk assessment had been done. Shortly thereafter, the security officer assigned to assist CDR Jowers in the preparation of the case was called as a witness to discuss his marking of classified documents in the case. He relayed that he had performed a risk assessment as early as December 1999 or January 2000. CDR Jowers was not at all surprised by this testimony, and before the defense had a chance to raise the issue with the investigating officer, indicated that she knew the defense would complain about her prior written response that no risk assessment had been done. The investigating officer then ordered CDR Jowers to produce any and all risk assessments for review and possible use by the defense, a process that certainly would have caused additional delay had the charges not been dismissed before she complied with the order.

CDR Jowers' security officer testified because CDR Jowers gave false information to the investigating officer regarding the role performed by the security officers in the classification of evidence. CDR Jowers chose to use the prosecution security officer as well as the two security officers assigned to the investigating officer to review and mark the classification level of the documents in the case. This tactic essentially changed these individuals from neutral officers assigned to help with physical security into witnesses. CDR Jowers told the investigating officer that these security officers had merely placed the classification markings on the documents under the direction of someone else, and had not made any independent judgments as to the proper level of classification. In essence, they had acted as nothing more than human pencils. Because it would be improper for witnesses to hear the testimony of other witnesses, the investigating officer agreed to let the defense question the security officers to determine the true scope of their involvement in classification before calling any additional witnesses. As soon as these individuals took the stand, they immediately contradicted CDR Jowers and stated that they personally determined the level of classification of documents or provided their opinions to others regarding the appropriate classification. The process of examining these security officers wasted a day of hearings that could have been saved if CDR Jowers had accurately conveyed the scope of their participation in the classification process. In addition, more time was lost when the convening authority had to find a replacement security officer to serve as security assistant to the investigating officer.

These false statements and others demonstrated the lack of a good faith effort to pursue this case with any kind of due diligence. Months of CTR1 King's life were wasted as the courts, the investigating officer, and the defense had to debunk the false statements and create mechanisms to mitigate the damage already done.

D. Tactics Causing the Denial of the Right to a Speedy Trial

Many of the actions discussed above had the consequence of delaying the case to the point where prosecution became a legal impossibility under the Speedy Trial protections of the Uniform Code of Military Justice, the Constitution and the Rules for Court-Martial. The government's imposition of

constitutional barriers to representation and a public trial combined with the inability to proceed in an orderly or coherent manner led to inexcusable delays. However, the convening authority and his FJA engaged in remarkable abuses of discretion and actually excused the prosecution of responsibility for delays that kept CTR1 King in jail for more than 15 months without a formal charge and denied CTR1 King of his right to a speedy trial.

Regardless of the individual acts of the government that lead to almost a year of delay before the first hearing commenced, the government was completely unprepared to go forward with its case until January 2001. This was the date of the final classification review, a necessary prerequisite to the commencement of meaningful proceedings. Taking more than a year to perform an adequate classification review of a relatively small number of documents demonstrates the prosecution's complete lack of due diligence in pursuing this case.

The convening authority essentially placed the burden of this lack of diligence on CTR1 King. Under Rule for Court-Martial 707, the government has 120 days to bring a person held in pre-trial confinement to trial (i.e., arraignment). However, the convening authority can exclude time from the government's accountability under the 120-day clock for such things as defense continuance requests. In essence, the convening authority can allocate blame for delay to either the government or the defense. The convening authority in this case encouraged CDR Jowers lack of diligence by excluding periods of delay no matter how outrageous the request. He excluded periods in which the prosecutor was simply unavailable for unexplained reasons, or when she was unable to find a Sensitive Compartmentalized Information Facility (SCIF) in which to hold the hearing. He excluded delays despite vociferous defense objections and requests to go forward immediately. He excluded delays to allow the government time to gather evidence for the defense but then refused to grant the defense time to review the evidence.

The government's failure to act with due diligence to bring this case to trial deprived CTR1 King of his statutory and constitutional rights to a speedy trial. The defense was confident that these failures ultimately would have prevented the case from ever being prosecuted. Clearly the convening authority recognized this situation as well. He tried to salvage what was left of the government's speedy trial case by excluding delay in an artificial and prejudicial manner.

E. National Security Violations

In its blind pursuit of prosecuting this case, the government representatives tossed aside national security law and regulations. At the same time that they were prosecuting CTR1 King for violations of national security regulations, the prosecutor and her expert witnesses were committing far more serious violations on a daily basis. These violations are clearly laid out in Professor Turley's prior correspondence with Chairman Shelby and CIA Director George Tenet. Additionally, the complete details of the violations are contained in my classified notes and in the recordings of the Article 32 proceedings. However, I will present an outline of some of the more salient violations that took place during the proceedings.

CDR Jowers consistently resisted defense counsel's objections to improper security procedures or attempts to identify security violations. She consistently argued that all such violations could be addressed at some unspecified time in the future in some forum other than the Article 32. She even refused the defense request to provide evidence of the clearance levels of all witnesses, spectators, and participants until ordered to do so. The controlling national security regulations do not permit TS/SCI clearance holders to resist and complain about another clearance holder raising security violations. These violations should always be raised and dealt with immediately.

The prosecution adopted a similarly laissez-faire attitude toward security procedures as had NCIS. CDR Jowers and LT Seafer both personally overclassified evidence despite the fact that they did not have the experience or authority to do so. CDR Jowers discussed TS/SCI information with LTJG Lewis even though LTJG Lewis did not have any type of security clearance whatsoever. CDR Jowers even brought LTJG Lewis into a SCIF to testify without telling the investigating officer or opposing counsel that LTJG Lewis did not have a clearance and that we should cover all classified information. CDR Jowers failed to ensure that documents were properly marked before distributing them. In one instance she placed a signed statement of LTJG Lewis into LT Freedus's inbox in the public area of the NLSO defense wing. This area is freely accessible to attorneys, staff and even clients. Months later and without warning or explanation, the Navy decided that this statement was Secret.

Perhaps the most troubling aspect of these national security violations is the refusal of the prosecution, the convening authority, or even program officials to act to cure confirmed violations. Government security experts swore under oath that they had committed security violations. One very senior program official,

Ms. Mary-Rose McCaffrey, admitted that she lied under oath and that she was personally responsible for almost a dozen security violations. She confirmed that the violations were at least sufficient to warrant a review of her clearance. To my knowledge, CDR Jowers and the convening authority have done nothing to report these and other admitted violations. As representative of the U.S. government they both have a responsibility to report and ensure that these issues are investigated. Instead, the defense counsel must push for investigation while the prosecution and convening authority apparently hope the whole case will go away.

III. CONCLUSION

The government's attempt to prosecute CTR1 Daniel King was a desperate attempt to manufacture a spy case where there was none. The NCIS took a person who had a very common indeterminate result on a polygraph examination and, through weeks of threats, sleep deprivation, and denials of constitutional rights molded him into someone they could coerce into signing a false confession. In order to do so, NCIS abandoned all semblance of a professional investigatory agency and violated the Constitution and law. They lied, they attempted to intimidate children, and they showed a blatant disregard for controlling national security law. The agents were undeterred by the evidence indicating that CTR1 King did not commit espionage. This was probably the biggest potential case of their careers, and they were determined to have a spy.

This mindset continued with the prosecution. CTR1 King's constitutional rights as well as the national security regulations he was charged with violating fell by the wayside as prosecutors sought every possible avenue toward conviction. The government actively prevented the defense from obtaining evidence tending to demonstrate CTR1 King's innocence and did not even review the evidence they would later claim established his guilt. This was the blind pursuit of a prosecution at all costs.

That such abuses were allowed to persist for 16 months is troubling. Professor Turley, LT Freedus, and I wrote dozens upon dozens of letters objecting to the procedures used by the Navy in this case. We made our objects to the convening authority, to the prosecution, to the investigating officer, to the Director of Naval Intelligence, to the Director of Central Intelligence, to the Navy Inspector General, to the Judge Advocate General, to members of Congress, and to this body. Only this body seemed to care that the Navy was engaged in a daily practice of violating the law and the Constitution is was designed to protect. Action must be taken to prevent similar abuses from taking place in the future.

I would be happy to answer any questions that the Committee may have regarding my testimony.

PREPARED STATEMENT OF

MATTHEW SIDNEY FREEDUS

LIEUTENANT
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES NAVAL RESERVE

DEFENSE COUNSEL FOR PETTY OFFICER DANIEL M. KING

Thank you, Mr. Chairman.

Mr. Chairman, members of the Subcommittee, my name is Matthew Freedus. I currently represent Petty Officer Daniel M. King and served as detailed military defense counsel during his prosecution for alleged espionage. I am currently serving active duty in the Judge Advocate General's Corps, United States Naval Reserve. [1]

[1] I graduated with honors and received a Bachelor of Arts in political science from Washington University, St. Louis, Missouri in 1993. I graduated with honors from Albany Law School of Union University in 1997. As a member of the Albany Law Review, I published an article in the area of constitutional law. See A Cause of Action for Damages Under the State Constitution: Brown v. State of New York, 60 ALB. L. REV. 1915 (1997). I have been a member of the Bar of the State of New York since 1998. I was commissioned in the Judge Advocate General's Corps, United States Naval Reserve in May 1997. I started working at the Naval Legal Service Office North Central, Washington, D.C. in April 1998. After practicing civil law for the first nine months of my career, I started working as a criminal defense attorney. When I was assigned to this case in November 1999, along with my co-counsel LT Robert Bailey, I had been working as a criminal defense attorney for roughly ten months. With less than a year of criminal justice experience, I was the most senior defense attorney in the office.

The case of United States v. CTR1 Daniel M. King has become a national disgrace and has caused considerable controversy in the media.[2] It has been dubbed the next Wen Ho Lee case[3] and has been cited as an example of how not to prosecute a spy case.[4] After holding CTR1 King in pretrial confinement for 520 days on suspicions of espionage and mishandling classified information, the military judge presiding over the pretrial investigation found that the Navy had insufficient evidence to satisfy even a reasonable belief that an offense was committed and recommended the dismissal of all charges. Within hours of this recommendation, the Navy dropped the charges and let CTR1 King go free. This case has left the public questioning how the Navy can imprison someone for 520 days without a formal charge, let alone a trial. Even after Wen Ho Lee plead guilty to mishandling classified information, the federal judge presiding over his case issued a formal apology for the government's false statements and illegal pretrial confinement. In stark contrast, the Navy has been unapologetic and no government officials have been held accountable for this colossal miscarriage of justice. Instead, just twenty days after CTR1 King was released from the brig, the Navy congratulated the prosecutor in this case and awarded her the prestigious Meritorious Service Medal.[5]

[2] See e.g., Jim Oliphant, How Not to Prosecute a Spy, Part 2, Legal Times, December 11, 2000 at 3; Craig Timberg, Court Rules Spy Hearing Must Begin Again Publicly, The Washington Post, December 9, 2000, at B02, Laura Sullivan, Military Appeals Court Orders Navy to Restart Spying Trial of Petty Officer, The Baltimore Sun, at 4A; Matthew Barakat, Navy Struggles with Spy Case, Associated Press, December 9, 2000; David Rovella, The Next Wen Ho Lee Case, National Law

Journal, October 30, 2000, at A4; Matthew Barakat, Espionage Case Proceeds at Snail's Pace, Dayton Daily News, October 28, 2000, at 6B; Laura Sullivan, Government Gaffes Prompt Third Delay of Navy Spy Case Against Ex-NSA Worker Cryptologist, The Baltimore Sun, October 6, 2000, at 13A; Sabrina Eaton, Dispute Over Security Lapse Delays Elyria Native's Spy Case, The Plain Dealer, October 6, 2000, at 17A; David Rovella, Defense in Spy Case Cries Foul, The National Law Journal, August 21, 2000, at A11; Jim Oliphant, Accused Spy Left Out in the Cold, Legal Times, March 20, 2000, at 1; David Rovella, Accused Spy Wants Out, The National Law Journal, January 8, 2001, A7; David Rovella, Spy Case is Sunk, The National Law Journal, March 26, 2001, A22; Lionel Van Deerlin, Is the Navy Violating the Rights it Swears to Protect, The San Diego Union-Tribune, March 28, 2001, at B7; Barbara Bradley, Navy Petty Officer Held For 500 Days on Suspicion of Spying for Russia Finally Released Without Being Charged, National Public Radio, March 28, 2001; Vernon Loeb and Walter Pincus, Pentagon Probes Spy Case Navy Dropped Against Sailor, The Washington Post, March 29, 2001, A04.

[3] David Rovella, The Next Wen Ho Lee case, The National Law Journal, Oct. 30, 2000.

[4] Jim Oliphant, How Not to Prosecute a Spy, Part 2, Legal Times, December 11, 2000 at 3.

[5] It is perplexing that, on one hand, the military appellate court has characterized CDR Jowers as relatively inexperienced and the media portrayed her as totally incompetent, while on the other hand the President of the United States and the Chief of Naval Operations found her performance to be worthy of such a distinguished award.

After reviewing all the evidence in this case, it is absolutely clear that there was never any credible evidence of espionage. The sole basis for the charge was a coerced confession signed at 3:30 in the morning after a nineteen-hour interrogation.[6] When he signed the statement, CTR1 King had been seriously deprived of sleep, denied several requests for counsel, and interrogated relentlessly over the course of seven days. Simply put, he was mentally and physically exhausted and would have signed anything that the agents put in front of him.

[6] In the two days proceedings this signed statement, CTR1 King was interrogated for 30 out of 39 hours.

After several more weeks of interrogations, the Navy placed CTR1 King in jail and kept him there for more than 500 days, based solely on a coerced and uncorroborated confession. The Navy apparently expected that a lengthy pretrial incarceration would demoralize CTR1 King and induce him to plead guilty to anything in exchange for his freedom. Just weeks after the defense discovered the highly exculpatory tapes, the Navy approached the defense with several offers to settle this case. CTR1 King rejected these offers and the Navy simply dropped the charges.

This congressional inquiry is a necessary step towards revealing the incredible abuses committed by government officials in this case. To ensure a complete and thorough review, the defense urges this Committee to demand a transcription of the Article 32 proceedings in this case.[7] This record documents a disturbing pattern of unethical, dilatory and unconstitutional practices by the government. In addition, this record reveals multiple violations of national security by government witnesses and the prosecution. Several government witnesses admitted under oath to violating national security rules and regulations and to knowing of numerous violations by others involved in the prosecution of this case. The statements of my co-counsel, Professor Jonathan Turley and LT Robert Bailey explain these violations in great detail. I fully concur with their respective testimonies.

[7] In most courts-martial cases, the tapes of the Article 32 investigations are not transcribed.

Focusing on the weight and credibility of the evidence in this case, my testimony is categorized into four main parts. Part I explains the purpose, substance and findings of the Article 32 investigation in this case. In essence, the Article 32 investigation is required by federal statute and it is designed to avoid trials on baseless charges. At this investigation, the government has the burden to present evidence that establishes a reasonable belief or probable cause that the charged offenses were committed. It is well settled that this standard of proof represents a very minimal burden for the government. In this case, however, the military judge who has overseen the Article 32 investigation and has reviewed the government's evidence, concluded that this evidence was so scanty that it barely, if at all, satisfied this minimal burden. As a result, the military judge recommended the dismissal of all charges in this case and the convening authority immediately followed this recommendation and released CTR1 King from jail.

Part II of my testimony examines the evidence proffered by the government to support its espionage allegation. The government's sole evidence in support of this charge was a coerced and uncorroborated confession. In his recommendation to dismiss the charges, the military judge explained that the defense had a legitimate claim that CTR1 King's confession was involuntary and coerced. This section details the nature and circumstances surrounding CTR1 King's so-called confession that led the military judge to reach this conclusion. This section discusses the length and frequency of the interrogations, the treatment of CTR1 King during his rotation from safe house to safe house, and the coercive methods and tactics used by the interrogators to secure a false confession. In addition, this section details the repeated declarations of innocence that CTR1 King made throughout his 29-day custodial interrogation.

Part III of my testimony examines the lack of corroboration for the government's so-called confession. A fundamental tenet of our Constitution is that all accused are innocent until proven guilty and the government bears the exclusive burden to prove guilt beyond a reasonable doubt. The military judge reviewed the evidence in this case and found that the government hardly satisfied a probable cause standard, which is by all accounts a minimal burden. Despite an astronomical expenditure of resources and a comprehensive investigation, the Navy could not find any evidence to corroborate the central facts of the espionage charge. Literally dozens of agents from several different law enforcement organizations were sent across the globe to look for evidence of espionage. These agents conducted hundreds of interviews, seized and searched every personal possession of CTR1 King, searched every conceivable database of information and found nothing to support this charge. This case simply has none of the traditional indicators of a genuine spy. CTR1 King had no unauthorized travel, no contact with foreign nationals, and no unexplained wealth or income. To the contrary, the Navy's investigation actually proved the impossibility of several facts contained within his statements. This section examines the categorical failure by the government to corroborate CTR1 King's statements.

Several issues concerning the lack of corroboration involve classified information. As the Navy, however, has denied access to our classified materials, we were unable to prepare such a report for this hearing. As such, we respectfully request an opportunity to present a classified report to the Committee at a later date.

Part IV discusses the highly exculpatory[8] evidence in this case, most of which the government concealed from the defense. Although CTR1 King was not required to prove his innocence, powerful evidence was revealed during the investigation that demonstrates he never committed espionage. This section presents unclassified statements extracted from the audiocassette tapes of some of CTR1 King's polygraph examinations wherein he is coerced into confessing to his fantasies as reality. He is heard telling agents he is only saying what they want to hear. In addition, this section discusses several crucial pieces of evidence establishing that CTR1 King did not and indeed could not have committed the acts that he confessed to in the coerced statement.

[8] Exculpatory evidence is that which tends to clear the defendant from alleged guilt. BLACK'S LAW DICTIONARY (6th ed.)

I. THE ARTICLE 32 INVESTIGATION

Before a case can be sent to trial by general courts-martial, an investigation of the charges must be conducted under Article 32 of the Uniform Code of Military Justice. This investigation is the military's counterpart to a grand jury proceeding. The Article 32 investigation has traditionally been accorded special status in military jurisprudence. It is an important statutory right afforded to military personnel, an important defense discovery tool, and a bulwark against baseless charges.[9] The Uniform Code of Military Justice recognizes the importance of this hearing by granting the defendant the right to be represented by counsel and the right to cross-examine the witnesses against him. Critical to the proper functioning of the Article 32 investigation is effective representation of the defendant.[10]

[9] See United States v. Samuels, 27 C.M.R. 280, 10 U.S.C.M.A. 206 (1959); Talbot v. Toth, 215 F.2d 22 (D.C. Cir. 1954).

[10] See U.S. v. Tebsherany, 32 M.J. 351 (C.M.A. 1991) (stating that "[a] component of effective representation of an accused at the pretrial stage is preparation for an Article 32 investigation) (citing United States v. Worden, 17 U.S.C.M.A. 486, 38 C.M.R. 284 (1968). If the government either interferes with discovery or acts in bad faith to preclude defense counsel's preparation for an Article 32 investigation, an accused is deprived of his right to effective representation. See id. at 354.

In order to justify sending a charge to trial, the government must present evidence to satisfy a reasonable belief standard that the accused committed the offenses alleged.[11] This standard of proof is analogous to what is commonly referred to as a probable cause standard. At the conclusion of the Article 32 investigation, a legal opinion must be given to the Convening Authority as to the appropriate disposition of the charges. In this case, CDR James Winthrop, the military judge, acting as the investigating officer for the Article 32 proceedings, found that the evidence in this case fell short of the probable cause standard, let alone the beyond a reasonable doubt burden necessary for a conviction. Judge Winthrop presided over this investigation for the past year and reviewed the evidence in this case and heard the testimony of the government witnesses, to include highly exculpatory evidence that is currently classified. The Navy has confirmed in writing that no corroborating evidence exists in the case that has not already been presented to the defense and the military judge. Following this comprehensive review, the military judge recommended that the charges be dismissed because of the lack of corroborating evidence to support a probable cause finding and the unreliability of CTR1 King's signed statement.

[11] See Rule 405(j)(2)(H), Rules for Courts-Martial, Manual for Courts-Martial, (2000 ed.)

II. LACK OF EVIDENCE

According to the military judge, the government lacked any strong evidence to support the espionage charge. In fact, the government's only evidence of espionage was a coerced confession that followed seven days of interrogation, with the last interrogation session lasting 19 hours. The military judge found that the defense had a valid claim that CTR1 King's statements were involuntary due to coercion.

There are several facts that demonstrate excessive coercion in this case. First, the length and frequency of the custodial interrogations alone constitute coercion. The government interrogated King for 29 straight days, with many of the interrogation sessions lasting between 12 and 19 hours at a stretch. The lengths of these interrogation sessions are reflected in the NCIS interrogation logs. It is disturbing to note that the government never provided these logs to the defense. In fact, the defense first received of a copy of these interrogation logs from CBS News after the charges had been dismissed.

Second, CTR1 King was held in custody and under constant surveillance for 26 days. It is axiomatic that custodial interrogations are inherently coercive in nature. CTR1 King was rotated between three different safe houses and was guarded around the clock for 26 days. The NCIS agents guarding him during this period were armed and one agent even told King that he would be shot if he tried to run.

Third, the agents deliberately deprived CTR1 King of sleep. At the safe houses, the agents played the television and made the phone ring at all hours of the night. In addition, CTR1 King was required to keep his bedroom door open and the lights on. After little or no sleep at all, CTR1 King was dragged back to the interrogation room time and again, for twelve, seventeen or nineteen hours at a stretch.

Fourth, CTR1 King's so-called confession was nothing more than fantasies that the agents forced him to write out and sign as fact. He repeatedly insisted that his statements were fantasies or dreams but that these thoughts did not reflect reality. Nevertheless the agents pressured him to discuss and write out his fantasies about committing espionage. When his fantasies were not detailed enough, the agents asked him to fill in the holes with hypothetical examples of espionage. CTR1 King repeatedly stated that he never acted on these fantasies and never committed espionage. He said that he was "just making stuff up to please you." After a nineteen hour interrogation session, the agents insisted that his fantasies must be real and forced him to sign statements to that effect. Based on these facts, the military judge concluded that the government's statement would not likely be admissible at trial due to the coercion used by the agents to obtain these signed statements and the lack of corroborating evidence.

Noting the extraordinary length of the custodial interrogations and CTR1 King's repeated declarations of innocence, the military judge found that the defense had a legitimate claim that CTR1 King's confession was involuntary and coerced. Moreover, the military judge found that "the investigation in this case has apparently not revealed any direct evidence to corroborate the accused's confession."[12] While the judge noted that even a "slight" amount of corroborating evidence is legally sufficient to proceed to a court-martial, he stated "the evidence I am aware of barely, if at all, reaches that threshold."[13] When a confession has been coerced, it stands to reason that there will be no evidence to corroborate that confession.

[12] Written recommendation of military judge, CDR James Winthrop, JAGC, USN, to dismiss all charges dated March 9, 2001.

[13] Id.

A. 29 days of Interrogations and Sleep Deprivation

This ordeal started when Daniel King registered inconclusive on a routine polygraph examination. He was then subjected to coercion, manipulation and constitutional violations at the hands of government officials that simply shock the conscience. This country has not seen the type of Draconian interrogation tactics that were used in this case since the 1930's. It is virtually unheard of for the government to hold someone in custody and interrogate him for 29 straight days and then throw him in jail for 520 days based on nothing more than a coerced and uncorroborated confession. The government's own records demonstrate that King was interrogated incessantly over the course of 29 days. The Supreme Court of the United States has ruled that even a confession gleaned after 16 days of interviews, with only an hour or less a day of interrogation, was involuntary.[14] In addition, he was systematically denied rest throughout this entire period. While he was moved between three different safe houses, he was guarded around the clock. Several agents rotated shifts in order to monitor CTR1 King. He was required to sleep with the lights on, and the agents played the television and the phone rang at all hours of the night. As a result, King was in a constant state of mental and emotional exhaustion.

[14] LT Robert Bailey's written testimony explains the law governing the issue of involuntary confessions.

Based on the how the statements were obtained, it is clear that CTR1 King was under a tremendous amount of duress and that his statements were involuntary and false. This section outlines the 29 days of interrogations and reveals how a routine polygraph examination mutated into a full-blown spy hunt. The defense was able to get a flavor for the coercive nature of the tactics employed by listening to the tapes of these interrogations. The government, however, withheld these tapes from the defense for more than a year into CTR1 King's confinement. A detailed discussion of these tapes and the associated statements illustrates NCIS's attempt to create a spy case where none existed. The tapes cover the period of September 29 until October 2, 1999.

On September 29, 1999, CTR1 King registered a no opinion on a routine polygraph test. Special Agent Robert Hyter from the Naval Criminal Investigative Service conducted this examination. At the time, CTR1 King was taking several different medications for high blood pressure and weight loss. In response to the polygraph questions, CTR1 King stated that he never committed espionage and never acted to harm the United States. SA Hyter's written reports indicate that her could not render an opinion as to the truthfulness of King's answers, but he told CTR1 King that the polygraph indicated deception. The agent then probed CTR1 King's background and personal life. For more than seven hours, CTR1 King delved into what sounded like an adversarial meeting with a marriage counselor. He expressed his perceived shortcomings in his family life and explained the personal struggles that he was having with his marriage. CTR1 King further explained that he was battling with bouts of depression as a result of the separation from his family. SA Hyter manipulated these feelings of inadequacy and repeatedly attempted to steer the conversation towards CTR1 King's character for honesty and any possible security violations. SA Hyter asked CTR1 King whether he blamed the Navy for his personal problems. In response, CTR1 King occasionally expressed disappointment and dissatisfaction with the Navy for sending him to Guam and not promoting him. SA Hyter asked King whether he ever fantasized about hurting the Navy or committing espionage as a result of these feelings. CTR1 King admitted that he had occasional fantasies about espionage over his 20-year career, but stated unequivocally that these were just fantasies and that he would never do anything to hurt the Navy.

It should be noted that it is very common for individuals working in the national security field to have fantasies of committing espionage. In fact, during an interview several months later, SA Hyter acknowledged that fantasies of espionage were common and even admitted that he had thoughts of espionage. The government recorded and made a written transcript of this interview that is currently marked For Official Use Only (FOUO).

On September 30, 1999, SA Hyter resumed his interrogation of CTR1 King. He questioned CTR1 King for nearly six consecutive hours and administered multiple polygraph examinations throughout the day. The results of these polygraph examinations were mixed. In the first examination, CTR1 King was asked whether he had any unauthorized contacts with a representative of foreign government and whether he had any contacts with a foreign diplomatic establishment. His answer was "no" to both questions and SA Hyter was unable to render an opinion as to the truthfulness of his statements, which is a very common occurrence.

In the second polygraph examination, King was asked whether he ever met with a representative of foreign government for espionage purposes and whether he ever had any communication with a representative of foreign government for espionage purposes. Again, his answers were "no" to both questions, but it was SA Hyter's opinion that his responses were deceptive to these questions.

In the third polygraph examination on this day, he was asked whether he ever provided any classified material to a representative of a foreign government and whether he was ever asked to provide any classified material to a representative of a foreign government. He responded in the negative to both of these questions, but it was the opinion of SA Hyter that King was being deceptive on these questions. On the fourth polygraph examination of the day, CTR1 King was the same relevant questions. Again, CTR1 King answered no to both questions and SA Hyter reported another "no opinion."

In between the polygraph examinations SA Hyter would interrogate CTR1 King and tell him that he must be lying and that he must have committed or attempted to commit espionage. Any credible polygrapher would admit that such accusations would distort the results of a polygraph by artificially raising the level of anxiety of the subject. SA Hyter pressured CTR1 King for details about the fantasies, manipulated his feelings of inadequacy in his personal life and repeatedly questioned his character for truthfulness. This is all reflected in the tape recordings of these sessions. SA Hyter told CTR1 King that at some point he must have acted on his fantasies and took steps towards committing espionage. While, CTR1 King admitted to having a very active imagination and very detailed dreams, he repeatedly stated that he never did and would never commit espionage. CTR1 King's fantasies literally sounded like stories from a bad romance novel. One dream in particular involved CTR1 King selling classified information to the Russians, moving to the Black Sea, marrying a beautiful Russian woman, and becoming a well-liked hero. SA Hyter disregarded the fantastical aspects of these dreams and focused only on the more plausible parts. SA Hyter pressed him to explain these dreams in excruciating detail and stressed that some parts of these dreams must be true. At the end of the day, SA Hyter had CTR1 King sign another statement acknowledging and explaining these fantasies in some detail, but again King stated that he absolutely never acted on these fantasies and never committed espionage.

On October 1, 1999, the third day of questioning, SA Hyter conducted another series of polygraph examinations. SA Hyter asked King whether he ever had unauthorized contact with a foreign national and whether he ever had unauthorized contact with a foreign diplomatic establishment. King answered no to both questions. According to SA Hyter, he was unable to register an opinion on this polygraph. SA Hyter's interrogation logs from the day reflect that King was interrogated for roughly six hours. On October 2, 1999 SA Hyter administered another polygraph examination. In this exam, CTR1 King was asked whether he ever offered to provide any classified information to representative of a foreign government and whether he ever provided any classified material to representative of foreign government. His answer to both questions was no. While SA Hyter's report of this examination reflects that he was unable to render an opinion on this polygraph, SA Hyter lied to CTR1 King and told him that he failed this examination. By this point, it is clear from the tape recordings that SA Hyter was desperate for a confession.

Petty Officer King repeatedly denied any act of espionage. While these exculpatory statements were recorded on audiocassette tapes, they were concealed from the defense for 14 months of CTR1 King's confinement. For example, CTR1 King is heard saying:

> "I can say for a one hundred percent fact that I have never committed espionage or anything like that."
>
> "I might have fantasized about it, but over the past twenty years I never contacted any foreign national."
>
> In response to a question about additional details in his fantasies, King is recorded as saying: "I don't know, I don't know, I don't know (raising his voice and becoming emotional), I don't know how to tell you this, but I don't know."
>
> "I'm starting to make stuff up to please you..."
>
> "I don't know what I'm supposed to give you."

While statements like this can be heard clearly on the tapes, they were conspicuously absent from any of his written statements or the NCIS reports of investigation. It should come as no surprise that the Agents stopped using the recording equipment after these statements on October 2, 1999. When the defense interviewed SA Hyter, he informed us that NCIS headquarters initially told him to record the

interrogations, but at some point he was specifically instructed to stop recording.[15] As a result, we are left speculating as to exactly what happened after October 2nd. However, several salient facts establish that the coercion continued.

[15] The defense is aware of only two other recordings that were made after October 2, 1999. On October 19, 1999, the NCIS made a video recording of CTR1 King's interview with Dr. Michael Gelles, a staff psychologist with the NCIS. Also, the government recorded an interview of CTR1 King that took place at the Pentagon on October 25, 1999. In both of these recordings, King made highly exculpatory statements. In fact, CTR1 King made exculpatory statements on every recording that has been produced to the defense.

Many of these statements were actually recorded on audiocassette tapes that the government had in its possession from the inception of this case but concealed from the defense. The prosecutor flagrantly violated her independent and affirmative duty to disclose these tapes. The prosecutor was either grossly negligent in failing to review the evidence in her possession, or she committed the most egregious form of prosecutorial misconduct by deliberately withholding evidence of CTR1 King's innocence.

It is not surprising that the charges were dismissed just weeks after these tapes were released to the defense. These tapes reveal that CTR1 King repeatedly and adamantly professed his innocence before, during, and after his so-called confessions. These statements, however, were conspicuously absent from the agents reports of investigation. Had these tapes been properly released at the outset, CTR1 King would not have suffered such a tremendous loss of freedom and damage to his reputation. [16]

[16] CTR1 King spent two Thanksgiving and two Christmas holidays incarcerated and away from his family. During this incarceration, CTR1 King's mother became terminally ill and wanted to see her son. Despite her understandable wish to see her son released and cleared of these accusations, she passed away without ever speaking to her son or knowing the outcome of this case. The costs of these personal losses are immeasurable and indelible.

On October 5, 1999, Special Stewart Wilson joined the investigation and assumed the role as lead case agent. SA Wilson works in the counterespionage division of the NCIS in Washington, D.C. and he traveled from Washington, D.C. to Guam to question King. Shortly after his arrival, King told the agents that he wanted to speak to a lawyer, which is documented in his statement of October 6, 1999. At this point, all questioning should have stopped immediately. The caselaw creates a bright line rule that requires police to stop questioning on a dime when an accused invokes his right to counsel. However, after flying to Guam, SA Wilson had no intention of letting the right to counsel interfere with his interrogations. SA Wilson disregarded this request and told King that he was not going to let him speak to an attorney. Experts in the field of national security have noted that an accused's rights and a potential future prosecution are sacrificed as secondary considerations by espionage investigators. [17]

[17] Barbara Bradley, Navy Petty Officer Held For 500 Days on Suspicion of Spying for Russia Finally Released Without Being Charged, National Public Radio, March 28, 2001

At that point, SA Wilson and SA Hyter both interrogated King for more than nineteen hours. This interrogation session started at 9:00 in the morning on the 5th of October and ended at 3:30 in the morning the following day. At the end of this marathon, King signed a false confession where he admitted to sending a disk to the Russian embassy. Later that evening, King was brought back to the interrogation room and was interrogated for three more hours.

On October 8, 1999, King made two written invocations of his right to counsel early in the morning session with SA Alex Bedoya. In one of these written requests, King refers to his earlier request for counsel on October 5, 1999. This chronology of events is alarming. The fact that the agents had CTR1 King sign a waiver just days after his original request for a lawyer indicates a knowing violation of his constitutional rights and a subsequent attempt to cleanse or repair that violation. Only the Supreme Court has made it perfectly clear that police officers can not repair prior deprivations of the right to counsel with retroactive waivers. This reference on the 8th to his earlier request for counsel on the 5th is particularly revealing because there is no corresponding reference in any of the NCIS reports of investigation from the preceding days. When the defense interviewed SA Hyter, he said that he could not recall whether King ever mentioned his desire to speak to an attorney. As a request for counsel has such significant meaning to police officers and law enforcement personnel, it defies common sense that SA Hyter would not remember such a conversation. Moreover, the NCIS records reflect that SA Hyter participated in the interrogations on

the 5th and 6th of October. CTR1 King's requests for counsel were completely ignored and SA Bedoya, SA Wilson, SA Hyter and SA Sherry continued to interrogate him for 12 hours, from 8:00 a.m. until 8:00 p.m.

This pattern of all day interrogations and sleep deprivation continued. Agents insisted that CTR1 King confess to fantasies and yet he continued to deny that the statements were true. The coercive techniques, sleep deprivation and constant monitoring wore away at CTR1 King, who could no longer tell the difference between fact and fantasy. On October 19, 1999, CTR1 King is taken, at his request, to see NCIS psychologist Michael Gelles. This meeting was recorded. During a 45-minute videotape of this meeting, CTR1 King is seen telling Dr. Gelles that he has no memory of any of the espionage activities to which he had earlier confessed and that he could no longer distinguish fact from fantasy. King even asked the doctor to give him sodium pentathol or truth serum. The tape of this meeting, along with the audio taped interrogations, was also withheld from the defense for 14 months.

On October 25, 1999, King was questioned at the Pentagon. This interview was recorded and King provided a detailed synopsis of his entire career. At the end of this tape, CTR1 King is heard yet again contradicting his earlier confession. Specifically, CTR1 King said apologetically, "I know you don't want to hear this, but I don't think there ever was a disk," or words to that effect. Three days later NCIS finally relinquished its custody of CTR1 King and he was placed in the Quantico Base Brig on October 28, 1999.

Three days later, on October 31, 1999, CDR Jowers, LT Mindi Seafer and SA Kenny Rogers took a trip to Quantico and interrogated King at the brig. Despite hundreds of pages worth of information gathered by NCIS, 29 days of continuous interrogation by teams of trained NCIS agents, and CTR1 King's repeated requests for counsel, CDR Jowers, LT Seafer and SA Rogers proceeded to question King regarding the alleged offense.

In order to conduct this interrogation, CDR Jowers contacted SA Rogers, one of the NCIS agents assigned to the CTR1 King detail at the Homewood Suites, and asked him to accompany her to the brig on a Sunday morning. SA Rogers remembers CTR1 King responding to the interrogations by CDR Jowers and LT Seafer and refusing to confirm the violations for which he was confined. CTR1 King stated, as he had on several previous occasions, that he had no memory of such facts.[18] SA Rogers stated that he did not take notes of the interview, but he does remember these statements. At the Article 32 proceedings, the defense raised the issue of the government counsel's failure to provide this exculpatory information to the defense. Despite the recollections of both CTR1 King and SA Rogers of the exculpatory statements, CDR Jowers only admitted to questioning CTR1 King but claimed to have no memory of any exculpatory statements.[19] CDR Jowers promised the defense that she would check for notes of this meeting, but several months later she stated that she was unable to locate any such notes. This is just another alarming example of the exculpatory information that was withheld from the defense.

[18] While SA Rogers refused to be tape recorded, there were five witnesses to this statement, including Jonathan Turley, LT Robert Bailey, LT Glen Girding, Billy Cochran and myself. LT Girding took careful notes during this meeting.

[19] This admission can be found on the record of the Article 32 proceedings.

This pattern of coercive and unconstitutional interrogations leading to admissions that were followed by denials establish that the government's sole evidence, the "confession", was wholly unreliable. The NCIS created a textbook environment for producing a false confession.

III. LACK OF CORROBORATING EVIDENCE

One of the unique and telling aspects of a coerced confession is its lack of corroboration. That is, when the government forces someone to confess to a crime that never happened, this coercion is reflected by the inability of the government to find evidence to corroborate the essential elements of that crime, i.e. the act of espionage. That is exactly what happened in this case. The government coerced a confession from CTR1 King, but then could find absolutely no evidence to corroborate his statement. This failure, however, was not for lack of trying. Agents virtually combed the globe and elicited help from other federal law enforcement agencies, but could not confirm any of the essential elements of the statement.

It is a well-established principle of law that, in order to admit a confession into evidence, the government must corroborate the essential facts of the confession. In other words the government must produce independent evidence, either direct or circumstantial, in order to create a sufficient inference that a confession is true. "The amount of corroboration required is *slight* and need only raise an inference of truth

concerning the essential facts admitted in the confession."[20] In this case, the government simply had no direct or circumstantial evidence to support espionage. [21]

[20] See United States v. Melvin, 26 M.J. 145 (CMA 1988)(emphasis added).

[21] In a letter from CDR Mark Newcomb, Force Judge Advocate, the government admitted that all the evidence of corroboration had been provided to the military judge and the defense. Moreover, the prosecution conceded this point and only proffered one document to corroborate the confession.

The military judge who presided over this Article 32 hearing found that "the investigation in this case has apparently not revealed any direct evidence to corroborate the accused's confession." The government asserted that the existence of a daily log was sufficient to corroborate CTR1 King's confession. The military judge further noted that although a "slight" amount of corroborating evidence is legally sufficient to proceed to a court-martial, this log "barely, if at all, reaches that threshold."

This section examines the lack of corroboration in several different categories. First, there is no witness to the alleged act of espionage. The government interviewed hundreds of people from around the world and could not find any witness who could corroborate any part of the confession. Second, there is no physical evidence of espionage or any foreign contacts. To the contrary, the Navy's investigation actually proved the impossibility of several claims contained within CTR1 King's statements.

A. Interviews and Government Witnesses

The NCIS and other law enforcement organizations interviewed hundreds of potential witnesses during the course of this investigation. The government interviewed practically every friend, family member and co-worker from CTR1 King's entire life. There is not a single witness to the alleged act of espionage. Furthermore, CTR1 King's closest friends and co-workers never heard him talk about espionage and thought it impossible that he could ever commit such an act.

To the contrary, these interviews revealed information that actually supports the finding that his confession was coerced. CTR1 King's close friends and co-workers described him as very susceptible to pressure. They reported that CTR1 King dislikes confrontation, has a very strong desire to please others, and has a very low self-esteem. In addition, his friends described him as having an exceptionally active imagination and a penchant for science fiction. CTR1 King was even known for discussing his dreams in vivid detail. It is clear from these interviews that CTR1 King is the type of person who, after several days of interrogation and intense pressure, would confess to something that he did not do. Moreover, the statements that he made contemporaneously with his so-called confessions, such as "I am just making stuff up to please you," are consistent with his character and reputation.

B. No Physical Evidence of Espionage

There is absolutely no physical evidence that CTR1 King ever committed espionage. With CTR1 King's permission and cooperation, the NCIS agents seized and searched all his worldly possessions. In a genuine espionage case, one would expect to find some trace of communications with a foreign national or foreign diplomatic establishment amongst these possessions and his personal and business records. For example, one could expect to find a letter, name, address, phone number, phone record, bank record, email record or some other indication that there was communication with a foreign national. The government checked all of these places and came up empty handed. There was not a shred of evidence to suggest that CTR1 King ever even communicated with a foreign national.

While the government classified several of the sources and methods used in this investigation, it should be noted that the government searched everywhere one might expect to find evidence of corroboration in this case, but found none. The government found no independent evidence to suggest that CTR1 King ever called the Russian Embassy on the telephone, visited the Russian Embassy in person or mailed anything to the Russian Embassy. Several other issues concerning the lack of corroboration involve classified information. As the Navy has denied access to our classified materials, we were unable to prepare such a report for this hearing. As such, we respectfully request an opportunity to present a classified report to the Committee at a later date.

C. Daily Log Offered by Government Does Not Constitute Corroboration

The sole evidence offered by the government to corroborate his statements consists of a two-page daily log that he kept as part of his normal duties. To suggest that this log constituted corroboration was a laughable

proposition. The military judge examined this log thoroughly and found it to be wholly inadequate to corroborate the essential elements of the espionage charge. As a result the military judge concluded that the government's alleged confession would likely be deemed inadmissible at a trial due to a lack of corroboration, which is a basis for suppression separate and apart from coercion. To understand the absurdity of the government's contention, it may be helpful to consider an analogy. The government would have you believe that an accused's ability to describe the interior of his own bank would corroborate his confession that he stole money from the bank. That is absurd. Corroboration means that there must be independent evidence that confirms an essential fact of the charge. In this case, there is nothing about that log that relates to the act of espionage.

IV. EXCULPATORY EVIDENCE

In addition to the lack of credible evidence and corroboration, there is highly exculpatory evidence to demonstrate that CTR1 King never committed espionage. In other words, there is powerful evidence that tends to show that CTR1 King is innocent of the charged offense.

A. Tapes of Interrogations Session Capture Coercion and Recantations

Not only was this case built entirely upon a coerced and uncorroborated confession, the government withheld powerful evidence of CTR1 King's innocence. One of the most notorious moments in this case came when the defense discovered highly exculpatory evidence that the government had concealed from the defense. Despite several written demands for the production of our client's statements, whether written or recorded, the government withheld audio and video tapes from the defense for more than 14 months of CTR1 King's confinement. CTR1 King repeatedly professed his innocence throughout the 29 days of interrogation, and many of these statements were captured on audio and video tape.

I came across these tapes quite by accident. I was in the NCIS Field Office working on an unrelated case and supervising the fingerprinting of one of my clients. While there I asked to look at the evidence log sheet in the evidence locker room. The agent serving as evidence custodian provided me the log. As I was looking through the log, the agent who was fingerprinting my client asked the evidence custodian whether she knew I was a defense attorney. She said, "no," and was clearly surprised and uncomfortable with me looking at the log. By that point I had noticed several references to evidence regarding CTR1 King or, as NCIS called him, Regal Falcon, that the defense was unaware existed. These included numerous audiocassettes, microcassettes, 8 mm tape, and video tapes that we had been told did not exist. SA Hyter told us that he only recorded the first polygraph session, did not record any interrogations, and stopped recording at the direction of NCIS headquarters. When I asked the NCIS for access to these tapes, CDR Jowers specifically instructed the agents to deny my access to this information.

It is not coincidence the charges were dismissed just weeks after the tapes were released to the defense. These tapes reveal that King repeatedly and adamantly professed his innocence before, during, and after his so-called confessions. These statements, however, were conspicuously absent from the agents reports of investigation. Had these tapes been properly released at the outset, CTR1 King would not have suffered such a tremendous loss of freedom and damage to his reputation.

B. Interrogation Logs Withheld from Defense

The NCIS never produced the interrogation logs to the defense. In fact, despite repeated defense discovery requests, the NCIS never even acknowledged that such logs existed. The manner in which the defense ultimately discovered these logs is downright shocking. The NCIS provided these logs to CBS News apparently to rebut the defense claims that CTR1 King was interrogated for 29 consecutive days. In speaking to CBS News representatives, the defense learned that NCIS had provided logs of its interrogations to the media. Having never seen or heard about these logs, the defense asked CBS News for a copy. It is simply astonishing that the defense received highly exculpatory and discoverable evidence from the media, and not from the NCIS.

These logs corroborate the coercive nature of the interrogations. The logs reveal that CTR1 King was placed in a designated room and interrogated for more than 110 hours. These logs further document that individual interrogation sessions frequently lasted 12, 15 or 19 hours at a stretch, without taking breaks for food or use of the bathroom. The audacity of NCIS to withhold evidence that depicts the extraordinary length and frequency of their interrogations further underscores the coercive nature of these interrogations.

C. Facts Contained in Statements Proven to be False by NCIS

During the course of its investigation, the NCIS attempted to corroborate the details of CTR1 King's statements. However, instead of corroborating the details, the NCIS actually proved the falsity or impossibility of several of the essential facts contained in his confession. This should hardly be surprising considering that the agents forced CTR1 King to literally spin a tale of espionage. There are so many illustrations of this point that it would be unmanageable to list them all here. A few significant examples will serve to illustrate the point.[22]

[22] Additional examples will be included in our classified filing.

The government alleged that CTR1 King mailed a disk containing classified information to the Russian embassy. It is rather self-evident that he would need the mailing address to accomplish this task. CTR1 King's statement said that he obtained the address from the website for the Russian Embassy. The NCIS, however, discovered that no such website existed at the time of the alleged offense. It would have been impossible for CTR1 King to find the address, and thereby complete the act of espionage in the manner described in the confession.

The NCIS agents discovered other evidence indicating the impossibility for CTR1 King downloading a classified log to a disk, as the NCIS typed in the October 6th statement. Without going into classified areas, it is sufficient to note that some evidence indicated that it was impossible.

As another example, CTR1 King allegedly stated that he planned to meet a Russian national at a Baskin-Robbins ice cream parlor at a particular mall in Maryland. CTR1 King has repeatedly stated that this statement is absolutely false and that he has never had contact with foreign national. When the NCIS agents traveled to the mall, it was confirmed that there was no Baskin-Robbins at this location.

The government has alleged that CTR1 King admitted to other security violations during the course of his questioning. Specifically, the government alleged that CTR1 King admitted to removing a classified document from his workspaces in Guam. The NCIS, however, obtained a copy of this document from his computer at work and determined that it was completely unclassified. In fact, his computer did not have the capability to obtain the type of classified document he referenced in his statement.

D. False Statements and Violations of Judicial Process by NCIS

NCIS Director David L. Brant made several blatantly false statements to the media concerning this case. First, Mr. Brant reportedly told the press that his agents followed the Department of Defense guidelines for administering polygraph examinations. Not only is there considerable historical evidence to demonstrate the falsity of this statement,[23] but the facts of this case clearly show that NCIS polygraph techniques in this case amounted to textbook violations of the governing regulations. This is particularly troubling considering that several Navy officials "close to this case" have leaked information that CTR1 King repeatedly failed polygraph tests. In reality, CTR1 King registered inconclusive on most of the examinations. As for the examinations he failed, the polygrapher was interrogating him and telling him that he was a spy before administering the exam, which any credible polygrapher would say violates the DoD regulations and inevitably causes elevated responses. The nature of these violations are discussed in greater detail in the testimony of my counsel LT Robert Bailey.

[23] See Written testimony of Professor Jonathan Turley, lead defense counsel, for elaboration on the documented abuses by NCIS agents.

In another false statement, NCIS Director Brant reportedly told the media that his agents never interrogated CTR1 King after he was ordered into confinement on October 28, 1999. This statement is patently false. SA Kenny Rogers admitted to the defense that he participated in an interrogation of CTR1 King at the Quantico Base Brig. This interrogation occurred a few days after King was ordered into confinement. CDR Jowers acknowledged that this meeting took place and it is reflected in the visitor log-book for the brig.

NCIS Director Brant has demonstrated an unmistakable willingness to defy of judicial process and the rule of law. In United States v. SGT Vinh Nguyen, USMC, a recent military justice case before the Atlantic Judicial Circuit, Mr. Brant was ordered by the trial judge to produce documents within his possession and control, as these documents were deemed material to the defense case.[24] After Mr. Brant disregarded the first order of the court, the military judge issued three additional orders directing Mr. Brant to produce the documents in question. Mr. Brant, however, willfully and blatantly refused to comply with these orders and withheld the evidence from the defense, the prosecutor and the court. In response to this repeated and deliberate defiance of judicial authority, the prosecutor in this case stated that Mr. Brant had no legal basis

for his noncompliance and recommended that the trial judge hold Mr. Brant in contempt of court. However, unlike federal or state court judges, military judges do not have contempt power for violations of court orders. Despite ruling that the Mr. Brant clearly violated the court's orders and the accused's Sixth Amendment right to compulsory process, the military judge and the prosecutor declined to refer this matter to the United States Attorney's Office for intervention, despite several defense requests. Not only was it hypocritical and unconstitutional for Mr. Brant to defy the court's authority, but it was criminal under Article 47 of the Uniform Code of Military Justice, which makes it a federal crime to refuse to comply with judicial process.

[24] I served as individual military defense counsel in this case. On March 16, 2001, SGT Nguyen was convicted of one specification of distribution of ecstasy and sentenced to a reduction in grade and ordered to pay a fine. See United States v. Nguyen, Docket No. 01-8026/NA, Court of Appeals for the Armed Forces (March 2001).

E. COOPERATION BY CTR1 KING

CTR1 King's behavior during the course of the interrogations is inconsistent with guilt, and is exculpatory in and of itself. He cooperated and told the NCIS agents every detail about his life and his career. He even volunteered himself for hypnosis or drugs therapy to probe further into his memory. These are hardly the actions of someone who has something to hide. The practices of the NCIS interrogators had so thoroughly confused CTR1 King that he could no longer distinguish between dreams and reality. He denied any act of espionage but through constant interrogation, monitoring, sleep deprivation and abusive interrogations, the agents had convinced him that he must have done it because the polygraphs said so.

Once the agents convinced CTR1 King of this absurdity, they played on the true elements of his character and fidelity toward the Navy and the United States to convince him to provide as much detail regarding his background as possible. At a taped session held on October 25, 1999, in the Pentagon, CTR1 King told NCIS agents and other officials about every aspect of his career. He relayed as much information about every program that he could remember being associated with throughout his career. He told his interrogators that he wanted them to have this information just in case he committed the acts he could not remember but NCIS agents insisted were real. He wanted to make sure that the Navy was aware of this information so they could take corrective action to prevent further compromise of information or the endangering of sailors' lives. CTR1 King provided this information precisely because espionage was inconsistent with his character and he wanted to guard against the unthinkable. These are not the actions of a traitor.

F. RECANTATIONS

Throughout his 29 days of custodial interrogations, CTR1 King repeatedly denied having ever committed espionage. Many of these powerfully exculpatory statements were captured on audio and video tape. On these tapes, CTR1 King is heard saying, "I can tell you for a one hundred percent fact that I never committed espionage or anything like that." Instead of actually conducting an independent investigation, the agents pressured King to discuss fantasies and hypothetical examples of espionage. In response to demands for the details of his fantasies, CTR1 King is heard saying, in an exasperated voice, "I don't know, I don't know, I DON'T KNOW. I don't know how to tell you this, but I just don't know." The interrogators were undeterred by these emotional outbursts and continued to pressure CTR1 King to write out his fantasies in painstaking detail, filling in any factual gaps with his imagination. After several more hours of pressure, CTR1 King played along and discussed his fantasies, but all the while he clearly stated, "I am just making this stuff up to please you." It is not surprising that the agents stopped recording the interrogations soon after these statements were made and these statements never appeared in the agent's notes or reports of investigation. CTR1 King's false confession was made two days later, after his repeated requests for counsel were denied and after a nineteen hour interrogation session. It is clear from these tapes that, when the Navy investigators found no evidence of espionage, they proceeded to manufacture evidence to justify what can only be described as a colossal blunder. Not surprisingly, just weeks after the defense discovered this evidence, the government dropped the charges against King and allowed him to retire from the Navy with a full pension and benefits. I strongly urge this Committee to demand the release of these tapes so that the public can hear how the Navy obtained a false confession in this case.

VI. CONCLUSION

The Navy never had evidence to support its case against CTR1 King. Its investigators concocted an espionage case out of indeterminate polygraph results, coercion and the fantasies of a sleep deprived and threatened highly decorated sailor with 20 years of honorable and faithful service. The NCIS took every

available step to confirm the confession it coerced out of CTR1 King and failed. To the contrary, investigating agents found more evidence indicating CTR1 King did not commit the acts alleged in his statements than they did evidence to corroborate them.

Rather than admit error, the Navy deprived one of its sailors of 520 days of his life and engaged in a pattern of public slander that will haunt him for the rest of his life. Such practices are an affront to the values every service member swears to uphold upon entry into the service of their county. The Navy and the NCIS may not be permitted to continue such practices if the armed services are to remain a bastion of American ideals and the protector of our constitutional values and freedoms. Investigation and meaningful reform is necessary to prevent such abuses from destroying the lives of other sailors and undermining the concept of a volunteer and professional armed force.

It is deeply troubling to me that the Navy has never issued a formal apology to CTR1 King and his family for this colossal miscarriage of justice and that no government officials have been held accountable. I would be happy to answer any questions that the Committee may have regarding my testimony.

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

March 29, 2001

By Facsimile Transmission and Overnight Mail

The Honorable Richard C. Shelby
Senate Select Committee on Intelligence
SH-211 Hart Senate Office Building
Washington, DC 20510-6475

Re: United States v. CTR1 Daniel M. King, USN

Dear Mr. Chairman:

This morning *The Washington Post* ran a story in which you stated your intention to call a hearing on the handling of the above referenced case. As lead defense counsel, I was previously told by your staff to expect to be called as a witness. I understand that my two detailed military co-counsel, LT Robert Bailey and LT Matthew Freedus, will also be called to testify.

Neither I, nor my co-counsel, have received a formal letter to appear before the Senate Select Committee on Intelligence. We are eager to present evidence to the committee in the closed session. To that end, we wish to begin our work on a written submission. However, we have been denied access to our classified notes and files in the case. Thus, while the Navy representatives have access to their classified notes and files, the defense cannot use our own material to submit a substantive statement to the Committee. This is particularly distressing given public statements that the evidence in this case was "strong." The military judge overseeing the Article 32 proceeding stated in his written recommendation that the evidence in this case fell short of even probable cause, let alone evidence to convict. He recommended that the preferred charges be dismissed due to a lack of corroborating evidence and evidence of coercion by the Navy in procuring the signed statement by Petty Officer King. Recently, CDR Mark Newcomb, the military lawyer for the Convening Authority and the individual who oversaw the prosecution, wrote to me and confirmed that there was no corroborating evidence in the case that had been withheld from the defense or the military judge. He stated that any corroborating evidence in the case was already part of the evidence presented in the two Article 32 proceedings. Likewise, in the classified proceedings, CDR Jowers confirmed that she had no other evidence that would be considered corroborating evidence in the case.

Judge Winthrop reviewed the evidence in this case and heard all of the witnesses presented by the government. This includes highly exculpatory evidence that is classified. In the interests of fairness and full disclosure, I respectfully ask that the Committee seek the release of the defense notes and files to allow the defense to prepare a statement to the Committee and to be prepared to respond to questions on the evidence in the case. This can be easily done with an order to our security expert, Mr. Billy Cochran, to assist the defense in the transport and review of the material. I am confident that a request from the Committee would be honored by the Navy but time is now of the essence with the rapid approach of the hearing date.

I appreciate your consideration of this request and I would be willing to answer any questions that you or your staff may have on the case. Should you have any questions, I can be reached directly at the law school at 202-994-7001.

Sincerely,

Jonathan Turley
Lead Defense Counsel for Petty Officer Daniel King

cc:
VADM Mobley
LT Bailey
LT Freedus
CTR1 King

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

March 19, 2001

By Facsimile Transmission and First Class Mail

The Honorable Sherrod Brown
2438 Rayburn House Office Building
Washington, DC 20515-3513

Re: United States v. CTR1 Daniel M. King, USN

Dear Representative Brown:

I am writing to you as counsel to an Ohio sailor, Petty Officer Daniel King, who was recently released from confinement after 520 days during an espionage prosecution. The abuses in this case have received a great deal of attention in the Ohio press, as well as national media coverage, including an upcoming segment on CBS 60 Minutes. I will be in Congress in the next two weeks to discuss this troubling case and to support our request for a congressional inquiry. King's case is extremely troubling due not only to the lack of evidence but also the abusive interrogations conducted over 26 days lasting as long as 19 hours. We ask only for the truth to be revealed and for an impartial inquiry by a congressional committee. Your support for such an inquiry would be extremely influential. We understand that you cannot reach any conclusion on the merits of these allegations until all of the facts are established. A congressional inquiry would create such a record.

On March 9, 2001, the charges against Petty Officer Daniel King were dismissed by the Navy. This dismissal followed a written recommendation from the military judge serving as the investigating officer in the case. The judge found that, even before the completion of the preliminary Article 32 hearing, the evidence did not support a formal charge, let alone conviction, for espionage. The charges in the case were dropped within hours of the decision.

I am writing to you to seek your support for a congressional inquiry into the facts and alleged abuses in this case. With the dismissal of these charges, there is no bar to direct congressional inquiry into these violations. I also ask for your intervention to preserve evidence of unlawful conduct, including serious national security violations, by various officials in this case. The defense is deeply concerned that evidence and transcripts could be destroyed or compromised in the coming days. This evidence includes classified material, notes, physical evidence, video and audio tapes as well as uncompleted transcripts of the proceedings. Moreover, it is vital that the transcript of proceedings in the case be protected and completed. This transcript contains express admissions under oath by national security officials that they made false statements under oath and committed various national security violations. Many tapes of these proceedings must still be transcripted by the Navy, a prerequisite to any meaningful congressional review or inquiry. For example, on the final day of the proceedings before the dismissal, Ms. Mary Rose McCaffrey made a range of admissions of extremely serious violations committed by herself and by her staff. The scope of these admissions is described in my March 8, 2001 letter to the Director of Central Intelligence.

The evidence and record in this case contain information relevant to two distinct areas of congressional review. First, the defense has written repeatedly about knowing and reckless violations of national security rules in this case. These violations have been described under oath as serious breaches of national security and, at a minimum, would be sufficient to revoke the clearances of any responsible officials. Some of the nation's most sensitive information was compromised despite the repeated objections and warnings of the

defense. The transcript in this case shows Navy officials refusing to act to prevent unauthorized disclosures and even laughing at warnings by the defense of violations that were later found to be well-based and supported. Dozens of such violations occurred and continued over objections by myself, military co-counsel LT Robert Bailey, and military co-counsel LT Matthew Freedus. As indicated in my prior letters, no one has contacted me or my co-counsel for information on these violations. Rather, the only investigation by the program was ordered by Ms. McCaffrey, who admitted that her office only conferred with the accused officials rather than independent witnesses. Ms. McCaffrey, who has now admitted to a host of "serious violations," testified that these witnesses never revealed a number of serious breaches. Likewise, CDR Mark Newcomb, the force judge advocate, asked the Naval Criminal Investigative Service (NCIS) to look into violations despite the fact that the NCIS is one of the chief culprits behind the national security violations alleged in this case. The defense now has confirmed violations by no fewer than ten NCIS agents. CDR Newcomb also chose not to refer the majority of violations previously reported to Congress, including violations now confirmed under oath by witnesses. As a result of the obstruction by Navy officials like CDR Newcomb and CDR Lynn Jowers, program information was handled and disclose with careless abandon in this case. As a result, a number of special access programs must be reviewed for possible damage and the need for corrective action. We are preparing an unclassified list of dozens of different types of violations in this case that we can confirm on the record in this case and in a classified report.

Second, the evidence is relevant to review the conduct of the Navy in pursing this prosecution. As both an academic and a litigator, I have never seen a more troubling case. There is no question in my mind that this prosecution was prolonged by the personal interests of Navy officials who lacked the integrity or the courage to admit to a colossal error. At the outset of this case. Navy officials ran prematurely to the mediate announce the arrest of a spy and a "counterintelligence coup." This case was used to trumpet the Navy's prowess in comparison to the Department of Energy and the Federal Bureau of Investigations (FBI) in the wake of the Wen Ho Lee affair. However, soon after this media campaign, it became clear that there was no evidence of espionage beyond a highly questionable statement by Petty Officer King. This statement was the result of interrogations that ran 19 hours and involved blatantly unconstitutional and coercive techniques by the NCIS. Despite this abuse. Petty Officer King consistently denied the charges and stated that he was only signing the statement to end the interrogations. Recently, a cache of tapes was found secreted in a locker in the Navy Yard. These tapes show Petty Officer King repeatedly denying that he committed espionage. The tapes reveal a sobbing Petty Officer King asking for the interrogations and polygraphs to end. On the tapes. Petty Officer King repeatedly makes such statements as "I'm starting to make stuff up to please you to get through this" and staling that he was inventing facts "to say something to get through this so I can get back to my family." Petty Officer King later states that the long interrogations have destroyed any line between fantasy and reality and pleads "I don't know what I'm supposed to give you." The NCIS also videotaped a meeting requested by King with a Navy psychologist in which Petty Officer King is shown crying and pleading with the Navy doctor to put him under hypnosis or to give him sodium pentothal (truth serum) to show the NCIS that he did not commit any act of espionage. Petty Officer King is shown staling that he is exhausted from the interrogations. Previously, NCIS agents told the defense that such polygraphs and interrogations were not taped. Petty Officer King's repeated denials do not appear in reports by the NCIS and Navy officials told the media that King was a "confessed" spy without revealing his contemporaneous denials. The military judge ultimately ruled that the statement was contradicted, highly questionable, and offered a weak basis for any espionage charge.

The lack of evidence in this case was independently confirmed in the recommendation of CDR Winthrop. CDR Winthrop wrote that the case has been marred by blunders and violations by various Navy officials, including himself. CDR Winthrop stated that "there is plenty of blame to go around" and calls for an official review to "determine the lessons learned from the case so the mistakes committed will not be repeated." CDR Winthrop notes that, after a year and a half, the government had yet to complete the testimony of a single witness. CDR Winthrop stated that he doubts that the case could be prosecuted under the constitution due to delays and blunders by the government. However, CDR Winthrop also found that the evidence in the case is highly questionable and unreliable. In his decision, CDR Winthrop is critical of the Navy's case and notes that the espionage charge "is based exclusively on a confession that the accused subsequently contradicted on several occasions." Moreover, CDR Winthrop states that there is merit to defense arguments that this statement was coerced and involuntary. King was interrogated in sessions that lasted 19-hour periods and he was denied a lawyer by the NCIS. CDR Winthrop stated that "I don't believe that the government evidence on any of the charges in this case is strong. On the other hand, the defense evidence in extenuation and mitigation is significant."

The King prosecution is a national disgrace that has imposed prohibitive costs on both Petty Officer King and national security interests. It is particularly disturbing that these serious breaches of national security were committed in pursuit of a meritless case. Various high-ranking Navy and civilian officials are at

considerable personal and professional risk in any investigation of these matters. The defense was previously offered a settlement agreement to dismiss all charges if both Petty Officer King and his counsel agreed not to pursue later charges or lawsuits against the Navy or officials in the case. My greatest concern is that the individuals and programs responsible for these violations be fully identified, investigated, and held accountable. Additionally, compromised programs should be immediately reviewed and corrective action taken. The first step, however, is to preserve the evidence of the violations and to guarantee the completion of the transcript in the case. This case has a troubling history of altered documents and concealment that is confirmed on the record of the proceedings. We have seen ominous signs of an effort to cut off any review or charges in the last week. Within a day of the dismissal of charges, officials accused of serious wrongdoing contacted the defense and requested that we turn over all evidence and material that we have assembled. This would prevent the defense from supplying a classified report and evidence of unlawful conduct in the case. These same officials have sought to terminate the clearances of defense counsel, which would prevent any meaningful disclosures or cooperation by the defense. These documents remain secured under the previously approved conditions that have been in place for over a year. The material under the control of the defense is limited to material classified at or below the secret level. All program material has been secured by our security officer and is not part of the files retained by the defense. The sudden effort to transfer defense files and to remove the clearances of defense counsel is extremely disconcerting.

All of the members of the defense team are prepared to supply sworn statements supporting these allegations as well as a detailed and fully documented report on these violations. Without your assistance, however, it is doubtful that we will be able supply this information and identify the unlawful conduct that we have witnessed in this troubling case. The Ohio delegation was previously instrumental in clearing the name of Ohio sailor, Clayton Hartwig, who was wrongly accused of the explosion on the U.S.S. Iowa. Ironically, Hartwig lived near Petty Officer King's home of Elyria and was also targeted by the same naval investigative service. There remains a pronounced view in the military that men and women in uniform are routinely denied basic rights afforded to other citizens. When we speak of supporting our men and women in uniform, their abuse at the hands of investigators is rarely discussed as part of the congressional agenda. The King case is a vivid and disturbing example of how our soldiers and sailors are often given second-class status as citizens despite their service to protect our constitution and our country. By calling for a congressional inquiry, we understand that you must reserve your judgment as to the allegations. However, without your support, we may never be able to reach those merits and address the serious allegations in this case.

I appreciate your attention to this matter. I would be happy to brief you on these allegations in the coming days. Should you have any questions, I can be reached directly at the law school at 202-994-7001.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

cc:
LT Bailey
LT Freedus
CTR1 King

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

March 16, 2001

By Facsimile Transmission and Overnight Mail

The Honorable Richard C. Shelby
Senate Select Committee on Intelligence
SH-211 Hart Senate Office Building
Washington, DC 20510-6475

Re: United States v. CTR1 Daniel M. King. USN

Dear Chairman Shelby:

Over the course of many months, I have written to you and various intelligence officials concerning serious breaches of national security in the above referenced case. This letter is to inform you that, as anticipated in my earlier correspondence, the charges against Petty Officer Daniel King have been dismissed by the Navy. This dismissal followed a written recommendation from the military judge serving as the investigating officer in the case. The judge found that, even before the completion of the preliminary Article 32 hearing, the evidence did not support a formal charge, let alone conviction, for espionage. The charges in the case were dropped within hours of the decision on March 9, 2001.

I am writing to you to ask for your intervention to preserve evidence of unlawful conduct, including serious national security violations, by various officials in this case. With the dismissal of these charges, there is no bar to direct congressional inquiry into these violations. The defense is deeply concerned that evidence and transcripts could be destroyed or compromised in the coming days. This evidence includes classified material, notes, physical evidence, video and audio tapes as well as uncompleted transcripts of the proceedings. Moreover, it is vital that the transcript of proceedings in the case be protected and completed. This transcript contains express admissions under oath by national security officials that they made false statements under oath and committed various national security violations. Many tapes of these proceedings must still be transcripted by the Navy, a prerequisite to any meaningful congressional review or inquiry. For example, on the final day of the proceedings before the dismissal, Ms. Mary Rose McCaffrey made a range of admissions of extremely serious violations committed by herself and by her staff. The scope of these admissions is described in my March 8, 2001 letter to the Director of Central Intelligence, a copy of which was sent to you earlier.

The evidence and record in this case contain information relevant to two distinct areas of congressional review. First, the defense has written repeatedly about knowing and reckless violations of national security rules in this case. These violations have been described under oath as serious breaches of national security and, at a minimum, would be sufficient to revoke the clearances of any responsible officials. Some of the nation's most sensitive information was compromised despite the repeated objections and warnings of the defense. The transcript in this case shows Navy officials refusing to act to prevent unauthorized disclosures and even laughing at warnings by the defense of violations that were later found to be well-based and supported. Dozens of such violations occurred and continued over objections by myself, military co-counsel LT Robert Bailey, and military co-counsel LT Matthew Freedus. As indicated in my prior letters, no one has contacted me or my co-counsel for information on these violations. Rather, the only investigation by the program was ordered by Ms. McCaffrey, who admitted that her office only conferred with the accused officials rather than independent witnesses. Ms. McCaffrey, who has now admitted to a host of "serious violations," testified that these witnesses never revealed a number of serious breaches. Likewise,

CDR Mark Newcomb, the force judge advocate, asked the Naval Criminal Investigative Service (NCIS) to look into violations despite the fact that the NCIS is one of the chief culprits behind the national security violations alleged in this case. The defense now has confirmed violations by no fewer than ten NCIS agents. CDR Newcomb also chose not to refer the majority of violations previously reported to Congress, including violations now confirmed under oath by witnesses. As a result of the obstruction by Navy officials like CDR Newcomb and CDR Lynn Jowers, program information was handled and disclosed with careless abandon in this case. As a result, a number of special access programs must be reviewed for possible damage and the need for corrective action. We are preparing an unclassified list of dozens of different types of violations in this case that we can confirm on the record in this case and in a classified report.

Second, the evidence is relevant to review the conduct of the Navy in pursing this prosecution. As both an academic and a litigator, I have never seen a more troubling case. There is no question in my mind that this prosecution was prolonged by the personal interests of Navy officials who lacked the integrity or the courage to admit to a colossal error. At the outset of this case, Navy officials ran prematurely to the media to announce the arrest of a spy and a "counterintelligence coup." This case was used to trumpet the Navy's prowess in comparison to the Department of Energy and the Federal Bureau of Investigations (FBI) in the wake of the Wen Ho Lee affair. However, soon after this media campaign, it became clear that there was no evidence of espionage beyond a highly questionable statement by Petty Officer King. This statement was the result of interrogations that ran 19 hours and involved blatantly unconstitutional and coercive techniques by the NCIS.

Despite this abuse, Petty Officer King consistently denied the charges and stated that he was only signing the statement to end the interrogations. Recently, a cache of tapes was found secreted in a locker in the Navy Yard. These tapes show Petty Officer King repeatedly denying that he committed espionage. The tapes reveal a sobbing Petty Officer King asking for the interrogations and polygraphs to end. On the tapes. Petty Officer King repeatedly makes such statements as "I'm starting to make stuff up to please you to get through this" and slating that he was inventing facts "to say something to get through this so I can get back to my family." Petty Officer King later states that the long interrogations have destroyed any line between fantasy and reality and pleads "I don't know what I'm supposed to give you." The NCIS also videotaped a meeting requested by Petty Officer King with a Navy psychologist in which Petty Officer King is shown crying and pleading with the Navy doctor to put him under hypnosis or to give him sodium pentothal (truth serum) to show the NCIS that he did not commit any act of espionage. Petty Officer King is shown stating that he is exhausted from the interrogations. Previously, NCIS agents told the defense that such polygraphs and interrogations were not taped. Petty Officer King's repeated denials do not appear in reports by the NCIS and Navy officials told the media that King was a "confessed" spy without revealing his contemporaneous denials. The military judge ultimately ruled that the statement was contradicted, highly questionable, and offered a weak basis for any espionage charge.

The lack of evidence in this case was independently confirmed in the recommendation of CDR Winthrop. CDR Winthrop wrote that the case has been marred by blunders and violations by various Navy officials, including himself. CDR Winthrop stated that "there is plenty of blame to go around" and calls for an official review to "determine the lessons learned from the case so the mistakes committed will not be repeated." CDR Winthrop notes that, after a year and a half, the government had yet to complete the testimony of a single witness. CDR Winthrop stated that he doubts that the case could be prosecuted under the constitution due to delays and blunders by the government. However, CDR Winthrop also found that the evidence in the case is highly questionable and unreliable. In his decision, CDR Winthrop is critical of the Navy's case and notes that the espionage charge "is based exclusively on a confession that the accused subsequently contradicted on several occasions." Moreover, Winthrop states that there is merit to defense arguments that this statement was coerced and involuntary. Petty Officer King was interrogated in sessions that lasted 19-hours and he was denied a lawyer by the NCIS. CDR Winthrop stated that "I don't believe that the government evidence on any of the charges in this case is strong. On the other hand, the defense evidence in extenuation and mitigation is significant."

The King prosecution is a national disgrace that has imposed prohibitive costs on both Petty Officer King and national security interests. It is particularly disturbing that these serious breaches of national security were committed in pursuit of a meritless case. Various high-ranking Navy and civilian officials are at considerable personal and professional risk in any investigation of these matters. The defense was previously offered a settlement agreement to dismiss all charges if both Petty Officer King and his counsel agreed not to pursue later charges or lawsuits against the Navy or officials in the case. My greatest concern is that the individuals and programs responsible for these violations be fully identified, investigated, and held accountable. Additionally, compromised programs should be immediately reviewed and corrective action taken. The first step, however, is to preserve the evidence of the violations and to guarantee the

completion of the transcript in the case. This case has a troubling history of altered documents and concealment that is confirmed on the record of the proceedings. We have seen ominous signs of an effort to cut off any review or charges in the last week. Within a day of the dismissal of charges, officials accused of serious wrongdoing contacted the defense and requested that we turn over all evidence and material that we have assembled. This would prevent the defense from supplying a classified report and evidence of unlawful conduct in the case. These same officials have sought to terminate the clearances of defense counsel, which would prevent any meaningful disclosures or cooperation by the defense. These documents remain secured under the previously approved conditions that have been in place for over a year. The material under the control of the defense is limited to material classified at or below the secret level. All program material has been secured by our security officer and is not part of the files retained by the defense. The sudden effort to transfer defense files and to remove the clearances of defense counsel is extremely disconcerting.

It is unlikely that an independent investigation will occur without the oversight of Congress. I ask for you to act to assert that oversight authority in this matter and help mediate a process for a classified report and a full inquiry. All of the members of the defense team are prepared to supply sworn statements supporting these allegations as well as a detailed and fully documented report on these violations. Without your assistance, however, it is doubtful that we will be able to supply this information and identify the unlawful conduct that we have witnessed in this troubling case.

I appreciate your attention to this matter.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

cc:
VADM Mobley
CAPT McPherson
LT Bailey
LT Freedus
CTR1 King

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

March 8, 2001

By Facsimile Transmission and Overnight Mail

The Honorable George J. Tenet
The Director of Central Intelligence
Washington, D.C. 20505

Re: United States v. CTRI Daniel M. King, USN Dear Sir:

On March 6, 2001, I sent you a letter detailing on-going national security violations in the above referenced case. I am sending a follow-up to inform you that, after this letter was sent, new violations of national security were discovered in the case. Given the gravity and scope of these violations, I felt that I should immediately inform you of the latest disclosures, which were recorded for transcription in the case. Once again, my co-counsel LT Robert Bailey and LT Matthew Freedus concur in this letter and the requested intervention.

[As of] Yesterday, a large amount of previously unclassified material is in the process of [being] collected due to the discovery of the defense that the Naval Criminal Investigative Service (NCIS) now considered information in the documents to be classified. This information includes facts that have been widely revealed by named and unnamed Navy officials in the media. The parties have been instructed to collect virtually all of the unclassified documents, files, and material in the case for yet another classification review.

Additionally, over the last week, the defense was able to question one of the security officials mentioned in the March 6, 2001 letter. In her cross-examination, Ms. Mary Rose McCaffrey made a series of startling admissions under oath that further established the widespread violation of national security rules and procedures by government officials in this case. First, Ms. McCaffrey admitted to a host of "serious" violations that she and her staff have committed over the course of the litigation. She specifically admitted that her staff committed at least seven different categories of violations that cover the full range of possible national security breaches. Second, Ms. McCaffrey admitted that she and her staff have committed acts that warrant a review for possible revocation of their clearances. Third, Ms. McCaffrey admitted to serious violations of her own and demonstrated on the stand an astonishing lack of knowledge of her own programs and procedures. Ms. McCaffrey could not identify program information in documents reviewed previously and admitted that she has repeatedly failed to properly identify, mark, and maintain classified information under her control and supervision. For example, Ms. McCaffrey was given her own short affidavit in the case which she has reviewed numerous times after basic mistakes were found as to the meaning of programs under her supervision. Ms. McCaffrey has had to issue and re-issue the same affidavit to correct extensive mistakes and, while on the stand, she was shown additional errors in such program markings requiring a third version to be prepared. Ms. McCaffrey also admitted that she does not even know the meaning of words that she previously stated under oath were classified program terms (including terms that are entirely unclassified). Finally, Ms. McCaffrey admitted to giving false statements under oath and specifically retracted a variety of prior sworn statements. The military judge serving as the Investigating Officer dismissed Ms. McCaffrey as a witness before voir dire was completed as clearly incompetent to serve as a witness on the programs under her supervision. The judge stated that he was confidant that the defense would be able to show numerous other errors in all of the documents reviewed by Ms. McCaffrey. Thus, the most senior security official for these programs has been found unacceptable as a witness to actually identify material in her respective programs.

The testimony in the last few days can only be described as chilling. While we are taking steps to have this case dismissed due to constitutional violations, we renew our request for immediate intervention and inquiry into these on-going violations. Ms. McCaffrey admitted on the stand that no one has made an independent inquiry into these violations. In fact, even with regard to her own limited inquiry, Ms. McCaffrey admitted that she relied only on the accounts of security officers accused for the violations and not other independent security officers who witnessed the violations. As a result, Ms. McCaffrey admitted that she was not even informed of some of the most "serious" violations by these security officers.

I ask that you include this information in your review of matters detailed in my March 6, 2001 letter. I also ask that you immediately order the expedited completion of the transcript in this case to allow for a review of past admissions and sworn statements relating to these violations.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

cc:
The Hon. Donald Rumsfeld
The Hon. Robert B. Pirie, Jr.
RADM Donald Guter
VADM Mobley
CAPT McPherson
CDR Newcomb
CDR Sundel
CDR Winthrop
CDR Jowers
LT Bailey
LT Freedus
CTR1 King
Members of Congress

Jonathan Turley
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March 6, 2001

By Facsimile Transmission and Overnight Mail

The Honorable Richard C. Shelby
Senate Select Committee on Intelligence
SH-211 Hart Senate Office Building
Washington, DC 20510-6475

Re: United States v. CTR1 Daniel M. King. USN

Dear Mr. Chairman:

I am writing to you again regarding the on-going and serious national security violations in the above referenced case. I previously sought congressional intervention when all efforts to abate and correct these violations had failed. After writing to members of Congress with oversight authority in the intelligence area, I was assured that the Navy had promised Congress an inquiry and appropriate action. Since that time, witnesses have testified that no inquiry was ever made and the national security violations have continued. I have attached our most recent communication to the Director of Central Intelligence on this subject.

In the last twenty-four hours, another major security violation was discovered in which extremely sensitive program information was disclosed on repeated occasions to unauthorized persons. This latest violation involved a videc tape containing program information that was played at a local hotel to an audience of unauthorized parties. Over the course of several weeks, the defense repeatedly objected that the tape contained program information but those objections were repeatedly dismissed on the record. This resulted in the failure to properly secure the tape and to take immediate steps to contain damage caused by the on-going violation. Had an inquiry been made, such on-going violations could have been addressed and corrected.

I have become convinced that national security interests are being compromised due to the professional and career concerns of program security officials and Navy officers. It is particularly alarming that no one even inquired with the defense as to the scope and gravity of these violations. This complete failure to investigate and correct these violations has placed myself and my colleagues in an extremely difficult position as security clearance holders. We believe that we have an obligation to use every possible means and avenue to address the violations and seek corrective action.

I ask for your immediate intervention into this matter and an inquiry into the failure to investigate these serious allegations. I would be happy to speak in detail as to these violations with the participation of our security officer, Mr. Billy Cochran, and my two co-counsel, LT Robert Bailey and LT Matthew Freedus.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

March 6, 2001

By Facsimile Transmission and Overnight Mail

The Honorable George J. Tenet
The Director of Central Intelligence
Washington, D.C. 20505

Re: United States v. CTRI Daniel M. King, USN Dear Sir:

As lead defense counsel in the above referenced case, I am again writing to you to ask for your intervention to stop on-going and serious violations of national security laws and regulations. Military co-counsel, LT Robert Bailey and LT Matthew Freedus join me in this request for intervention and investigation. In the fall of last year, I repeatedly wrote to you and other intelligence officials concerning these violations. Despite these letters and subsequent inquiries from members of Congress, violations have continued unabated in the case and witnesses have now given sworn testimony acknowledging such violations under oath. Moreover, despite assurances to Congress that inquiries have been made, critical witnesses have recently testified that no such inquiry or investigation has occurred. The failure to take even minimal steps to inquire into these violations is alarming. Even more distressing is the failure of any intelligence official to contact me or any member of the defense as to the specific allegations and supporting details.

As before, I wish to emphasize that this correspondence is not part of any litigation tactic. To the contrary, the prosecution of Petty Officer Daniel King is now virtually impossible given constitutional errors committed by the Navy. In fact, the Navy recently admitted to the media that it was moving to dismiss the charges against Petty Officer King. Petty Officer King has now been confined for over 520 days without the benefit of a formal charge, let alone a trial. In the pending speedy trial challenge before the United States Court of Appeals for the Armed Forces (CAAF), the Navy has waived the right to file a brief contesting our demand for a complete dismissal. As I stated in my prior correspondence, I informed you that my concerns stem from my obligations as a holder of a Top Secret/Sensitive Compartmented Information (TS/SCI) clearance as well as a former employee of the National Security Agency (NSA). As an academic and practitioner in the national security field, I have never witnessed nor heard of such flagrant disregard of national security rules and regulations regarding the handling of classified information as committed by the government in this case.

Given the gravity of these violations, I ask for the opportunity to detail these violations in a classified meeting or to prepare a classified report of the violations. I must also repeat my earlier request that an independent inquiry be made of these proceedings to establish the scope of national security violations. I strongly encourage you to act to contain any damage due to those violations, and to take appropriate action with respect to the responsible individuals.

I. FAILURE TO INVESTIGATE OR TO INQUIRE INTO THE ALLEGATIONS.

It is clear from the record of these proceedings that various program and Navy officials have steadfastly opposed any formal review of the violations in this case due to their own professional and legal interests. While the defense has prevailed upon the Navy to tighten precautions in some significant aspects, violations remain on-going and it appears that there is a resistance to make changes out of a fear that such corrective action might be viewed as a further admission of misconduct or gross negligence.

I am particularly concerned about the testimony of Ms. Karan Wright, who until recently served as a security officer assigned to the proceedings. Ms. Wright admitted under oath that she had violated national security regulations in the proceedings and stated that other officials had also committed such violations. Ms. Wright, however, testified that no inquiry or investigation had been made of the security violations or procedures in the proceedings. This testimony was consistent with the knowledge of the defense. Despite an extensive record of such violations, including the release of program and classified material to unauthorized persons, there has been little effort by the Navy nor by other relevant agencies to act to avoid any further compromise of information. After defense counsel raised serious allegations of national security violations, no one has contacted the defense or sought further information from the complaining party.

There appears a complete lack of interest in these admitted violations of the handling and disclosure of extremely sensitive information. For example, when the defense wrote to the NSA concerning violations by LT Timothy Orr, NSA General Counsel Robert L. Deitz replied stating that no violations had occurred and that the allegations were meritless. Before reaching this conclusion, Mr. Deitz never contacted the complaining party. Accordingly, Mr. Deitz would have had to rely upon conversations exclusively with the accused party to reach such a conclusion. It is shocking that the general counsel for an intelligence agency would be so cavalier about allegations of security violations as not to make any independent inquiry with the complaining party. The violations by LT Orr were minor compared to those committed by other members of the prosecution and the program offices as confirmed throughout these proceedings. The handling of this matter shows the complete failure to respond to allegations of national security violations in a responsible and appropriate manner.

All of the defense correspondence regarding these violations has been unclassified. The defense anticipated that someone would arrange a classified meeting or method to permit a detailed presentation of these violations. The failure of any intelligence official to contact the accusing party on these allegations speaks volumes as to the reluctance of responsible agencies to acknowledge and respond to comprehensive violations by their own officials. Months have gone by without such an inquiry, an act of omission that itself constitutes a violation of national security regulations.

II. THE ON-GOING VIOLATION OF NATIONAL SECURITY LAWS AND REGULATIONS.

It is not possible to give details of the specific allegations of national security violations in this case in an unclassified letter. However, it is important to convey the scope and gravity of these violations. What is striking about these violations is that they involve virtually every possible failure to protect program and other classified information, including violations relating to (1) the physical facility for the discussion of classified material; (2) the marking, storage, and handling of classified material; (3) the disclosure of classified material to unauthorized personnel; and (4) the proper response to unauthorized disclosures and other national security violations. A few examples from each of these areas merit mention.

A. Violations Concerning the Physical Facility for the Discussion or Disclosure of Classified Information.

1. The Navy continued to use a SCIF at Quantico that the defense repeatedly objected to as manifestly insufficient and uncertified to handle the program information in this case. The Navy insisted on using the SCIF for a year and a half until the defense was able to secure testimony of one security official that the SCIF was not certified and not appropriate for the discussion of her program.

2. The Navy allowed unauthorized individuals to enter a SCIF where program information was readily visible without any warning to the hearing participants that an uncleared individual was entering the room.

3. The Navy only recently began (in the last few weeks) to announce at the beginning of each session the level of access needed to be present -- after repeated disclosures to unauthorized persons of program information.

4. The Navy investigators played a tape containing program information to the accused in a hotel on a hotel tape machine. This same tape was played to other individuals without access in at least one earlier meeting. When this tape was classified on the secret level, the defense objected that the tape clearly contained program information and that it had to be immediately reviewed and secured. Navy prosecutor CDR L. Lynn Jowers repeatedly dismissed the objections and stated that Ms. Wright had also reviewed the tape for any program information. The need for corrective action was raised repeatedly by the defense on no less than seven different occasions. Finally, in the last twenty-four

hours, the government admitted on the record that the tape did contain program information and that "serious" violations of national security regulations had occurred.

5. The Navy repeatedly asked the accused to discuss highly sensitive program information with uncleared investigators in hotel rooms and unsecure locations. The details of these interrogations, containing program information, were typed up by these uncleared agents on uncleared computers and handled by uncleared personnel.

6. Basic SCIF practices were ignored, including the repeated failure to warn individuals not to bring cell phones into the SCIF. In fact, the military judge in the case, CDR James Winthrop, was found twice with a ringing cell phone in the midst of testimony on highly sensitive program information.

B. Violations on the Proper Marking, Storage, and Handling of Program and Other Classified Information.

1. The Navy conducted three classification reviews that were grossly negligent. This failure resulted in mismarkings and the unauthorized release, discussion and storage program information mistakenly marked as unclassified or "secret."

2. The defense has repeatedly found copies of program information that contained no program markings. As late as last week, the defense found Mr. Bill McKinney, a high program official, relying in his testimony on a document that was improperly marked.

3. Program information has been stored in areas that are not allowed to house such information over repeated defense objections.

4. Controlled documents have been copied, taken out of control channels, and treated as "working papers." Each of the government witnesses who are proffered as experts in national security regulations have engaged in this conduct. These copies do not fit the standard definition of working papers because they are final products that are transported and released outside the individual program offices. As such, the witnesses defeated the purpose of the control system by developing unaccounted copies of controlled documents and letting those documents be made part of an official court record. In some cases it is impossible to determine how many copies of a controlled document exist.

5. Unclassified documents have been designated as classified outside of the proper classification review process, including a document so designated by CDR Jowers who admitted to using her own "instincts" in the matter.

6. Virtually all of the program material in the case has been handled without the back cover or last page having any markings to show the classification level of the material contained therein. Many of these documents have TS/SCI information on the final page. Moreover, CDR Jowers has been allowed, over repeated objections of the defense, to submit classified documents as exhibits and to show those documents to witnesses without a cover sheet. Both CDR Jowers and CDR Winthrop refused to stop the practice and CDR Winthrop only asked that covers be added by "the end of the Article 32 proceedings" -- a potential delay of months.

7. The Navy did not clear or arrange for proper protection of program information during the investigation of Navy investigators, who were uncleared for access to such information.

8. The Navy knowingly allowed unclassified material marked as classified despite months of objections from the defense that such classification violated federal law.

9. The Navy refused numerous demands for declassification review and mandatory classification reviews which could have avoided the unauthorized disclosure of program information.

10. The Navy repeatedly refused to confirm the access of individuals to programs, leading to numerous individuals being exposed to programs for which they were not cleared.

11. The Navy repeatedly failed to respond to defense objections that specific program information was being held in unsecured or unauthorized locations.

12. On the stand various security officials, including Ms. Mary Rose McCaffrey, showed an astonishing lack of training or knowledge on the most basic national security procedures in the

copying and handling of controlled documents. These admissions are on the transcript in the proceedings.

C. Disclosure of Program and Other Classified Information to Unauthorized Individuals.

1. The Navy repeatedly allowed program information to be disclosed to over a dozen individuals without access to those programs, including people without an active clearance of any kind.

2. The Navy has allowed various NCIS investigators to collect, report, and discuss program information without proper access or clearance. This includes disclosures that were incorporated into documents prepared on uncleared computers or shown on videos in unsecured settings.

3. Efforts by the defense to demand proof of access of individuals in these proceedings was opposed by CDR Jowers and CDR Winthrop resulting on continued violations until the defense refused to continue absent such written proof. Once proof was supplied, the true scope of the violations was even more extensive than the defense had ever expected.

D. Improper Response to Unauthorized Disclosures and Other Allegations of National Security Violations.

1. The Navy has failed to obtain Inadvertent Disclosure Agreements (IDAs) from individuals with unauthorized access to program information despite the fact that the defense has been able to locate these individuals and confirm their prior violations of unauthorized access.

2. One high-ranking program official, Mr. Bill McKinney, stated that the Navy had decided to wait until the end of this case to act to get IDAs signed and retrieve program information in the possession of such uncleared individuals. Meanwhile, some of these individuals have been in possession of information for which they are not cleared for seventeen months. Others have since left the government. When challenged on this lack of due diligence, Mr. McKinney claimed that many of these individuals are unreachable despite the fact that the defense has had no difficulty in locating the same individuals.

3. National security officials assigned to the proceedings stated that, when confronted with a witness who lacked any clearance, that the acceptable approach was to intentionally reveal program information and then get the witness to sign an IDA.

4. In one instance, the defense noted that a document's cover page referred to a program for which no one, not even the security officials, had access. The security officer assigned to the proceedings suggested that the proper response was for him to read the document to confirm that the document did indeed contain references to a program for which neither he nor anyone in the room was given access.

5. When the defense repeatedly challenged the access sof spectators such as LT Orr to various programs, the challenge was objected to by CDR Jowers as meritless and CDR Winthrop repeatedly refused to take action. Ultimately, the defense was proven correct that LT Orr and others did not have access to program information revealed in the proceedings.

6. When the defense repeatedly demanded a matrix showing the programs for which participants were given access, such written confirmation was denied. Instead, Ms. Wright repeatedly and falsely informed the defense that everyone was cleared for these programs. Ms. Wright made such oral assurances three times -- each time it was shown that the statements were false and unauthorized disclosures resulted. It was only after the defense refused to continue without written confirmation that a matrix was produced -- the matrix showed numerous instances of unauthorized access to program information.

7. The Navy, through CDR Jowers, has concealed evidence of violations of national security rules and regulations.

8. Even after dozens of documented national security violations, the Navy refused to conduct an independent inquiry into the on-going violations and allowed identical violations to occur unabated over defense objections.

9. CDR Jowers and CDR Winthrop have repeatedly admitted to knowledge of national security violations but never complied with their obligations as security clearance holders to report violations.

10. Each time the defense notices a security violation related to the proceedings we raise it immediately and ask that corrective action be taken without delay. Whenever such a concern is raised, CDR Jowers objects that now is not the proper time to consider such violations and asserts that they can be dealt with at some unspecified later date. CDR Winthrop has adopted a similarly passive attitude and refuses to order any immediately corrective action.

III. REQUESTED RESPONSIVE OR CORRECTIVE ACTION.

The defense has now attempted every possible official avenue to address these violations. The defense first raised its concerns with the immediate Navy officials and program officials responsible for the violations. When these officials refused to act, the defense asked Vice Admiral Joseph Mobley, the convening authority, to act. When this effort failed, the defense asked CDR Winthrop to act. When this failed, the defense wrote to you for intervention as well as other high-ranking officials. When this failed, the defense wrote various members of Congress on the intelligence committees. None of these efforts have produced an inquiry or investigation and the violations have continued.

What is especially disturbing is that every effort by the defense to address national security violations has been met with consistent and determined opposition from the Navy. The prosecutor in the case, CDR Jowers, has opposed every such effort, including determining if material in the proceeding required immediate action to avoid a compromise of national security. It was due to this opposition that the proceedings continued to occur in an improper SCIF and program material was released to unauthorized persons over the numerous defense objections.

In my earlier letters, I expressed confidence that my obligations were satisfied by raising these violations to you and to Congress. I can no longer make such an assumption. Due to the lack of response to my earlier letters, additional violations have occurred and national security interests have been compromised. I feel compelled to seek all possible avenues to spur meaningful action in this area without further delay.

I ask that three steps be taken immediately to address these concerns. First, I ask that an inquiry be made as to the scope of prior violations and the on-going failure to properly control program information in this case. Given the fact that program security officials, like Ms. McCaffrey, have had direct knowledge of these violations and not acted to prevent them, it is essential that this inquiry be made by an outside and independent panel. Second, at a minimum, the defense should be allowed the opportunity to detail these violations at the outset of such an inquiry and to speak with officials conducting the inquiry. Third, I ask for a formal revocation review of the clearances of those officials who either committed these violations or refused to take corrective action to protect the information. This review should also include a specific review of the program security under the supervision of Ms. McCaffrey, which was the source of the most extensive and serious violations in the course of these proceedings.

Please inform me if you intend to intervene in this matter or to order any of the three responses requested above. If you intend to refer this matter for investigation, please indicate whether you will also ask for a formal inquiry, defense presentation of evidence, or clearance revocation review. Given the on-going nature of these violations and the sensitivity of the information, I respectfully request an expedited response.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

cc:
The Hon. Donald Rumsfeld
The Hon. Robert B. Pirie, Jr.
RADM Donald Guter
VADM Mobley
CAPT McPherson
CDR Newcomb
CDR Sundel
CDR Winthrop
CDR Jowers
LT Bailey
LT Freedus
CTR1 King
Members of Congress

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

October 23, 2000

By Facsimile Transmission and Overnight Mail

The Honorable George J. Tenet
The Director of Central Intelligence
Washington, D.C. 20505

Re: United States v. CTRI Daniel M. King, USN Dear Sir:

On October 16, 2000, I reported a series of violations of national security procedures and protections in proceedings related to the above referenced matter. I stated that violations were occurring on a daily basis and that immediate action was necessary to conduct an outside review of the lax security in the handling of program information.

Last week, additional violations were uncovered by the defense involving unauthorized disclosures of program information and the continued failure to safeguard TS/SCI material. This weekend, additional violations were uncovered, including unauthorized disclosures of program information as unclassified information. Once again these violations were found by the defense and not security staff including two additional programs for which no security staffer attorney had been previously given access. Additional officials were responsible for these violations. These officials include program security official Ms. Mary Rose McCaffrey and Navy LT Tim Orr. In the case of LT Orr, the defense repeatedly challenged LT Orr on his access. Not only did he falsely represent that he was cleared for all programs but had to be reprimanded twice by the judge for laughing during these inquiries. It has now been confirmed that he was not cleared for access to at least one such program.

I will be submitting a report on these violations as soon as I am able to break away from proceedings in the case. However, I wanted to immediately notify you that continued violations are occurring in this case. My repeated requests for a hearing on the level of security and on-going violations were denied by Commander Winthrop. I further requested that outside experts review the procedures in the case and the possible need to assign new security staff. This review was also denied. Commander Winthrop stated that, as one of the individuals responsible for these violations, it was not "appropriate" for him to call for such a review. He stated that such a request would have to come from your office. This misconception of the security responsibilities of a challenged individual is indicative of the problems in this case. However, it is now clear that disclosures and violations will continue without your immediate intervention.

There are now over three dozen violations of national security rules and regulations in this case, including the unauthorized disclosure of program information and repeated refusals to take minimal prophylactic measures in the face of rampant violations. These violations now include the entire management staff of the program security office, including Ms. McCaffrey who heads the office.

I would like to meet with security staff in a SCIF to disclose additional violations and explain some of the areas of lax and careless security. I would like to have the entire defense team participate in such a meeting. I ask that you contact Commander Winthrop to avoid further disclosure of program information until the security procedures in this case can be evaluated by an outside expert.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

cc:
The Hon. William S. Cohen
The Hon. Richard Danzig
RADM Donald Guter
VADM Mobley
CDR Winthrop
CDR Jowers
LT Bailey
LT Freedus
CTR1 King

Jonathan Turley
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052

October 16, 2000

By Facsimile Transmission and Overnight Mail

The Honorable George J. Tenet
The Director of Central Intelligence
Washington, D.C. 20505

Re: United States v. CTRI Daniel M. King, USN Dear Sir:

As lead defense counsel in the above referenced case, I am writing to inform you of a series of national security violations relating to special program material and information. I am reporting this misconduct pursuant to my briefing and access to SCI information and special access programs. I am under an obligation to report adverse or derogatory information as to individuals handling, or given access to, SCI material. I have witnessed a series of serious and willful security breaches in the handling and unauthorized disclosure of such material. Since these allegations involve program security personnel and continue despite objections from various individuals with SCI clearances, there is an immediate and urgent need for action to protect the integrity of these programs.

The reported incidents discussed below have been established by the defense on a classified record. These incidents involve willful breaches of security procedures as well as unauthorized disclosures by Commander James Winthrop, Commander L. Lynn Jowers, security officer Ed Glenn, and security officer Karen Wright. While the defense previously revealed alleged national security breaches by two witnesses in the case, LT Mary Lewis and Major Kathleen Heverly, the instant report addresses only these four officials and their on-going failure to protect SCI and special access information. Due to the classified nature of this information, the allegations below are presented without specific references to programs or equity holders involved in the case.

Under Director of Central Intelligence Directive 1/14, enacted pursuant to Section 102 of the National Security Act of 1947, and Executive Order 12333, I am required to take action to report violations of security procedures and the safeguarding of SCI material. This Directive and other controlling authorities require that any doubt concerning the safeguarding of SCI material must be resolved in favor of protecting such information, restricting access, and confirming proper control and access. Moreover, this Directive establishes that "[i]ndividuals determined to have disclosed classified information to any person not officially authorized to receive it may be considered ineligible for initial or continued SCI access." Furthermore, this Directive established that security violations are often committed "by carelessness or ignorance" but that "a pattern of [such] violations may be sufficient ground for a recommendation of disapproval." Specifically, such repeated violations require a determination of whether SCI access will be continued.

The standards contained in the Director of Central Intelligence Directive 1/14 are mirrored in the CFR and other regulations governing the responsibility of both individuals accused of breaches as well as those who believe that classified information is not being properly safeguarded. Federal regulations expressly emphasize that "disclosing classified information, by any means, to unauthorized persons or discussing or handling classified information in a manner than would make it accessible to unauthorized persons" is incompatible with withholding even the most basic clearance. 32 CFR §154.61. Federal regulations further require that any "derogatory information" on individuals with such access must be reported immediately and "shall be referred by the most expeditious manner" for review. 32 C.F.R. §154.55.

All of the incidents described below occurred in the preparation for, or the participation in, classified proceedings held at Quantico Marine Base. Despite repeated objections by defense counsel, these violations have been continuing on a daily basis in flagrant disregard of national security laws and regulations. Given the recurring and confirmed violations, I must ask for an expedited inquiry and action to bring the proceedings in full conformity with national security regulations to protect the program information in this case from willful or inadvertent disclosure. Moreover, since these incidents include derogatory information as to holders of SCI clearances, I ask that you review the continued or interim access of these individuals to SCI material or special access material.

Commander James Winthrop

1. *Unlawful Access to Program Information.* Commander James Winthrop is the Investigating Officer (I0) assigned to the Article 32 proceedings in this case. At the outset of the investigation, CDR Winthrop stated that everyone in the Special Compartmented Information Facility (SCIF) had secured TS/SCI clearances and the necessary access to the various programs involved in the case. CDR Winthrop expressly asserted that he had such access before the start of testimony. The government then proceeded to present the testimony of Mr. Ed Glenn, a civilian security expert associated with some of the programs in this case. Mr. Glenn proceeded to give information on each and every program including: (a) code names; (b) scope of activities under the programs; (c) comparisons between classified programs; and (d) the various agencies involved in such programs. CDR Winthrop repeatedly solicited further information from Mr. Glenn on these programs. In the course of this testimony by Mr. Glenn, defense counsel LT Robert Bailey became concerned that he was not cleared for one program (hereinafter Program A). A subsequent review of persons with clearances revealed that CDR Winthrop and a spectator were not cleared for this program. During his cross-examination, Mr. Glenn established that it is the obligation of each individual in the room to determine their own access to information and to stop disclosures (as did LT Bailey) if they are uncertain of such access. CDR Winthrop admits that he failed to obtain the necessary access to the programs in this case before participating in a detailed disclosure of the information. Moreover, the record establishes that CDR Winthrop listened to a full description of the program and never asked (as did LT Bailey) for confirmation of his access.

2. *Failure to Properly Protect Program Information*. As the I0, CDR Winthrop was ultimately responsible for the failure to individually confirm the access of every individual, including himself and the spectator, for the information in the case. This is particularly clear when the defense specifically called for the exclusion of spectators and questioned their need to be present for such program information.

3. *Second Alleged Unlawful Access Violation*. CDR Winthrop also was given access to documents with markings and information which he was not cleared to receive. These documents and information were supplied by CDR Jowers and security officers in the form of statements made by individuals in this case, including a statement of LT Mary Lewis that was put into evidence before the violations were discovered.

4. *Third Alleged Unlawful Access Violation*. CDR Winthrop committed additional violations in relation to another program (hereinafter Program B) even after the disclosure of the violations relating to Program A. On Monday, October 16, 2000, CDR Winthrop admitted to a failure to secure access to Program B before participating in the discussion of material under that classification. This failure was revealed by Ms. Francine Stephens, a civilian security official with the Judge Advocate General at the Washington Navy Yard. Again, CDR Winthrop failed to ascertain clearances under each of the programs even after his earlier violation.

5. *Refusal to Comply with Access Verification Requests*. CDR Winthrop also refused to comply with a standard request for written verification of access of individuals in the SCIF. After the disclosure of the multiple access violations leading up to the October 16, 2000 hearing, the defense asked for written verification of the access of everyone in the room before further information was disclosed. This was done after three prior assurances by security officer Karen Wright that the access of every individual had been established. All three of these assurances proved false and led to security breaches. While CDR Winthrop agreed that this request was made "in good faith" and would have to be satisfied, he refused to delay the presentation of further program information until written verification could be acquired. CDR Winthrop maintained this position despite the fact that CDR Jowers expressed a preference to wait until the next day to present the information. When the defense insisted on such confirmation as a condition for moving forward, CDR Winthrop ordered that all parties continue despite the stated objections of the entire defense team including the security expert assigned to the defense. The defense refused and, in order to avoid participating in a further violation, the defense walked out of the proceedings. The defense refusal forced the termination of the proceedings until Tuesday, October 17, 2000. By refusing to require written confirmation of access and relying on the oral assertion of Ms. Wright despite her demonstrated

unreliability, CDR Winthrop failed to protect the integrity of program information. Moreover, CDR Winthrop refused to comply with basic procedures in establishing access when he attempted to force the participation of defense members, including two junior officers, without satisfying their concerns over the clearance of all individuals for the information. The defense concern was realized after the hearing on October 16, 2000 when the defense learned that LT Orr may not be cleared for access to yet another program in this case despite the assurances of Ms. Wright.

6. *Refusal to Allow Confirmation of the "Need to Know" Spectators.* Defense counsel have repeatedly attempted to determine the "need to know" of a LT Orr, who has been a spectator at these proceedings. Defense counsel repeatedly asked for specific proof (names and dates) that the individual equity holders over the relevant programs had given such approval. In response, CDR Jowers varied from claims that she had "direct contact" with the equity holders to approval by a single individual to approval "through the Convening Authority." CDR Winthrop repeatedly refused efforts by defense counsel to determine the specific authorization on the record over two days of proceedings. Rather, CDR Winthrop repeatedly stated that the law only required that he be satisfied on this point. Ultimately, CDR Jowers never offered specific names and referred generally to a meeting with "equity holders" without identification of the agencies. She stated that she could not remember the names of the representatives and could not provide any documentation of the claimed determination of the "need to know."

7. *Failure to Protect the Integrity of the SCIF Proceedings.* While clearly not as serious of the above breaches, CDR Winthrop also violated rules on the use of cellular phones in a SCIF. On October 4, 2000, CDR Winthrop's cellular phone rang after hours of testimony on highly classified program information. CDR Winthrop was asked to immediately turn off the cellular phone as a violation of the SCIF restrictions. However, this violation was repeated again after a recess and after additional classified discussion in the SCIF.

8. *Pattern of Willful Failures to Follow Security Procedures and to Protect SCI Material from Unauthorized Disclosure.* The repeated refusal of CDR Winthrop to follow procedures and verify basic access information shows a willful disregard of his obligations under the SCI briefing to protect classified information and special access information.

COMMANDER L. LYNN JOWERS

1. *Inadvertent Disclosure Violation.* Trial counsel in this case is responsible for a series of intentional and inadvertent disclosures of TS/SCI material and special access material. The first such violation began in December 1999 when the government provided the defense with 5 binders of information marked as SECRET/NOFORN. Shortly thereafter, government security officers found TS/SCI program information within these 5 binders marked SECRET. In the interim, CDR Jowers repeatedly provided these binders to defense counsel who did not have TS/SCI clearance.

2. *Inadvertent Disclosure Violation (2).* A second inadvertent disclosure was disclosed in October 2000 when the government found, again, program material in the 5 binders. During his testimony, Mr. Glenn admitted that the binders marked SECRET contained program information. This material had been reviewed more than a dozen times by defense counsel who, at the time, did not have and was not actively seeking a TSI clearance.

3. *Inadvertent Disclosure Violation (3).* A third violation occurred in the second week of October 2000 when CDR Jowers had material delivered to defense counsel's office under her express assertion that the material did not contain program information. Within seconds of opening the material, defense counsel discovered clearly marked program information which should not have been removed from a SCIF or reviewed in an unsecure office.

4. *Intentional Disclosure of Program Information to Individuals Without Access and Failure to Follow Procedures for Disclosure of Such Information.* Weeks prior to the Article 32 proceedings, CDR Jowers is also believed to have shown LT Lewis a version of her statement containing program code names and identifying specific provisions with specific programs. This material contains TS/SCI material as well as special access program information and markings. LT Lewis did not possess any clearance and it was only in the last week that the Navy attempted to obtain a waiver for such access. Such disclosure was done in full knowledge of the classification of this information on the face of the document and without following the procedures for determining LT Lewis' access for such information. In fact, while apparently disclosing this information to LT Lewis, CDR Jowers had previously relied on the special access designations of the information in barring access to uncleared defense counsel.

5. *Intentional Disclosure of Program Information to Individuals Without Access and Failure to Follow Procedures for Disclosure of Such Information (2).* A second violation by CDR Jowers occurred when she gave the Lewis statement with program markings and identifications to CDR Winthrop who did not have access to the program information at the time.

6. *Intentional Disclosure of Program Information to Individuals Without Access and Failure to Follow Procedures for Disclosure of Such Information (3).* A third violation by CDR Jowers occurred when she read the program markings and elicited testimony on programs without determining the access of spectators in the proceedings. One such spectator did not have the necessary program access.

7. *Intentional Disclosure of Program Information to Individuals Without Access and Failure to Follow Procedures for Disclosure of Such Information (4).* A series of violations and attempted violations occurred on October 13, 2000 in relation to CDR Jowers effort to circumvent national security rules and regulations. Defense counsel repeatedly objected to the failure of CDR Jowers to establish the access of individuals in the classified proceedings. The defense specifically objected to LT Lewis being called into the SCIF without determining the level of her clearance and access to information. CDR Jowers, and Ms. Wright had initially argued that LT Lewis could simply testify on her statement and could be shown her statement to incorporate the statement into the record. Defense counsel objected that the statement contained program markings and that LT Lewis should not have been allowed into the SCIF without a clearance. In fact, when LT Lewis entered the SCIF, neither CDR Jowers nor Ms. Wright asked for program material to be covered despite the fact that such information was visible on every table. It was only upon the defense objection, resisted by CDR Jowers, that LT Lewis was removed to permit discussion of her access. The entry of LT Lewis into the SCIF exposed program information without warning that she lacked access and compromised the integrity of the SCIF.

8. *Attempted Intentional Disclosure of Program Information to Individuals Without Access.* In clear violation of security rules and regulations, CDR Jowers insisted that LT Lewis be allowed to return and testify on information that she knew to be program information and that she then be cross-examined on such information. No prior inadvertent disclosure form was submitted for LT Lewis' original disclosure of this information. No authority was supplied for LT Lewis to discuss such information again in her testimony. To the contrary, CDR Jowers maintained that no such authorization was needed. The defense succeeded in preventing this violation by convincing the IO that some specific authorization must be shown.

9. *Attempted Intentional Disclosure of Program Information to Individuals Without Access (2).* After the defense threatened to leave the October 13, 2000 hearing rather than participate in another violation, it was determined by the IO that authorization would be required. CDR Jowers again objected and stated that no such authorization would be required. After additional discussion, the government then stated its intention to justify testimony of LT Lewis on the following Monday with an authorization from the Chief of Naval Operations (CNO). The support for this position was a reference on an inadvertent disclosure form. The IO indicated that he believed that this was sufficient. The defense again objected and stated that only a signed Non-Disclosure Agreement establishing that the individual had been briefed or "read into" the programs would suffice. On Monday, October 16, 2000, CDR Jowers attempted again to call LT Lewis. CDR Jowers, however, abandoned her earlier position and now sought the testimony on the basis of a letter from the Director of Naval Intelligence authorizing "temporary access" to these programs. While this letter was used to support a claim that LT Lewis had been briefed into the programs, the letter failed to establish any of the conditions set forth in the CFR for such access. After apparently reviewing these procedures for the first time, CDR Jowers again stated that she could not produce the necessary authorization. Again, the only reason this witness did not violate national security rules and regulations was that persistence of the defense and its refusal to allow the violation to occur.

10. *Failure to Act on Mandatory Declassification Review Requests and Classification Challenges.* CDR Jowers also failed to act on repeated requests for declassification review and classification challenges despite the obviously unclassified nature of material marked SECRET in the evidence binders. It was not until October 2000 that a classification review was performed, almost a year after the first requests and after she repeatedly invoked classification barriers in refusing disclosures to counsel. CDR Jowers failed to follow the regulations regarding classification challenges despite repeated assurances that the process was underway. 11. *Pattern of Willful Failures to Follow Security Procedures and to Protect SCI Material from Unauthorized Disclosure.* The repeated refusal of CDR Jowers to follow procedures and verify basic access information shows a willful disregard of her obligations under the SCI briefing to protect classified information and special access information.

ED GLENN

1. *Negligent Disclosure of Program Information to Individuals Without Access.* Mr. Glenn is a senior program security officer who appeared as a witness in a preliminary hearing in this case. During this testimony, the unauthorized disclosure of program information was discovered. Mr. Glenn was responsible for the vast majority of such information disclosed on Program A. In his testimony, Mr. Glenn admitted that he was under an obligation to determine the access of individuals before disclosing the information. He admitted that he did not in fact make this inquiry. Later, Mr. Glenn referred to his failure to ascertain the access of individuals to program information as a mere "administrative oversight" and not a serious concern.

2. *Intentional Disclosure of Program Information to Individuals Without Access and Failure to Follow Procedures for Disclosure of Such Information.* It is believed that Mr. Glenn participated in a meeting in which he and CDR Jowers showed LT Lewis a version of her statement and discussed its contents containing classified program code names and identifying specific provisions with specific programs. This material contains TS/SCI material as well as special access program information. LT Lewis did not currently possess any clearance and it was only in the last week that the Navy attempted to obtain a waiver afford LT Lewis access to these programs. Defense counsel attempted to determine who participated in this meeting but were prevented from doing so by CDR Winthrop.

3. *Negligent Disclosure of TS/SCI and Program Information to Unauthorized Individuals.* It is believed that Mr. Glenn was involved in the repeated failures to properly mark material in the binders given to the defense, including the failure to remove program information described in the Jowers violations above.

4. *Failure to Require Proof of Access by Individuals in the Investigation and Article 32 Proceedings.* It was ultimately Mr. Glenn's responsibility, as well as Ms. Wright's, to ascertain the access of individuals prior to their exposure to program information. The defense. has discovered a number of individuals apparently not given access. Yet, these individuals appear to have typed or reviewed the statements of Major Heverly or LT Lewis which contained TS/SCI and special access information.

5. *Pattern of Willful Failures to Follow Security Procedures and to Protect SCI Material from Unauthorized Disclosure.* The repeated refusal of Mr. Glenn to follow procedures and verify basic access information shows a willful disregard of his obligations under the SCI briefing to protect classified information and special access information.

KAREN WRIGHT

1. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures.* As the security officer assigned to the IO, Ms. Wright bears considerable responsibility for the series of violations committed in the Article 32 proceedings. The first such failure concerned the lack of program access given to the IO despite her assurances that the IO did have such access before the disclosure of program information.

2. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures (2).* Ms. Wright further failed to ascertain the program access of a spectator prior to the discussion of Program A, as discussed above.

3. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures (3).* Ms. Wright further failed to ascertain the program access of the IO to Program B until after his exposure to such information. 4. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures (4).* Ms. Wright further failed to establish the access and require proper authorization before LT Lewis entered the SCIF for testimony, as described above.

5. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures (5).* Ms. Wright failed to warn individuals in the SCIF that LT Lewis lacked access to TS/SCI material or program material when she entered the SCIF or to alert individuals to cover such material.

6. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures (6).* Ms. Wright failed to object to the repeated attempts of the government to permit LT Lewis to testify (1) without authorization; (2) with only authorization from the Chief of Naval Operations; or (3) without satisfying the express conditions of 32 CFR § 147.32-33 and the DCID 6/4.

7. *Negligent Disclosure of Program Information to Individuals Without Access and Failure to Follow Security Procedures (7).* On three separate occasions, Ms. Wright reportedly represented to the IO that every one present for the proceedings was cleared for access to programs in the case. These assertions were false and clearly the result of a failure to make an adequate inquiry. These failures led to repeated violations.

8. *Pattern of Willful Failures to Follow Security Procedures and to Protect SCI Material from Unauthorized Disclosure.* The repeated refusal of Ms. Wright to follow procedures and verify basic access information shows a Wilful disregard of her obligations under the SCI briefing to protect classified information and special access information.

The individuals discussed in this report continue to handle and disclose SCI and special access material. In today's hearing, further violations were prevented only by the defense leaving the SCIF. However, CDR Winthrop and CDR Jowers have stated an intention to proceed on October 17, 2000 without establishing that basic procedures and protections have been confirmed in the case. Defense counsel is, therefore, in the position of placing the rights of our client at risk or adhering to the briefing instructions contained in the Director of Central Intelligence Directive 1/14 and other controlling authority. For that reason, I ask for action by your office without delay.

Sincerely,

Jonathan Turley
Defense Counsel for Petty Officer Daniel King

cc:
The Hon. William S. Cohen
The Hon. Richard Danzig
RADM Donald Guter
VADM Mobley
CDR Winthrop
CDR Jowers
LT Bailey
LT Freedus
CTR1 King

PDF Version

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CHAPTER ONE

(U) INTRODUCTION, EXECUTIVE SUMMARY, MISSION STATEMENT, METHODOLOGY, AND ACKNOWLEDGMENTS

A. Introduction

From 1982 to 1984, from 1994 to 1995, and from 1996 to 1999, Wen Ho Lee was the subject of Federal Bureau of Investigation ("FBI") counterintelligence investigations. The first of these investigations was competently, professionally and ably conducted. The others were not.

This report is the record of the FBI's investigations of Wen Ho Lee over the course of these two decades. For one critical time period it is also the record of the Department of Justice's own direct and substantial involvement in the Wen Ho Lee investigation, an involvement that, like the investigation from which it arose, was mishandled. Because this is a report about a matter arising out of an allegation presented by the Department of Energy ("DOE"), this report is also, naturally, the record of the interaction between the FBI and DOE. Among the most disturbing judgments reached by the Attorney General's Review Team ("AGRT") are those concerning significant and material misrepresentations made by DOE personnel to the FBI at the initiation of this investigation.

The primary focus of this report is on the investigation of Wen Ho Lee conducted between 1996 and 1999. This was an investigation that from its first moments, indeed from its *very* first moments, went awry and never, in any real sense, recovered its equilibrium. It was an investigation riven with problems, and entirely unable to make its own breaks. While the handling of this investigation was principally an FBI responsibility and, hence, the *mis*handling of this investigation was principally an FBI failure, the Department of Justice, too, failed in *its* responsibilities, and did so on a matter of grave consequence.

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Some of the problems we have identified in this report are specific to the Wen Ho Lee investigation and are not likely to reoccur. Some of the problems, however, are certain to reoccur if they are not recognized and remediated, and we have made numerous recommendations intended to address these structural and procedural flaws.

The Wen Ho Lee investigation involved allegations of espionage as significant as any the United States Government is likely to face. It required an appropriate, aggessive and effective response. It did not get such a response from any of the departments and agencies whose conduct we have examined, and the gravity of this failure may yet not be fully known. If there is a lesson to be learned from this, and we certainly believe there is, it is at least this: We must do better.

B. Executive Summary

What follows is a brief outline of the contents of this report.

CHAPTER ONE

(U) This chapter contains the introduction to this report, an Executive Summary, the AGRT's Mission Statement, the eleven questions posed by the President's Foreign Intelligence Advisory Board, the methodology of the AGRT's work, and certain acknowledgments.

CHAPTER TWO

This chapter describes the 1982-1994 investigation of Wen Ho Lee, an investigation that the AGRT finds to have been competently, professionally and aggressively pursued. However, the FBI failed formally to advise DOE of spedfic derogatory information concerning Wen Ho Lee which was acquired in the course of that investigation, and which might have led DOE to revoke Lee's security clearance.

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CHAPTER THREE

This chapter describes [deleted].

CHAPTER FOUR

This chapter consists of a comprehensive overview of the FBI's handling of the Wen Ho Lee investigation from 1994 to 1999, both within the National Security Division ("NSD") and at FBI Albuquerque Division ("FBI-AQ").

This chapter concludes that the FBI's counterintelligence investigation of Wen Ho Lee, in virtually every material respect, was deeply and fundamentally flawed. Among the matters addressed in this chapter are the following: (1) The Wen Ho Lee investigation was never a high priority matter within either NSD or FBI-AQ. Indeed, for much of the investigation, it was the single lowest priority in FBI-AQ's National Foreign Intelligence Program, which was, itself, the fourth lowest priority of the Division. (2) The choice of the two case agents responsible for this investigation was problematic and unfortunate. Although each agent can be credited with some accomplishments, neither agent was the proper choice for a case of this magnitude, importance and inherent complexity. (3) The investigation was never accorded the resources which the underlying allegations warranted and should have dictated. (4) Two agents were sent by FBI Headquarters to FBI-HQ specifically to support the Wen Ho Lee investigation. FBI-AQ diverted both agents to other assignments. (5) Frequent, unnecessary, and inappropriate delays characterized the Wen Ho Lee investigation. While FBI-AQ is principally responsible for these delays, NSD is accountable for several unfortunate and avoidable delays. (6) At every level of management at FBI-AQ from May 1996 to August 1998, there was a failure to provide proper supervision to the case and its case agents. The SAC responible for the investigation for a substantial period of time had so little involvement in the investigation that he was not even aware of the underlying predicate until long after he left FBI-AQ. Both of the Supervisory Special Agents responsible for the direct supervision of the case failed to supervise the case or the agents effectively or properly. (7) NSD, too, bears a major share of responsibility for the inadequacies of this

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investigation. Initially, it demonstrated an unreasonable reluctance to become involved in the investigation. When it did become involved, NSD inappropriately deferred to the judgment of DOE on matters that lay at the core of the FBI's own investigative responsibilities. As the investigation proceeded, NSD became keenly aware of FBI-AQ's poor handling of the case, yet it took no effective measures to fix the problem, even when it was given an explicit opportunity to do so. Instead, it simply attempted to run the case from FBI Headquarters, an approach that was unmanageable from the start and which would severely handicap the investigation. In this chapter, the AGRT identifies nine respects in which NSD failed appropriately to advance and manage this investigation.

CHAPTER FIVE

This chapter describes FBI-AQ's inadequate handling of the preliminary inquiry on Wen Ho Lee in 1994 and 1995, a missed opportunity of critical significance.

CHAPTER SIX

This chapter describes: (1) the operations of the Kindred Spirit Analytical Group ("KSAG"), a scientific panel convened by DOE in 1995 to assess certain developments in the PRC'S nuclear weapons program; (2) KSAG's judgment that a limited compromise of United States Government classified nuclear weapons data had been established; (3) [deleted] (4) the FBI's failure properly to investigate the predicate for itself; and (5) the Central Intelligence Agency's ("CIA") September 1997 assessment which might have, but unfortunately did not, lead the FBI to recognize that there was a fundamental problem with its understanding of the predicate for the Wen Ho Lee investigation.

CHAPTER SEVEN

This chapter examines the DOE Administrative Inquiry, an inquiry that culminated in the issuance of a formal report to the FBI which launched the full investigation of Wen Ho and Sylvia Lee.

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[lines deleted] The AGRT further concludes that misleading representations were made in this reort which invited the FBI to focus its investigative attention exclusively on Wen Ho and Sylvia Lee. The AGRT also concludes that the FBI contributed materially to the problem with the Administrative Inquiry by its failure properly to investigate either the predicate for theinvestigation or the means by which the Administrative Inquiry came to judge Wen Ho and Sylvia Lee as "the most logical suspects." Finally, the AGRT concludes that recent allegations of racial bias in the selection of Wen Ho and Sylvia Lee are without merit.

CHAPTER EIGHT

This chapter examines the first ten months of the full investigation of Wen Ho Lee, and concludes three mistakes were made immediately that would have dramatic and unfortunate consequences for the FBI's investigation. The first was the choice of case agent. The second was the assignment of this important and complex matter to just one agent who could not even give it his undivided attention. The third was the initiation of a problematic and, at times, dysfunctional relationship between NSD and FBI-AQ as to who was in charge of the Wen Ho Lee investigation.

CHAPTER NINE

This chapter examines the FBI's profoundly consequential, and potentially catastrophic, failure to gain access to Wen Ho Lee's computer files in 1996, or even earlier. This chapter concludes that: (1) Lee's computer files could have been searched by the FBI at any point in 1996 through 1998, or even in 1994 or 1995 in connection with the preliminary inquiry. (2) Lee had no justifiable expectation of privacy that precluded such a search. (3) The FBI's failure to act was a product of missed opportunities, bad communication between DOE and the FBI, worse communication within the FBI itself,

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inadequate and inaccurate legal advice rendered to the field, undue caution and lack of aggressiveness on the part of FBI-AQ, and a complete failure to recognize the critical importance of Lee's work with, and access to, highly classified computer software and systems.

The AGRT concludes that this failure permitted Wen Ho Lee's computer misconduct to go unrecognized for years after it should have been uncovered. It permitted critical nuclear weapons secrets to remain unprotected on LANL's open computer systems; and it permitted Lee to download in 1997 some of our nation's most prized nuclear weapons secrets.

CHAPTER TEN

This chapter describes the months leading up to the submission of a FISA letterhead memorandum to OIPR, a time during which the FBI assembled critical information for its submission but failed to assemble or acquire other information that could have fundamentally altered OIPR's perception of the application's legal sufficiency.

CHAPTER ELEVEN

This chapter describes the FBI's unsuccessful efforts in the time period of June 1997 to August 1997 to persuade OIPR that it had established a sufficient factual basis for a FISA order in the Wen Ho Lee investigation.

The AGRT concludes: (1) OIPR was wrong: Draft #3, as the final FISA draft would come to be called, did establish probable cause; it should have resulted in the submission of a FISA application to the FISA Court and the issuance of a FISA order. (2)Draft #3, however, repeated DOE's significant misrepresentations to the FBI concerning the predicate and, therefore, knowing what we know today, Draft #3 could not be submitted to any court. (3) A major factor contributing to OIPR's rejection of the application was the FBI's failure to plead exceptionally important information, known to the FBI, which would have substantially strengthened the application. This included the omission of two facts concerning a critical 1994 incident that, alone, might have

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persuaded OIPR that the application was legally sufficient. (4) None of the arguments against probable cause, individually or collectively, were sufficient to justify OIPR's rejection of the application. (5) A contributing factor in OIPR's rejection of the application was OIPR's unduly constrained view of what constitutes "currency." (6) The FBI did not withhold any material exculpatory information from OIPR. In particular, it properly described [deleted] (7) OIPR's destruction of records was inappropriate, unwarranted and harmful.

CHAPTER TWELVE

This chapter describes the Department of Justice's August 1997 handling of the FBI's "appeal" of the adverse decision by OIPR on the Wen Ho Lee FISA application.

The AGRT concludes the following: (1) The review of the application should not have been assigned to an Associate Deputy Attorney General who, despite his other considerable qualifications and expertise, had almost no prior experience with FISA applications. (2) The Attorney General and the ADAG had significantly different understandings as to the purpose and goal of the undertaking. (3) The ADAG should have met with the FBI, and not just with OIPR, before determining that OIPR's evaluation of the application was correct. (4) The ADAG reached the wrong judgment. The application did meet the probable cause standard. (5) The ADAG should have reported his findings to the Attorney General who was never advised that the ADAG had decided the matter against the FBI. (6) There was no reason for the FBI to "re-appeal" this matter. It had done so once, to no avail, and it did not know the Attorney General was unaware of the ADAG's resolution of the matter.

CHAPTER THIRTEEN

This chapter describes the aftermath of OIPR's rejection of the FISA application, including an unfortunate four month delay while NSD contemplated a new investigative plan, and the acutely demoralizing effect that the FISA rejection had on FBI-AQ.

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This chapter also examines an exceptional opportunity provided to the FBI in September 1997 by the CIA to recognize DOE's fundamental mischaracterization of the predicate, and the FBI's failure to appreciate or act upon this opportunity.

Finally, this chapter describes Director Freeh's explicit admonishment to DOE, communicated on August 12, 1997 to DOE's Deputy Secretary, that the FBI's investigation of Wen Ho Lee should not in any respect influence or control DOE in its determination as to Wen Ho Lee's continuing access to classified nuclear weapons secrets. Director Freeh's "take that right off the table" statement to DOE was, essentially, ignored by DOE for a year-and-a-half.

CHAPTER FOURTEEN

This chapter describes the events of December 1997 to August 1998, with particular focus on two significant events.

First, there was the arrival at FBI-AQ of a December 1997 teletype containing NSD's new investigative plan, and FBI-AQ's nearly complete failure to comply with any aspect of the plan, including its several mandatory requirements.

Second, there was the planning and execution of the [deleted]. The AGRT concludes the following: (1) There was an astonishing lack of planning in connection with the [deleted] converting it into an improvised and impromptu performance. The most basic aspects of the [deleted] went essentially unplanned and unscripted. (2) Nevertheless, [deleted]. The AGRT concludes that it yielded 19 separate items in support of probable cause [lines deleted]. The [deleted] should have resulted in a serious effort by NSD to secure a FISA order. As Chapter 16 indicates, it did not.

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CHAPTER FIFTEEN

This chapter describes the events of August 1998 to December 1998, a time period principally characterized by the FBI's inability to [deleted] This inexcusable failure delayed by months NSD's consideration of whether to submit a new FISA application.

In addition, it was during this time period that DOE's Office of Counterintelligence determined that DOE and its contract polygrapher would interview and polygraph Wen Ho Lee when he returned from Taiwan. DOE's frustration with the pace of the investigation, and its determination to have a final resolution of the Wen Ho Lee matter, was understandable, but NSD and FBI-AQ should never have acquiesced in this decision. [lines deleted]

CHAPTER SIXTEEN

This chapter describes the FBI's second approach to OIPR concerning a FISA order in the Wen Ho Lee investigation.

The AGRT concludes the following: (1) The [deleted] as stated above, warranted a serious and substantial effort on the part of NSD to procure a FISA order and it warranted the issuance of such an order. (2) FBI-AQ agreed with that assessment and submitted to NSD a formal request for a FISA order. (3) Unfortunately, the [deleted] unit disagreed with that assessment and viewed the [deleted] as a "bust." (4) The [deleted] unit did speak with an attorney from OIPR about the [deleted] but in no respect was it a genuine effort to obtain a FISA order. In fact, by the time a brief and casual conversation with OIPR took place, NSD had already rejected FBI-AQ's request for an order and had conveyed its rejection to FBI-AQ. The [deleted] Supervisory Special Agent ("SSA") who contact OIPR had one purpose and it was not to persuade

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OIPR of the merits of the [deleted] Rather, it was to obtain OIPR's endorsement of the decision that NSD had already made, that the [deleted] did not warrant a FISA order. In a meeting which lasted mere minutes, the SSA did not tell the OIPR attorney much more than that [deleted] had failed. Naturally, inevitably, the OIPR attorney agreed that there was no basis for revisiting the FISA issue. Thus was lost the FBI's very last opportunity to obtain a FISA order that was likely to be productive. The next day, Lee was interviewed and polygraphed.

CHAPTER SEVENTEEN

This chapter examines the significant time period of December 1998 to March 1999. The AGRT concludes the following: (1) In four consequential respects, the December 23, 1998 interview and polygraph of Wen Ho Lee by DOE and Wackenhut demonstrated precisely why the FBI, not DOE, should have been in charge of the proceeding. The most significant of these consequences was Wackenhut's misinterpretation of its own polygraph, which was subsequently repudiated by both DOE's own OCI Polygraph Program manager, and by the FBI. (2) In addition, during this time period, DOE set what amounted to a 30-day deadline for a resolution of the Wen Ho Lee matter. [lines deleted] (3) A major contributing factor in the creation of this communication was the erroneous belief that Lee had "passed" the December 23rd polygraph. FBI-AQ did not know that Lee had not "passed" the polygraph because the FBI Polygraph Unit could not make that assessment until after it received the charts to review. Although FBI-AQ would assert that DOE was to blame for the tardy production of these charts, FBI-AQ was, itself, principally responsible for the FBI not getting the charts at an earlier point in time. (4) When the FBI, itself, did finally polygraph Lee, on February 10, 1999, it did so in a competent and professional manner that illustrated just how important it was to have had the FBI be in control of this process in the first place. (5) The March 5, 1999 FBI interview of Wen Ho Lee was also done in a competent and professional manner, with the assistance of a knowledgeable scientist. Most significantly, at the beginning of the interview, Lee signed a consent form to search his office, a uniquely important event in the life of this investigation, and one that ultimately would lead to Lee's prosecution. (6) The March 7,

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1999 FBI interrogation of Wen Ho Lee, intended by FBI-AQ to leave Lee "in despair," contained inappropriate, and threatening references to electrocution and other matters.

CHAPTER EIGHTEEN

This chapter addresses one critical issue, the complete failure of the United States Government to restrict Wen Ho Lee's access to sensitive and classified nuclear weapons secrets throughout the course of the full

investigation.

The AGRT concludes the following: (1) Initially, the FBI insisted on Lee retaining his current access to classified infomiation in order to avoid engaging in any conduct which might conceivably alert Lee to the existence of the investigation. In taking this position, the FBI did not consider or seriously explore alternatives to maintaining Lee's access, nor did it acquire any genuine understanding of the risk the United States was taking by keeping Lee in access. (2) On August 12, 1997, Director Freeh clearly and explicitly told DOE that it must take any considerations associated with the FBI's investigation of Wen Ho Lee "right off the table." DOE ignored this admonishment and did not alter Lee's access to classified information in any respect until DOE's Ed Curran learned of it and promptly addressed the issue in December 1998.

The AGRT concludes that there were four major contributing factors to the FBI's and DOE's failure properly and appropriately to address the access issue: first, there was the FBI's reflexive and inaccurate presumption that Lee must remain in access for the FBI to make its case; second, there was DOE's and the FBI's failure to work together to come up with non-alerting alternatives that would have limited Lee's access; third, there was the fact that the FBI and DOE repeatedly made the mistake of focusing on Lee's current work, rather than Lee's current access, a mistake of incalculable significance, as the FBI and DOE would eventually discover; and, fourth, there was a failure to recognize that the need to restrict Lee's access was even more critical than in other counterintelligence cases because the FBI had no surveillance or FISA coverage of Lee's activities. Thus, Wen Ho Lee, the principal subject of an espionage investigation alleging the theft of nuclear weapons secrets, was given both unrestricted access and unmonitored access to additional nuclear weapons secrets.

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The FBI's and DOE's failure to address this issue was consequential; indeed, it may have been catastrophic. For almost the entire course of the FBI's full investigation, Lee had unrestricted access to the X Division's vault, a repository of 50,000 classified document, including documents classified at the Secret Restricted Data level. He had unrestricted access to the X Division's classified computer systems, which contained the "crown jewels" of America's nuclear arsenal. And, in 1997, he created Tape N, one of the most significant downloads of critical nuclear weapons secrets.

CHAPTER NINETEEN

This chapter addresses the FBI's failure to comply with the mandatory Criminal Division notification requirements of the Attorney General's Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations, signed by the Attorney General on July 19, 1995.

Throughout the course of its investigation, one of the FBI's goals was the criminal prosecution of Wen Ho Lee. The FBI made numerous decisions that would materially affect a potential criminal prosecution, yet the head of the Internal Security Section ws not advised of even the existence of the investigation. [lines deleted] Additional reminders of the obligation to notify the Criminal Division came in May 1996, with the receipt of the DOE Administrative Inquiry, again in July 1996, with the FBI's submission of its initial letterhead memorandum to OIPR, and again in June 1997, with the FBI's submission of its FISA letterhead memorandum. Each of these events should have triggered notification to the Criminal Division.

The AGRT also concludes that OIPR failed in its obligation to notify the Criminal Division concering the existence of the Wen Ho Lee investigation. OIPR, unlike the FBI, was not under a *mandatory* notification obligation because there was no

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FISA coverage in place. Nevertheless, it clearly should have recognized the importance of insuring that the Criminal Division was apprised of the existence of this critical investigation.

The AGRT further concludes that the FBI's failure to notify the Criminal Division was in part a manifestation of a much larger issue, the problematic relationship among the FBI, OIPR and the Criminal Division on matters related to the sharing of intelligence information. That relationship, described in this report by various knowledgeable individuals as "dysfunctional" and "broken," is discussed in the Chapter 20.

The failure to notify the Criminal Division was consequential in a number of respects. This chapter describes six significant issues in the Wen Ho Lee investigation concerning which FBI should have

consulted the Criminal Division, not only because they affected a potential criminal prosecution but because the Criminal Division could have offered valuable advice.

CHAPTER TWENTY

This chapter describes the long-term dysfunctional relationship among the Criminal Division, the FBI and OIPR in matters related to intelligence sharing. This is a problem that preceded the Attorney General's July 19, 1995 memorandum; indeed, the memorandum was intended to address the problem. Unfortunately, the memorandum did not succeed in this respect, largely because of OIPR's imposition of unjustified and unwarranted limitations on contacts between the FBI and the Criminal Division. As a result of these limitations, the FBI has come to view contact with the Criminal Division as both unproductive and dangerous: unproductive because of the constraints OIPR has placed on the advice the Criminal Division may provide, and dangerous because of the perception, again fostered by OIPR, that communication with the Criminal Division may jeopardize an anticipated or ongoing FISA.

It was inevitable that at some point, and in some case, the Department's failure to resolve this problem would adversely and materially affect a specific investigation.

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Unfortunately, that point came in the midst of a critical investigation concerning the compromise of nuclear weapons secrets.

In October 1999, at the request of the Attorney General, the AGRT proposed to the Attorney General three interim recommendations to address that portion of this problem that relates to the notification and briefing of the Criminal Division about ongoing foreign counterintelligence ("FCI") investigations. The Attorney General responded in January 2000 with a memorandum that measurably expands the extent of notification to the Criminal Division concerning ongoing FCI investigations.

In this report, the AGRT makes five additional recommendations designed to address the other half of the problem, i.e., the scope of advice that the Criminal Division may provide to the FBI in connection with ongoing FCI investigations with criminal prosecution potential. In addition, the AGRT is providing to the Attorney General a draft of a proposed memorandum which would replace the July 19, 1995 memorandum. It incorporates the substance of the recommendations we propose.

CHAPTER TWENTY-ONE

The AGRT makes 42 recommendations for the consideration of the Department of Justice and the Federal Bureau of Investigation ("FBI".) These include the eight recommendations, described above, as well as five other recommendations, Recommendations 9-13, which, because they concern ongoing counterintelligence matters, are provided under separate cover. It was a part of our mission to identify "any structural or procedural flaws associated with the handling of national security investigations within the Department of Justice, and among DOJ components, which may have contributed to difficulties in the handling of this matter." These recommendations address the structural and procedural flaws which we have identified.

C. Mission Statement

On May 17, 1999, the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation was officially constituted and assigned

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its mission. See Letter from Gary G. Grindler, Principal Associate Deputy Attorney General, to Randy I. Bellows, Senior Litigation Counsel, dated May 17, 1999.

The Mission Statement of the AGRT reads as follows:

The Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation is hereby established. The Review Team shall conduct a review of the Lee Wen Ho investigation and shall report to the Deputy Attorney General and the Attorney General.

The purpose of this review is twofold:

First, the Review Team should ascertain the precise facts and circumstances associated with the Department of Justice's and Federal Bureau of Investigation's involvement in the Lee Wen Ho ("Lee") investigation during the time period of 1982-1999. This review may include but is not limited to the following matters:

- *the circumstances associated with the initial investigation of Lee in the 1982 - 1984 time period;*
- *the investigation of, and contacts with, Lee and his wife, Sylvia Lee, in the time period of 1985 - 1991;*
- *the investigative and analytical activities arising out of the suspected unauthorized disclosure to the PRC of nuclear weapon design information;*
- *the circumstances associated with consideration as to whether to monitor or search Lee's computer at the Los Alamos National Laboratory;*
- *the communications between the FBI and OIPR concerning the FBI's effort to obtain FISA coverage, and OIPR's determination not to approve a submission to the Foreign Intelligence Surveillance Court;*

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- *the internal DOJ review of OIPR's determination not to approve a FISA submission;*
- *the events of 1998 - 1999, including the [deleted] the interview of Lee and the polygraph examination of Lee, and associated interaction between DOJ components and the FBI.*

Second, the Review Team should to the extent possible identify any structural or procedural flaws associated with the handling of national security investigations within the Department of Justice, and among DOJ components, which may have contributed to difficulties in the handling of this matter.

The Review team should maintain sufficient contact with the Criminal Division, the United States Attorney for the District of New Mexico, and the FBI to ensure that the Review Team's investigation does not compromise or adversely affect the ongoing criminal investigation involving Lee Wen Ho or his wife, Sylvia Lee.

On June 15, 1999, following the issuance of the report Science At Its Best/Security At Its Worst: A Report on Security Problems at the U.S. Department of Energy by the President's Foreign Intelligence Advisory Board ("PFIAB"), the AGRT was also assigned eleven questions that appear at pages 31 and 34 of PFIAB's report. These questions read as follows [*After each question, the chapter which is responsive to the question is listed.]*:

> *PFIAB Question #1: Whether the FBI committed sufficient resources, including agents with appropriate expertise, and demonstrated a sense of urgency commensurate with an apparent compromise of classified U.S. nuclear weapons information.* See Chapter 4.
>
> *PFIAB Question #2: Whether the DOJ Office of Intelligence Policy and Review (OIPR) applied an inappropriately high standard to the FBI's request for electronic surveillance under the Foreign Intelligence Surveillance Act (FISA).* See Chapter 11.

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> *PFIAB Question #3: Whether the FBI provided to DOJ OIPR all U.S. Government information relevant to an appropriate evaluation of the FBI's FISA request.* See Chapter 11.
>
> *PFIAB Question #4: Why the FBI's FISA request did not include a request to monitor or search the subject's workplace computer systems, particularly since an attorney in the FBI's General Counsel's Office had provided an opinion in 1996 that such monitoring or searching in this case would require FISA authorization.* See Chapter 9.
>
> *PFIAB Question #5: Why the FBI did not learn until recently that in 1995 the subject had executed a series of waivers authorizing monitoring of his workplace computer systems.* See Chapter 9.

PFIAB Question #6: Whether the FBI adequately raised to the Attorney General the FBI's concerns over the declination of the FISA request. See Chapter 12.

PFIAB Question #7: Whether communications regarding the subject's job tenure broke down between DOE, FBI, and Los Alamos. See Chapter 18.

PFIAB Question #8: Whether the DOJ OIPR maintained appropriate records concerning FISA requests that were declined. See Chapter 11.

PFIAB Question #9: Whether the FBI appropriately relied on technical opinions provided by the DOE? See Chapters 6 and 7.

PFIAB Question #10: Why DOE, rather than the FBI, conducted the first polygraph examination in this case when the case was an open FBI investigation. See Chapter 15.

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D. Methodology

The AGRT was constituted as a joint effort by the Department of Justice and the FBI to conduct a comprehensive examination of the Wen Ho Lee investigation.

Toward that end, the Attorney General appointed Randy I. Bellows, Senior Litigation Counsel in the Office of the United States Attorney for the Eastern District of Virginia, to lead the AGRT. Two other attorneys were appointed to the AGRT, Ronald L. Walutes, Jr., Assistant United States Attorney for the District of Columbia, and James P. Gillis, Senior Trial Attorney in the Fraud Section of the Criminal Division of the Department of Justice. In addition, the FBI designated Supervisory Special Agent [deleted] to serve on the AGRT, and three Special Agents from the Washington Field Office of the FBI were assigned to the AGRT under SSA [deleted] direction. They were SA [deleted] (Ret.), SA [deleted] and SA [deleted] [It should be noted that SA [deleted] SA [deleted] and SA [deleted] were not responsible for the writing of this report. At the time this report was drafted, SA [deleted] had retired and SA [deleted] and SA [deleted] had returned to their normal duty stations.]

There were two principal components to the AGRT's work.

First, documents were sought and obtained from a wide variety of sources. In total, there were 163 separate productions of document. Principally, the AGRT received documents from FBI Headquarters, FBI-AQ, OIPR, the offices of the Attorney General and the Deputy Attorney General, DOE Headquarters, and the CIA. Almost all documents received by the AGRT were Bates stamped, and totaled approximately 42,000 pages. This included 22,000 pages of documents from FBI Headquarters alone, and an additional 6,700 pages of documents from FBI-AQ. In addition, the AGRT reviewed approximately 8,000 pages of documents at FBI San Francisco Division, the CIA and elsewhere.

The documents obtained by the AGRT were indexed, catalogued, and analyzed, and often led to requests for additional documents. All told, FBI Headquarters

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produced documents to the AGRT on 47 separate occasions; DOE Headquarters produced documents to the AGRT on 44 separate occasions.

Second, the AGRT conducted extensive interviews of individuals with relevant knowledge. No one we sought to interview refused our request to be interviewed; some individuals with critical knowledge were interviewed repeatedly. In the course of this inquiry, the AGRT interviewed the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, the Secretary of Energy, a former Secretary of Energy, two prior Deputy Secretaries of Energy, and a wide array of senior officials. In total, the AGRT conducted approximately 170 interviews.

For the purpose of reviewing records and conducting interviews, members of the AGRT made nine trips, consisting of four trips to New Mexico, and one trip each to California, New York, Colorado, Florida and Mississippi.

E. Acknowledgments

This report could not have been written without the consistent and extensive assistance provided by the FBI, both at Headquarters and in Albuquerque. The cooperation we have received from the FBI has been extraordinary, and it has extended throughout the course of the AGRT's work. We particularly wish to express our appreciation for the ongoing assistance provided by the [deleted] section, NSD itself, the FBI's Office of General Counsel, the Offices of the Director, Deputy Director and Assistant Director, and the agents and supervisors of FBI-AQ.

We also wish to express our appreciation to the consistent support we have received from the Offices of the Attorney General and Deputy Attorney General. Each office provided the AGRT unrestricted access to review pertinent documents and supported the AGRT in the resolution of the myriad administrative issues which arise in a review of this nature.

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We also express our appreciation to the CIA's Office of General Counsel for its assistance throughout this process, and to DOE's Office of General Counsel, which processed our numerous requests for DOE documents.

We also wish to note with deep appreciation the uniquely valuable contribution made by the FBI Special Agents assigned to the work of the AGRT. SSA [deleted] knowledge of counterintelligence work, his extensive experience in the investigation of espionage cases, and the high degree of respect and trust invested in him at all levels within the FBI, proved absolutely critical to our ability to identify and obtain necessary records and information. SA [deleted] provided the AGRT with great insight into DOE operations and devoted many hours of hard work toward the completion of this mission. SA [deleted] and SA [deleted] participated in the conduct of innumerable interviews, reviewed thousands of documents, and assisted in numerous other ways in the completion of our work.

We also wish to express the appreciation of the AGRT to United States Attorney Helen F. Fahey for allowing the AGRT to base its operations out of the offices of the United States Attorney for the Eastern District of Virginia, and for permitting us to draw upon the staff of this office for assistance on frequent occasions.

We especially acknowledge the critical role played in the completion of the work of the AGRT by [deleted] a Fraud Section paralegal. [Deleted] devoted literally hundreds of hours at night and on weekends to the achievement of our objectives. Among her many accomplishments [deleted] was responsible for creating an organizational structure for the indexing, cataloguing, management, analysis and retrieval of our documents. [Deleted's] dedication, hard work, and excellence has also played a critical role in the preparation and assembly of this lengthy report and appendix. We also express our appreciation to Joshua R. Hochberg, Chief of the Fraud Section, for permitting [deleted] detail to this project.

We also wish to acknowledge the dedication, hard work and commitment to excellence demonstrated by [deleted] the AGRT's sole secretary. [Deleted] has made an invaluable contribution to our work. We express our appreciation to John Vail, of DOJ's Justice and Management Division, for permitting [deleted] to

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undertake this detail. We also express our appreciation to [deleted] a United States Attorney's Office secretary, for her exceptional assistance and hard work in the final production of this report.

Finally, we wish to express our deep appreciation to United States Attorney Helen F. Fahey, United States Attorney Wilma A. Lewis, and Fraud Se@ofion Chief Joshua R. Hochberg for permitting this one-year detail of Mr. Bellows, Mr. Walutes and Mr. Gillis.

F. Several notes about this report

- The Bates numbers used in this report are principally from the following sources:

  FBI = Headquarters, including the National Security Division
  AQI = Albuquerque Division
  AGO = 0ffice of the Attorney General
  OIPR = 0ffice of Intelligence Policy and Review
  DOE = Department of Energy
  EAT = Central Intelligence Agency
  DAG = Office of the Deputy Attorney Gmeral

SF = FBI San Francisco Division
[deleted] = [deleted] DOE

- The AGRT has relied extensively on its interview reports and hand-written notes made during the course of interviews. Interviews are identified by the last name of the interviewee followed by the date of the interview.

- The four principal sources of classified documents in this report are the FBI, DOJ, DOE and CIA. The Points of Contact for these offices for classification matters are as follows:

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FBI Charles Middleton, Section Chief 202-324-XXXX
DOJ Associate Deputy Attorney General Craig Iscoe 202-514-6753
DOE Joseph Mahaley, Director of the Office of Security 202-586-6591
CIA [deleted] Office of General Counsel [deleted]

- In general, when this report refers to FBI personnel, it uses the position that the individual held at the time of the event in question. Thus, the same individual may be referred to as "Assistant Director" and "Deputy Assistant Director" in different chapters of the report, or even within the same chapter. Similarly, when reference is made to FBI personnel who have left the Bureau or retired, they are referred to by the title they held while they were in the FBI.

- The AGRT has prepared a Key Document Appendix to accompany this report. Due to the sensitivity of the contents of this Appendix, we recommend that this Appendix not be disseminated outside the Department of Justice and the FBI. Not every document referenced in this report is included in the Appendix. Some documents have been excluded due to their particular sensitivity, their voluminous nature, or their minimal relevance.

FAS Note: Much of "the Bellows report" was so aggressively censored that the surviving text is often incoherent. Following are some of the more substantial *excerpts* from released text of Chapter Six of the Report.

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CHAPTER SIX

THE PREDICATE

Questions Presented:

Question One: Did the DOE Kindred Spirit Analytical Group (KSAG) assess that Secret Restricted Data was compromised to the Chinese?

Question Two: Did KSAG eliminate indigenous development as a possible explanation for the advancements achieved by the Chinese nuclear weapons program?

Question Three: Did KSAG assess [deleted]?

Question Four: Was the KSAG assessment accurately communicated to the FBI by DOE?

Question Five: What was the scope of the compromise communicated to the FBI by DOE?

Question Six: Were there opportunities when the FBI could have recognized that the KSAG assessment had been inaccurately communicated to the FBI by DOE?

PFIAB QUESTION #9: Whether the FBI appropriately relied on technical opinions provided by the DOE?

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A. Introduction

[paragraph deleted]

[paragraph deleted] This group was called the Kindred Spirit Analytical Group (KSAG).

KSAG concluded their review in September 1995 and produced a two-page summary of their assessment. This concise summary, comprising a series of bullets, contained the assessment of these preeminent nuclear weapons designers and definitively answered the question they were assembled to address. [line deleted] Nor was there any dispute that this compromise had aided the Chinese nuclear weapons program by helping to establish what were attainable achievements and to

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353 Modern nuclear warheads consist of a primary and secondary nuclear device, the first acting as a trigger for the second.

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avoid blind alleys in their own research and development program. What KSAG concluded, however, and what the FBI would be *told* these DOE experts concluded, were two different matters. [remainder of paragraph deleted]

KSAG's assessment would never be provided to the FBI. In its place the FBI was told [lines deleted]. This inaccurate communication of the predicate resulted in the FBI spending years investigating the wrong crime.

The FBI received several summaries purporting to represent DOE experts' conclusions. The FBI was told [lines deleted]. Each of these representations inaccurately reflected the conclusions of KSAG.

On September 25, 1995, after the KSAG working group's assessment was completed, DOE told the FBI [lines deleted]. (AQI 2984-2985 at 84) On May 28, 1996, OEI released to the FBI a report of the Administrative Inquiry (AI) into this matter. It stated [lines deleted]

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[deletion] (AI at 3; FBI 00527) Each of these representations also inaccurately reflected the conclusions of KSAG.

KSAG clearly concluded [lines deleted]. That investigation, which is underway today, should have begun in 1995, not 1999.

OEI controlled the message that was communicated to the FBI and is responsible for the inaccurate representations given to the FBI. The consequences for the investigation caused by the inaccurate representations were profound. [lines deleted]. Responsibility for this massive failure rests with both OEI, for failing to accurately communicate the KSAG assessment, and with the FBI, for failing to become thoroughly familiar with the predicate for such an important investigation. As demonstrated below, a thorough examination of the investigation's predicate would have alerted the FBI to the inaccurate assessment communicated to them by OEI.

[...]

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[lines deleted] (FBI 00336) It is unclear why [deleted] does not track the analysts' language precisely. The FBI never received either the April 25, 1995 or May 25, 1995 memoranda and relied on this summary of the initial DOE assessment.

[deleted] investigative plan identifies five specific requirements for the working group to address. He characterizes it as "important" to "assist in the development of a logical investigative effort" to accomplish each of these five requirements.

- Establish a chronology of the stages of development of the US weapons design information allegedly copied by the PRC. It would assist ECI's [Energy Counterintelligence] investigative planning efforts to know for example, that US Weapons Laboratory "X" developed stage "A" of the weapons design

in question during the period 19xx-19xx. In turn, US Weapons Lab "y" piggy-backed on stage "A" to develop stage "B" of the design during the period 19xx-19xx, etc.

- Identify specific documents that contain the compromised warhead data;
- Determine which program staff at each US Weapons Laboratory worked on specific portions of the design in question[;]
- Determine which laboratories and specific employees eventually had access to the completed weapons design data in question;
- Brief the Federal Bureau of Investigation (FBI) on the results of the intelligence assessment and obtain their concurrence for ECI to initiate

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and discreetly conduct an Administrative Inquiry (AI) [361] This AI will follow the guidelines set forth in the following Investigative Plan. (The FBI will be continually updated on the results of the AI).

(FBI 00336)

Trulock initially contemplated forming only a LANL team, with CIA [deleted] participation, to validate the initial assessment.[362] "[Trulock] directed that the following actions be initiated ... establish a damage assessment team from LANL to review [deleted] (DOE 3473-3477 at 76) (McIntyre memorandum to the file dated June 23, 1995). This expanded to include LLNL, SNL and DIA. The specific composition of the KSAG was largely a product of selection by the initial members of the working group. The initial members were already assisting DOE Headquarters review intelligence reporting. Trulock personally selected [deleted] and then [deleted] to examine the [deleted] reporting.

Trulock approached and selected [deleted] to chair the KSAG during his trip to LANL in June 1995.[363] [Deleted] selection represented a

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361 This is the first time DOE indicated its intention to conduct an Administrative Inquiry (AI). [deleted] investigative plan also foresaw KSAG [deleted]

362 [deleted]

363 Trulock personally visited LANL to brief Director Hecker on Kindred Spirit and invite [deleted] to chair KSAG. The FBI field office in Albuquerque, New Mexico (FBI-AQ) learned of this visit from [deleted] LANL Counterintelligence (CI) Office. On July 5, 1995, the field office sent a communication to FBI Headquarters concerning Trulock's June 28, 1995, visit to LANL. [lines deleted]. No additional information is provided [continued on next page]

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recognition that someone with the necessary "horsepower" was needed to manage this group of experts assembled from the national laboratories and intelligence agencies. [Deleted] of LANL's X Division (responsible for nuclear weapons design), was ideal. [Deleted] reputation was as a fair, unbiased scientist who could draw a consensus, if one could be drawn, from a group of nuclear weapons experts. [Deleted] the most forceful advocate of the Chinese espionage of United States nuclear weapons information, did not object to [deleted] selection. [Deleted] believes [deleted] suggested [deleted] to Trulock. [deleted] 11/9/99)

[Deleted] assumed Director Hecker had made the suggestion when he was briefed by Trulock on June 28, 1995.[364] [deleted]

KSAG included nuclear design experts in recognition of the complex scientific issues involved in assessing the Chinese nuclear weapons program and China's ability to achieve such progress [deleted][365] KSAG consisted of two very

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but the implication is, since information is classified and not transferable, an unidentified employee or someone associated with LANL illegally provided the information to representatives of the PRC." (AQI 2932-2934 at 33) When interviewed [deleted] claimed [deleted] him only a cursury briefing while at LANL. It is not clear whether [deleted] was subsequently briefed by Director Hecker. ([deleted] 9/15/99) [deleted] had briefed [deleted] via STU III on Kindred Spirit on June 23, 1995. (FBI 680; DOE 1865, 2038)

364 When [deleted] first saw Trulock's name on his schedule, he assumed Trulock was coming have his detail to DOE Headquarters renewed, since Trulock was technically with [deleted] Division at LANL. [deleted]

365 Trulock broadened the small group of analysts he had previously asked to examine the intelligence within OEI. [Deleted] not nuclear weapons designers. Trulock first added [deleted] from LANL, a nuclear weapons designer whose judgment Trulock trusted. After receiving the second memorandum confirming the analysts' initial conclusion, Trulock further expanded the group to include a broader collection of nuclear weapons designers from the national laboratories. This expansion sought to definitively confirm whether advancements in the Chinese nuclear program necessarily indicated a loss of United States nuclear weapons [continued]

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different groups, pure analysts[366] and nuclear scientists.[367]. The analysts were familiar with the intelligence reporting while the scientists had designed and tested dozens of nuclear warheads. [Deleted] described the difference as "voting members and tire kickers" -- the latter group composed of OEI members who sat in chairs away from the table and never spoke. [Deleted]

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information. This broad inquiry generated an assessment which has survived the test of time.

366 The assembled analysts often claimed to have a scientific background and were often incorrectly described to the FBI as scientific experts. One scientist, hearing that [deleted] was being held out as a LANL scientist by OEI, laughed, stating [deleted] was a [deleted] not a nuclear designer. KSAG's [deleted] claimed that [deleted] would not recognized a nuclear warhead's primary from his ass." [deleted]

367 [lines deleted] This crowd was enchanted by [deleted] and his conviction and chose to ignore the consensus of the assembled scientific experts. [Deleted] and [deleted] were all analysts. [Deleted] believes [deleted] did not have a hidden agenda. [Deleted] during later discussions with [deleted] clearly misrecollected KSAG's consensus. [Deleted] cited this misrecollection as an example of this "N" personality type, that they become convinced of their position to the exclusion of the conclusions of others. [Deleted] shared a similar misrecollection when interviewed by the AGRT. [Deleted] This does not accurately reflect KSAG's assessment.[Deleted]

[...]

[page 263]

[lines deleted]

Although the compromised W-88 information was not thought to be public, it was believed to have been widely disseminated within this country's nuclear weapons infrastructure. [Deleted] recalls thinking, [lines deleted]. While KSAG may have recognized this broad dissemination, [deleted] did not. This distinction would prove to be a major failure within OEI.

The KSAG minutes from the August 16, 1995 meeting reflect the assessment [deleted]. It also reflected KSAG's assessment [deleted]. The information could not have come from [deleted] or from unclassified sources. Therefore, [deleted]. (EAT 00370) There was also further debate within KSAG over [lines deleted]

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380 The KSAG meeting notes from September 7, 1995, reflect this debate [lines deleted] (DOE 3431-3433 at 32)

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[deleted] (Id.) KSAG would revise this assessment at their next meeting and in the final bullets.[381]

5. The September 7, 1995 final KSAG meeting and the September 8, 1995 bullets

The fourth and final meeting of KSAG (and the third meeting chaired by [deleted] occurred on September 7, 1995. Although the previous meeting's minutes articulated an intention to "draft a report," EAT 00371, no such report was ever written. Instead, a series of bullets were drafted by the assembled experts capturing their collective assessment of the Chinese nuclear weapons program and the possible compromise of United States classified information. This two-page document, dated September 8, 1995, represents the conclusions reached by the assembled nuclear weapons experts. The brief document was carefully written. The experts recalled significant debate over the use of each particular word and phrase. [Deleted] was able to draw a consensus among the nuclear experts with only [deleted] dissent to two of the nine bullets. No other document was produced by the KSAG nor blessed by the

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381 The final bullets state: [lines deleted] (DOE 4636) (SC-255-0025/96)

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collective experts.[382] These nine bullets represent the only written conclusion produced by the group. The bullets were maintained in DOE's Headquarters inside OEI and were distributed only to the CIA. The FBI never received a copy of the document.[383]

KSAG's bullets, if shared with the FBI, could have prevented the misdirection of the FBI's counterintelligence investigation in this case. [lines deleted] See KSAG's second bullet, which states [lines deleted] (EAT 373-374 at 73) (emphasis added).

[lines deleted]

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382 KSAG reformed on May 16 and 17, 1996, to brief Deputy Secretary Curtis on their assessment. This later meeting generated a series of slides for use in briefing the Deputy Secretary. KSAG reaffirmed their September 8, 1995 written assessment at this subsequent meeting.

383 The FBI has only recently become aware of this document as a result of the AGRT's review of KSAG. The AGRT's review of FBI-AQ's files confirm the document was not received in the field. The walk-in document was not shared with the field until 1999. [Deleted] and was present during the FBI's October 31, 1995 briefing, did not believe that KSAG's bullets were ever shared with the FBI. [Deleted]

[page 266]

[lines deleted]

[Deleted] the FBI has been investigating a crime which was never established to have occurred [lines deleted] DOE's own experts, the nuclear weapons designers themselves, after reviewing the available evidence, did not make this assessment. Having been inaccurately briefed, the FBI failed to identify those documents which contained the compromised information [deleted]. Similarly, they failed to identify those individuals with access to this more limited information. [Lines deleted]. The far more limited group identified to the FBI *could have* been the source of this compromise, but a much larger group, including contractors, Department of Defense employees and other DOE employees located at numerous sites across the United States, could have *just as likely* been the source of this compromise. This larger group was not identified to the FBI [lines deleted].

[lines deleted]

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384 [lines deleted]

[...]

[page 269]

E. OEU's inaccurate portrayal of the working group's conclusions to the FBI

1. OEI's reaction to the KSAG bullets

The assembled experts returned to their respective laboratories believing their services were no longer needed. They were unaware of the FBI's interest or earlier briefing [deleted] on [deleted] conclusions. The experts were unaware that the FBI would be briefed on the assembled experts' assessment. Not one of the nuclear weapons designers were asked to participate in this briefing. The [deleted] was not aware that such a briefing had ever occurred. Instead, on October 31, 1995, [deleted] joined by [deleted] briefed the FBI on DOE's assessment of the Chinese nuclear weapons program. This briefing was billed as the working group's assessment. The FBI understood this briefing to summarize the assembled experts' assessment of the available intelligence. The briefing did not include the written bullets and no weapons designer was present.

There are indications that [deleted] KSAG's assessment of the available intelligence. First, the OEI chronology mischaracterizes the final KSAG meeting, inaccurately suggesting a split between LANL and OEI versus LLNL and the CIA. Second, [deleted] describes [deleted] dismissing the KSAG and [deleted] The AGRT assembled the most complete set of FBI records on the Kindred Spirit investigation, from multiple field offices and Headquarters. No copy of KSAG's bullets has been located among the FBI's

files.[386] Third, [deleted] comments to [deleted] capture his concerns with the bullets. Finally, [deleted] briefed the FBI on October 31, 1995, inviting only [deleted]

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386 [Deleted] the custodian for KSAG's bullets [deleted] They were not disseminated to the national laboratories. No "bigot" list was maintained on [deleted] was not not aware of the bullets having been given to the FBI, and explained that is was not his responsibility to have provided them. [deleted]

[...]

[page 287]

KSAG concluded the advancement observed in the Chinese nuclear weapons program may have occurred indigenously. KSAG assessed [lines deleted] (EAT 373) [deleted] who first reviewed these portions of the AI at the request of the AGRT, conceded it was "overstated" and the working group would not have agreed with it. [Deleted] observed that [deleted]

[Deleted] and the FBI heard only [deleted] assessment, elevated by OEI to represent the unanimous assessment of KSAG. This briefing, [deleted] ensured that DOE itself would investigate the wrong crime during their own AI. The inaccurate predicate inherent in DOE's own investigation would be relied upon by the FBI during their subsequent investigation. The error would not be recognized until 1999.[416] Little, if any, oversight was exercised over [deleted] the FBI. [Deleted] September 25, 1995 letter to the FBI was [deleted] Deputy Secretary Curtis, who personally briefed the CIA, [deleted] concerning the FBI. (Deputy Secretary Curtis 1/24/00) [deleted]

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415 A Kindred Spirit time line, classified by [deleted] records the working group's conclusion much differently. [Deleted] (DOE 3466-3468 at 67) This simply was not KSAG's conclusion.

416 The FBI was absolutely convinced it accurately understood the experts' assessment. The FBI submitted a summary of its own Kindred Spirit investigation as an appendix to a September 1997 CIA position paper. The FBI summary stated [deleted] (FBI 12360-12390 at 71, 85, 90) As late as November 27, 1998, the First Annual DOE Threat Assessment Report repeated this inaccurate summary of KSAG's assessment. [deleted] (FBI 6503-6537 at 15)

[...]

[page 290]

[...] FBI agent be detailed in support of this preliminary investigation by letter dated September 25, 1995. (FBI 375) The final AI report was provided to the FBI on May 28, 1996.[420] The FBI opened a full investigation on May 30, 1996.

[Deleted] developed an investigative plan for DOE AI in June 1995. This plan was shared with the FBI-HQ.[421] (FBI 336-337) [lines deleted] (Id. at 36) This well conceived plan was not followed. KSAG never assessed [deleted]. The OEI briefing, however, did provide answers to the satisfaction of both [deleted] and the FBI. The OEI briefing indicated [lines deleted] Although purporting to speak for KSAG, neither conclusion was reached by the working group. Relying upon this briefing, [deleted] began tasking LANL and LLNL to assemble their records of PRC visitors and laboratory personnel travel records for future review.

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420 The final and draft AIs are very poorly written. Lacking any effective structure and utilizing horribly inexact language, both are often impossible to understand or follow. Assertions are made without explanation or apparent support. While both the draft and final AIs identify [line deleted] the final AI was never reviewed nor approved by SA [deleted] The unfinished draft AI reviewed and approved by SA [deleted] was subjected to [deleted] These changes were not subsequently shown to SA [deleted] Amazingly, the FBI never shared the final AI with SA [deleted] nor was he consulted further by either FBI-HQ nor FBI-AQ. SA [deleted] assumed the draft he approved was the version provided to the FBI. The FBI assumed the version they received was the same as the one approved by SA [deleted] Neither assumption was correct.

421 A copy of [deleted] investigative plan was located in the FBI-HQ's case file at [deleted]

[...]

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It is true that LANL was not the only DOE location mentioned in the AI, but LANL was clearly emphasized as the likely location of the compromise by the Chinese. In the final report, LANL is subdivided into individual groups and offices, while the other locations are not subdivided.[427] The report breaks LLNL into three divisions (A, B and W), but they are all eliminated in the final report. [lines deleted][428] (AI at 39; FBI 563) Other locations were either ignored entirely (Defense Program elements) or the AI simply records that no records were located.[429]

[lines deleted] LANL became the focus as a direct result of how [deleted] defined the scope of the compromise. [lines deleted]

_____

427 The language identifying various locations of the compromise comes from SA [deleted] investigative plan for the subsequent full investigation by [deleted] and placed in the final AI report. Although not taken verbatim, [deleted] portions, deleted others and attributed the source for the information to [deleted]

428 [lines deleted] (AI at 35; FBI 00559)

429 [Deleted] requested the Office of International Technology Cooperation, DOE, to assemble all DOE Headquarters and field personnel's travel records. "The Foreign Travel Management System (FTMS), which identifies DOE Federal/Contractors traveling to foreign countries did not exist during the period [deleted] Further, during the period in question there was no specific DOE requirement to document and permanently retain such information." (AI at 5; FBI 529) Thirty-one pages later, [deleted] records a similar response for Rocky Flats. (AI at 36; FBI 560) Neither location is identified in the final report as requiring further investigation.

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[lines deleted] It was [deleted] impression that some of KSAG's members from LANL, including [deleted] thought LANL was the probable site of the compromise. Every time the discussion would move away from LANL, these members would bring it back to LANL. That focus didn't make sense to [lines deleted]

[lines deleted] The FBI readily accepted both this predicate and abbreviated suspect list and, until December 1998, never questioned the accuracy of the briefing or final AI report. Had the investigators been

accurately briefed, they could have begun to identify the documents which were the likely source of this compromise. The current investigation, begun only recently, may be able to identify the documents which were compromised. This investigation, deferred for three years due to an inaccurate briefing, now must occur with the associated publicity and still greater passage of time. KSAG deserves recognition for rapidly evaluating the available intelligence and producing a one and one-half page assessment which has survived the test of time.

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Unfortunately, because KSAG's assessment conflicted with [deleted] it was never disseminated.[430] The briefing given to the investigators has not survived the test of time.

H. Missed opportunities to discover the inaccuracies in the OEI briefing

There were a number of occasions when the investigators might have realized that the OEI briefing was inaccurate.[431] Five missed opportunities occurred *prior* to the AI's completion. The first missed opportunity occurred in August 1995, when the LANL liaison FBI agent learned of and reported to FBI-HQ the debate within KSAG. The second missed opportunity occurred when the investigators visited LLNL on December 4-7, 1995, and spoke with [deleted] briefed KSAG on the particulars of [deleted] and was aware of [deleted] in the walk-in document. The third missed opportunity was when SA [deleted] reviewed the supporting intelligence for the predicate on December 19, 1995. The fourth opportunity occurred when the FBI received the walk-in document [deleted]. The fifth opportunity occurred when [deleted] at LANL, sought access to the walk-in document in conjunction with the investigators' visit to LANL in February 1996. During this visit, at [deleted] suggestion, the investigators and future case agent were briefed by [deleted] concerning the dissemination of the W-88 information.

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430 [lines deleted] KSAG's briefing to Deputy Secretary Charles Curtis on May 17, 1996, also never left DOE. Deputy Secretary Curtis could not recall why the FBI were not at the briefing. (Deputy Secretary Curtis 1/24/00)

431 This section should not be understood to shift responsibility from OEI, which ultimately is accountable for inaccurately briefing the investigators as to the compromise's scope. [lines deleted]

[page 298]

1. Missed opportunity

SA [deleted] the FBI's liaison to LANL, based in Santa Fe, New Mexico, became aware of the debate within KSAG during a telephone conversation with a LANL counterintelligence officer on August 10, 1995. This source repeated information obtained from Diane Soran, deceased, who was then the supervisor of many LANL employees detailed to the OEI working group, KSAG. SA [deleted] repeated this information in a communication to FBI-HQ on August 22, 1995. "Lawrence Livermore National Laboratory (LLNL) individuals (NFI) and CIA personnel (NFI) familiar with the information which initiated DOE efforts in Kindred Spirits believe it is not unreasonable for the PRC, on its own, to do what was claimed in the document in the possessin of the CIA. LANL individuals involved in the DOE damage assessment do not feel this way, and want to do more assessment. LLNL and the CIA believe DOE is dealing with a non-issue, and the CIA has told this to DOE HQ." (AQI 2944-2946 at 45, AGO 191-193) The cable continues: "The issue is whether the PRC could have arrived at the information, as contained within the document in CIA possession, on its own without outside help, [deleted] (Id.) The communication repeats hearsay and contains several errors. However, it does place the FBI on notice that there are

conflicting opinions among the experts reviewing the intelligence. It identifies [deleted] and also identifies [deleted] although confusing his role [deleted] work.[432] (Id. at 46)

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432 DOE's Office of Counterintelligence has recently noted that this cable was never provided to DOE prior to late 1999. (FBI 19224-19233)

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SA [deleted] followed his August 22, 1995 cable with another dated October 10, 1995. This second communication again relied upon the LANL counterintelligence officer repeating information learned from Soran.[433] Written a month after KSAG had provided its written assessment [deleted] it states that:

1. The damage assessment report is complete, and somewhat of a consensus was reached. The report was provided to [deleted]

2. The bottom line is the PRC possibly could have come up with the information in question without help, but such possibility is not probable.

3. If information were provided to the PRC, the time period is such that a leak cannot be limited to any particular laboratory or organization.

(AQI 2964-1965 at 65) Soran revealed that the KSAG report was provided [deleted], although no specific individual is identified and this cannot be verified.

Thus, by October 10, 1995, the FBI had in its files, at both Headquarters and in the field, communications raising a number of very important leads. They identified a "damage assessment report" that was never given to the FBI; provided the names of two prominent weapons designers who participated in KSAG; identified the wide dissemination of the leaked information ("the time period is such that a leak cannot be limited to any particular laboratory or organization"); suggested the CIA and LLNL did not agree with DOE HQ or LANL and suggested that the PRC might have accomplished their achievements indigenously. Had these leads been pursued by the FBI, the problems identified in this report could have been avoided.

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433 Unfortunately, because Soran is deceased, we are unable to determine the source of her information. Soran related these facts to [deleted] at LANL. It was [deleted] who repeated them to SA [deleted] to keep him appraised of the progress in DOE's evaluatin of the intelligence in Washington.

[...]

[page 304]

[...] represented the FBI's only access to the raw materials in this investigation. [lines deleted] The FBI never received access to KSAG's written bullets.

4. Missed opportunity #4

The fourth missed opportunity during the AI occurred [deleted] when the FBI received a copy of the walk-in document. [deleted] SSA [deleted] conceded as much from his own review of the document. [deleted] 12/15/99) Nevertheless, the FBI uncritically accepted [deleted] SSA [deleted] explained that the FBI presumed that DOE had the appropriate expertise, not readily available anywhere else in the country, to

assess the implications of this intelligence. The FBI was no more prepared to go behind the predicate for this investigation [deleted]

It was a grave mistake for the FBI not to insist upon a detailed explanatin of the underlying intelligence for such an important FCI investigation. [lines deleted] Nevertheless, despite little prior experience working FCI cases with OEI, the FBI was prepared to accept the OEI evaluation of the intelligence and was not about to test that assessment. This failure to insist upon a complete understanding of the investigation's predicate at its inception cost the FBI years while they pursued an inaccurate predicate. More importantly, it cost the FBI the opportunity to investigate this crime without the publicity that is now irrevocably associated with this matter. This impact cannot be undone regardless of the resources devoted to the case today.

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439 SSA [deleted] believes he saw a copy of the walk-in document before its official dissemination to the FBI, but could provide no further information. [deleted] 12/15/99)

[...]

[page 313]

[...] seems to suggest that this May 17, 1996 briefing was principally conducted to ensure that DOE's credibility was not damaged by [deleted] within Washington.

Whatever motivated this briefing, its lesson never left the Forrestal Building. No formal report resulted, no letter was sent to the FBI, nor were there any meetings between the Deputy Secretary and the FBI. Instead, [lines deleted] Eleven days later the final AI report was transmitted to the FBI [lines deleted]

J. The reexamination of the predicate in light of the CIA's withdrawal of the walk-in document

[paragraph deleted]

[lines deleted]

[page 314]

[deleted][453] (FBI 489) [lines deleted] [454] (FBI 485-488 at 86). [lines deleted] (Id. at 87) SSA [deleted] explained that although he was alerted to the issue by the CIA, he deferred action until the CIA and DOE completed their review of the predicate. [deleted] 12/15/99) [lines deleted] (Id. at 88).

On July 29, 1996, the CIA formally issued a communication alerting the earlier recipients of the walk-in document of the CIA's intention to [lines deleted]

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453 In stark contrast with the late dissemination to the FBI of the walk-in document, the CIA is to be commended for the rapid transmission of this information to the FBI. SSA [deleted] note, dated May 16, 1996 states: [lines deleted]

454 [lines deleted]

[page 315]

[lines deleted][456] (Id. at 5)

After receiving the CIA's [deleted] SSA [deleted] ordered FBI-AQ to suspend the full investigation on Wen Ho Lee pending DOE's reexamination of the predicate. In a note to SSA [deleted] FBI-AQ, dated July 31, 1996, SSA [deleted] wrote: [deleted] This DOE conclusion was a major basis for above full FCI. AQ should temporarily suspend investigative activity until DOE HQ and FBI HQ can sort out this new information.(S)"[457] (AQI 992) SSA [deleted] suspended the full investigation pending DOE's revalidation of the underlying predicate and a review of the matter by OIPR.

This reexamination of the walk-in document by OEI was limited to a small group including [deleted] Recently [deleted] wrote Secretary

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455 See FBI 11638 to FBI 11644. The FBI, apparently accepting the CIA's warning, did not seek prior to 1999 to question this source for additional leads relevant to the Kindred Spirit investigation.

456 [lines deleted]

457 [lines deleted]

[page 316]

Richardson [lines deleted] (FBI5334-39) In an apparent reference to the OEI's reexamination of the predicate subsequent to CIA's alert, [lines deleted] (Id. at 36)

On August 19, 1996, OEI met with the FBI to reaffirm the predicate and provide a letter from [deleted] to Section Chief Jerry Doyle, FBI, reaffirming the OEI analysis of the Chinese nuclear weapons program despite the CIA recall/reissue cable. In attendance at this meeting were [deleted] and SSA [deleted] Unit Chief [deleted] and Section Chief Doyle. (FBI 662; see also FBI 11725) The OEI Kindred Spirit chronology identifies [deleted] as among the attendees, but omits [deleted] (FBI 675) [lines deleted] We have discussed this judgment with representatives from the respective CIA offices responsible for dissemination of this information and they do not disagree with this assessment."[458] (FBI 668) [lines deleted] (Id.) The FBI acted quickly to reactive [sic] the Wen Ho Lee investigation (AQI 1008-1011) ("DOE stands by their original conclusion").

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458 Although OEI restricted the number involved in reexamining the walk-in intelligence in light of the CIA's warning, no member of KSAG disagreed with the outcome when interviewed by the AGRT. [lines deleted] The compromise assessed by KSAG in September 1995 remained valid in August 1996 and remains true today. The AGRT will not add to what is already an extensive list of proferred motivations for this behavior (ranging from an inadvertent mistake to testing for a reaction from the United States in an effort to validate particular information in the document).

[...]

[page 323]

On September 13, 1996, the FBI interviewed [deleted] who was at DOE Headquarters.[468] [lines deleted] [469] (FBI 694-95 at 95; AQI 1046-47 at 47)

[Deleted] described the wide dissemination of the compromised information.[470] He specifically identified both contractors and the Department of Defense as potential locations where the compromise may have occurred. "When asked from where and when the Chinese might have acquired the information, [deleted] said it would be very difficult to say, as the W-88 is a deployed system. Deployment means that the plans would be available to various groups of people such as the US Navy (the W-88 is used by the Navy), contractor personnel and other involved personnel apart from the Department of Energy." (Id. at 95 and 46)

The FBI sought to record the predicate, not challenge it through this lead. This distinction probably explains their failure to react to the content of [deleted] interview

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468 SA [deleted] could not recall how [deleted] came to be included within the lead, but thought it was because either [deleted had mentioned him during his interview or because SSA [deleted] had asked the agents to include [deleted] and only [deleted] was in Washington. ([deleted] 1/18/00)

469 This FD-302 is inaccurately classified Secret by the FBI. [lines deleted]

470 SA [deleted] specifically recalled asking [deleted] about the information's dissemination because [deleted] had told them that LANL was the likely location for the compromise. [deleted] 1/18/00)

[page 324]

upon receipt. Neither the case agent in the field nor the supervising agents at Headquarters recognized the clear discrepancy in this interview and the predicate communicated to the FBI. [Deleted] was not interviewed further by the FBI until recently.[471]

[Deleted] when interviewed by the AGRT, emphasized [lines deleted][472] Although he allowed that one never can say never, he thought it unlikely based on the intelligence he has seen. [Deleted] within the working group from this consensus position. [Deleted] added that [deleted] and as a result he lacks credibility. [Deleted]

The FBI did take a few initial steps to review the predicate for this investigation, but, significantly, it did not follow up on those steps with additional

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471 [Deleted] is an affable scientist who would have been readily accessible to the FBI. He is succinct and easily understood, despite the complicated subject matter. [lines deleted] His expertise is in the area of weapons design and nuclear simulation. [lines deleted] As a scientific resource, he would have been invaluable to the FBI had they made the effort to contact him.

472 [lines deleted]

[page 325]

interviews to clarify important conflicts captured in the 302s. Had SA [deleted] and SSA [deleted] sought out [deleted] they would have come to understand the inaccuracies not only in the OEI briefing, but also in the AI report. SA [deleted] and SSA [deleted] failed to interview [deleted] who was at LANL and not DOE HQ like [deleted] SSA [deleted] should have insisted that SA [deleted] cover this lead personally. SA

[deleted] failed to identify the composition of the OEI working group, KSAG, so that he would know who at LANL was aware of the Chinese documents and already aware of the compromise. These individuals could have been interviewed without any expansion of the number of individuals aware of the compromise. SA [deleted] was present when [deleted] name were mentioned on February 13, 1996. These members whould have become resources to guide the FBI investigation at LANL. WMFO covered this lead and interviewed two subjects beyond the one identified by the case agent. The results were recorded on FB-302s and then apparently ignored by both the field and Headquarters.

L. The CIA's independent assessment of the Chinese nuclear weapon program

After receiving the AI report on May 28, 1996 and completing the three predicate interviews in September 1996, the predicate for this investigation was left unchallenged until ASAC Lueckenhoff began to question it in December 1998, with one exception. That single exception is a 1997 review of the Chinese nuclear weapons program by the CIA. The CIA's written report was shared with the National Security Council, DOE and the FBI. This Chinese Nuclear Warhead Paper accurately characterizes the walk-in document, a document that the FBI received on [lines deleted] (FBI 12365) The CIA report was provided to the FBI on September 11, 1997. It should have led to a comprehensive reevaluation of the predicate. It did not.

1. An NSC request for a CIA assessment

In July and August 1997, [deleted] numerous senior government officials on his analysis of China's nuclear weapons program. That briefing presented an

[page 326]

alarming portrait of Chinese efforts to acquire United States nuclear weapons information.[473]

DOE and CIA records indicate that [deleted] the National Security Council ("NSC") during this time period as well. (DOE 3420; EAT 180) On August 5, 1997, Sandy Berger, the President's National Security Advisor, asked for a CIA evaluation [deleted] concerns. (EAT 180)

That evaluation was begun in mid-August and completed by the end of the month. It was delivered to the NSC on September 5, 1997, (EAT 181) and to the FBI on September 11, 1997. (FBI 12388, 12360, 12361)

2. Background and limitations of the CIA assessment

[lines deleted]

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473 In one FBI document it was referred to [deleted] "sky is falling" briefing. (AQI 5337) Another FBI document dubbed it the "nightmare presentation." (FBI 12312)

474 [lines deleted]

[page 327]

[lines deleted]

[paragraph deleted]

There were several noteworthy limitations to the CIA assessment. First, the analysts prepared it in just two weeks. [Deleted] Second, it was never intended to confront [deleted] head on.[477] Third, the analysts never addressed

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[deleted]

475 [deleted]

476 [deleted]

477 [deleted]

[page 328]

KSAG's findings or interviewed the KSAG experts.[478] Finally, the original draft was completely rewritten to create a much shorter and less detailed product.[479]

3. [deleted] to the CIA

Since neither analyst was familiar with [deleted] them so they could become familiar with and assess the briefing's content. That briefing took place on August 13, 1997. [Deleted] recalled that [deleted] a series of slides.[480]

_____

[deleted]

478 [deleted]

479 [deleted]

480 These slides, revised over time, are entitled "CHINA'S STRATEGIC NUCLEAR MODERNIZATION PROGRAM" with the subtitle "DOE Nuclear

[page 329]

[lines deleted] During the briefing, [deleted] gave [deleted] names to answer any questions and provide whatever other assistance the analysts might require. The analysts

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Weapons Laboratory Contributions to Chinese Strategic Breakthroughs." The set provided by DOE numbers thirty-four slides, with several repeated slides. (DOE 1870-1903) [lines deleted]

481 [lines deleted]

482 Other who received [deleted] -- Attorney General Janet Reno, FBI Director Louis Freeh, Deputy Secretary Charles Curtis and Dan Galington, Deputy Counsel, OIPR -- each of whom were interviewed by the AGRT, were unable to recall in specific detail the representations made by [deleted] The CIA analysts, unique because they understood both the topic and available intelligence, were able to recall specific representations from [deleted] The analysts were also focused on the briefing's content given their assignement.

[page 330]

did speak with [deleted] Neither [deleted] expressed significant disagreement with the CIA's assessment of the Chinese nuclear weapons program.[483] [deleted]

4. The CIA assessment paper

[paragraph deleted]

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483 [Deleted] increasingly moved away from his early support of and agreement with [deleted] assessment in 1995. In early 1997 [deleted] authored a paper entitled: "Chinese Modern Nuclear Warhead Development." [lines deleted] (EAT 423) Today [deleted] firmly supports [deleted] recollection of KSAG's assessment and he rapidly points to the exact language of the KSAG bullets when describing the compromise's scope.

484 See also this statement from the final paper: [lines deleted] (FBI 12366)

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[lines deleted]

The final 1997 CIA position paper, as well as the draft, does adopt a position closer to that articulated [deleted] than that of KSAG. [lines deleted][485]

In addition, it appears that in the pursuit of brevity, much of the qualifying language used by the CIA analysts was removed from the final position paper.[486] [lines deleted]

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485 [lines deleted]

486 [lines deleted] (EAT 439) This observation is deleted in the final paper provided to the FBI.

[page 332]

[lines deleted] (EAT 445)

5. The FBI addendum to the CIA assessment

In an amazing example of circular reasoning, the CIA's position paper attaches and incorporates a written submission by the FBI. Not only would the FBI fail to recognize [lines deleted] On September 4, 1997, CIA [deleted] received the FBI's written submission (EAT 472-276) [lines deleted] The attachment summarizes various FBI investigations, including Kindred Spirit: [lines deleted] It would also be lost on the FBI when they received the final paper.

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On September 5, 1997, Section Chief Steve Dillard, Unit Chief [deleted] and SSA [deleted] provided an in-depth review of the Kindred Spirit investigation to [deleted] at the NSC (Id.) After the briefing, the NSC asked the FBI [lines deleted] (FBI 1086) This resulted in a time line, dated September 8, 1997, outlining the predicate in support of the FBI's investigation. It was forwarded to the NSC in preparation for the the NSC's briefing of NSA Berger on September 9, 1997 (Id.) This outline clearly records the inaccurate briefing given the FBI by OEI on October 31, 1995. [lines deleted] (FBI 13024-26 at 25) The outline includes important dates relevant to the walk-in document. On September 10, 1997, [deleted] requested the appendix to the CIA's position paper from the FBI. OIPR, which had previously approved the oral briefing of the NSC by the FBI (FBI 01085), also approved the dissemination of this information to the NSC on September 11, 1997. (FBI 12388) The appendix was sent to the NSC by facsimile the same day. (FBI 1088)

6. [deleted]

On August 29, 1997, Unit Chief [deleted] and SSA [deleted] attended a CIA meeting to review and contribute to the DI's paper addressing the PRC threat to the labs. (FBI 15752) Trulock was also at this meeting. During the meeting [lines deleted] At one point, [deleted] the CIA analysts [deleted]

Sometime between August 29, 1997 and September 11, 1997, Trulock wrote DCI George Tenet a letter which was described by one CIA officer as [deleted] (FBI 12388) Trulock wrote: "we would be remiss in not expressing our concerns regarding both the overall analysis and several of the key conclusions. In our judgment, the DI paper contains a number of important flaws." (EAT 384-85 at 84) Trulock also wrote: [lines deleted]

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[lines deleted][487] (EAT 384)

The analysts wrote an internal response dated September 30, 1997. "We agree with Notra's assessment that the National Laboratories have a CI problem and fully support DOE's efforts to combat this problem. We were asked to conduct an independent analysis of [deleted] We tried to convey the known acquisition of US nuclear weapons design information and put it into context [deleted] (EAT 386-87 at 86)

7. The October 15, 1997 NSC briefing

On October 15, 1997, [deleted] briefed [deleted] and [deleted] of NSC. [lines deleted] had already returned to LLNL to resume [deleted] detail and was not present. The DOE contingent arrived forty minutes into the briefing which had already begun with the CIA assessment.[489] Although the CIA's brief was in ninety-five percent agreement with [deleted] and focused on the five percent which [deleted] The analysts believe that

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487 [lines deleted]

488 It is unclear whether NSC came to this conlusion as a result of having heard [deleted] directly, or whether it was a result of the FBI's briefing on September 5, 1997.

489 The DOE contingent was late because of their attendance at the Freeh/Tenet/Pena meeting, concerning PDD-61, also taking place that day.

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[lines deleted] that he never claimed [deleted] At this point [lines deleted][492] [deleted]

8. The FBI's failure to recognize the significance of the CIA's assessment

A copy of the CIA's final paper, bearing the facsimile date of September 11, 1997, was provided to Director Freeh as part of a briefing package to assist the FBI/CIA effort to improve the counterintelligence program within DOE. [lines deleted][493]

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490 [lines deleted]

491 [deleted] LANL, and [deleted] also accompanied [deleted] to NSC, but did not speak.

492 The CIA analysts all emphasized that they were largely in agreement with [deleted] that DOE had serious and legitimate counterintelligence concerns in this area. [Deleted] The CIA shared [deleted] concerns over the lax security at the national laboratories.

493 It is not clear whether Director Freeh made these notations in 1997 or 1999.

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Thus, Director Freeh recognized that the CIA paper was clearly taking the position [deleted] But that point -- and its implications -- needed to be understood at a far lower level within the FBI, specifically at the [deleted] level. For it was the [deleted] personnel -- specifically Unit Chief [deleted] and SSA [deleted] -- who had read the AI report and received the October 31, 1995 [deleted] It was at this level that the message needed to be received and understood that there was a fundamental contradiction between what DOE had told the FBI and what the CIA was telling the FBI. It was received, but it was not understood.

The CIA's review of China's nuclear weapons program in 1997 represented the last opportunity to correct the predicate as it was communicated to, and accepted by, the FBI. [lines deleted]

M. The impact of the inaccurate prediction upon the FBI's investigation and current developments

From May 30, 1996 until early 1999, the FBI investigated the wrong crime. [lines deleted] The inaccurate predicate caused the FBI to improperly narrow the focus of their investigation to LANL due to the associated assumption [lines deleted]. The error was compounded by the FBI's complete and uncritical acceptance of the AI report's selection of Wen Ho and Sylvia Lee as the subjects of their investigation. The AI was accepted by the FBI until December 1998 when ASAC Lueckenhoff raised serious concerns over its content. The inaccurate predicate survived for months longer. Only in March 1999 did the FBI begin to recognize the error when they first visited SNL. At

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494 There is no indication that the CIA assessment was ever shared with FBI-AQ.

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SNL, the FBI, by chance, spoke with [deleted] an original participant of KSAG, and began to appreciate the predicate's inaccuracy.

[paragraph deleted]

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495 [lines deleted]

496 This fact, which may or may not be a coincidence, has only recently been discovered. KSAG did not recognize the coincidence in 1995. [deleted]

497 [lines deleted] The CIA's analysis may or may not represent the final word on this subject, but it is clear that this is precisely the type of rigorous dissection that the walk-in document required in 1995 and 1996 and requires today.

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Parallel efforts, by the FBI and DOE OCI, are presently underway [lines deleted] This effort has already demonstrated a broad dissemination among various DOE components, DOD components and contractors. It has also identified documents disseminated before the 1984 window established by KSAG and utilized by the AI. [Deleted] observed that they "didn't recognize the fact that in the interface documents" this "information is shared with a larger number of organizations." "It was a blind spot" in their 1995 analysis. [lines deleted] These documents were widely disseminated within DOE, DOD and the contractors.

Similarly, [deleted] at SNL have identified documents in the early 1980s that were widely disseminated which contain the compromised information. In an effort to acquire an accurate understanding of the predicate, the FBI has assembled a task force to interview the original participants of KSAG and identify what information has been compromised and which documents contain that information. This effort, combined with the ongoing review by DOE OCI of W-88 documents to determine which contain the compromised information, should focus the FBI's future investigation on the information which was compromised to the Chinese. These efforts will better define those materials which represent the universe of documents capable of having been the source of the compromise. Whether that will also identify the individual or individuals responsible for the compromise is more difficult to predict.

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CHAPTER SEVEN

THE DEPARTMENT OF ENERGY'S ADMINISTRATIVE INQUIRY:
SEPTEMBER 1995 TO MAY 1996

Questions Presented:

Question One: Should the FBI have asserted "primary investigative jurisdiction" on this matter in September 1995?

Question Two: Did the FBI unduly defer to DOE?

Question Three: What was the purpose of the Administrative Inquiry ("AI")?

Question Four: What investigation was conducted in support of the AI?

Question Five: How did the AI's investigators' misunderstanding of the predicate affect the AI?

Question Six: What contribution did the FBI make to the AI?

Question Seven: How were various drafts of the AI altered, and toward what end?

Question Eight (U) Did the Al report transmitted to the FBI accurately reflect the predicate for the investigation? Question Nine: Did the AI report transmitted to the FBI make premature and unwarranted judgments concerning Wen Ho Lee and Sylvia Lee that invited and encouraged the FBI to focus exclusively on the Lees?

Question Ten: Was a full investigation on Wen Ho Lee warranted?

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Question Eleven: Did the FBI's own failure to conduct a full and thorough investigation contribute to and magnify the defects of the AI?

Question Twelve: Was the Administrative Inquiry report's selection of Wen Ho Lee the product of racial bias?

> *PFIAB QUESTION #9: Whether the FBI appropriately relied on technical opinions provided by the DOE?*

A. Introduction

DOE conducted the initial investigation into China's acquisition of classified information concerning the W-88 warhead design. This investigation, called an Administrative Inquiry ("AI"), culminated in a forty-

one page written report with four attachments. Completed on May 28, 1996, the report was provided to the FBI "for your information/action."[498]

The AI represented a woefully inadequate investigation into the "facts and circumstances relative to the loss of the W-88 weapons design information." (FBI 00375) The final report was so poorly-written and organized that this alone made it difficult to evaluate and comprehend. More significantly, it contained very serious deficiencies, including numerous inconsistent and contradictory statements as well as unsubstantiated assertions. Other deficiencies lay just beneath the surface; even a cursory investigation -- had it been done by the FBI -- would have revealed them.

Principal among these deficiencies was the very foundation of the investigation itself, the predicate [lines deleted]

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498 See AQI 00886, DOE 02406: "Hand carried [and] Delivered to [deleted] [on] 5/28/96."

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was blatantly inaccurate. It was true that a working group of nuclear weapons experts had been assembled by the Director of the Office of Energy Intelligence ("OEI") "to conduct an in-depth review" of the matter. And it was also true that this group, called the Kindred Spirit Analytical Group ("KSAG"), was composed of highly qualified nuclear weapons designers with access to [lines deleted] The working group's concise and limited conclusions were never shared with the FBI. Instead, the FBI was misled.

By mischaracterizing the predicate, DOE compromised and undermined the FBI's own investigative efforts. This is not to say that Wen Ho Lee did not warrant investigation [line deleted] He did. Rather, it is to say that the mischaracterization of the predicate in the AI caused the FBI to ignore and exclude numerous other possible subjects and numerous other possible venues which might have been the source of the far more limited compromise definitively established by KSAG.

The final report transmitted to the FBI was the product of an editing process that ultimately converted the AI from a broad identification of potential suspects to a virtual indictment of the Lees. These editing changes materially altered the scope, tone and conclusion of the report and made it that much more likely that the FBI would focus solely on the Lees. Remarkably, the FBI agent detailed to support the AI did not participate in, nor review the changes made to the AI, during the final two months before DOE delivered it to the FBI even though his name appears on the final AI as one of the two "Case Officers" for the AI. Although this editing process deleted numerous avenues for additional investigation, certain leads did survive the final edit. The FBI ignored them, embracing instead the AI's grandiose claim that Wen Ho Lee was "the only individual identified during this inquiry who had the opportunity, motivation and LEGITIMATE access." Upon receipt of the final AI report, the only "action" taken by the FBI was to open and conduct a full investigation on Wen Ho Lee and his wife, Sylvia

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Lee. Unlil December 1998, no one within the FBI questioned the AI's assumptions, content or conclusion. With one exception, no further investigation was conducted, or even contemplated, by FBI Headquarters or by the case agent in the field.[499]

The FBI's own lack of investigative interest in looking beyond Wen Ho Lee and Sylvia Lee magnified each of the AI's defects. Mistakes made during the AI were not corrected during the subsequent FBI investigation. Locations ignored during the DOE AI were also ignored by the FBI. Individuals missed by the AI were also missed by the FBI. With the exception of Wen Ho and Sylvia Lee, employees identified in

the final AI report as having both access and travel to China were not investigated. Leads identified, however fleetingly in the AI report, were not pursued by the FBI.

The AI undertaken by DOE should have at a minimum: (1) repeated KSAG's concise and limited assessment of the compromise; (2) identified the universe of locations which received the limited information known to have been compromised: and (3) collated visitation and travel records for those locations within DOE's umbrella. This was not done. Instead, DOE mischaracterized the predicate and then settled on Wen Ho Lee as the "most logical suspect." When the AI report was given to the FBI, it did not encourage and facilitate a broad and thorough FCI investigation but, rather, it focused the FBI in on the Lees. The FBI compounded this error by never critically examining the investigative steps leading to the selection of the Lees or the exclusion of others.

Recent assertions of impropriety in the conduct of the AI have been made by [line deleted] claimed that the AI was not a vigorous counterintelligence inquiry, but a mechanism to summarily finger a Chinese American. *The AGRT has found no evidence of racial bias.* [Deleted] claim is particularly ironic [line deleted] To the extent that [deleted]

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499 That one exception was a December 1997 instruction from NSD to FBI-AQ to open preliminary inquiries ("PIs") on [deleted] mentioned in the AI. FBI-AQ ignored the instruction and FBI-HQ did not insist on the opening of the PIs until March 1999.

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complaint is really an attack on the AI's lack of rigor in its assembly of a list of possible suspects, that is certainly a claim with merit. Wen Ho and Sylvia Lee should never have been the *sole* suspects upon which the AI ultimately focused.

The AI should have been a *sieve* resulting in the identification of a number of suspects. Instead, it ended up as a *funnel* from which only Wen Ho and Sylvia Lee emerged. That was not because they were of Chinese heritage but, rather, because, one, other suspects and locations of potential compromise were improvidently and improperly rejected, and, two, Wen Ho Lee came to the attention of DOE already "tagged" as a prime candidate for suspicion. Indeed, Wen Ho Lee's name first appears in DOE's "Kindred Spirit" records in June 1995 -- long before the AI even began. This is not to say that the results of the AI were preordained. A knowledgeable and experienced FBI agent had been involved in the early phase of the AI and there is nothing to suggest that he viewed the AI as designed to achieve a particular result. It is to say that the AI did not *need* to be preordained. Given its slap-dash quality, its flawed rationales, its complete mischaracterizadon of the predicate, and its queer mash of intense review of some pertinent records and complete ignorance of other venues of compromise, once Wen Ho Lee was "tagged" with the patina of suspicion, the AI was all but over. He would be "*it*."

B. <u>The FBI's undue deference to DOE</u>

The decision to conduct an AI was separate and distinct from the decision to have KSAG assess the Chinese nuclear weapons program. KSAG's assessment addressed the larger issue of whether the Chinese had compromised classified information, while the AI focused on the possible locations and sources of any compromise. Both decisions were discussed with the FBI. Tbe FBI deferred to DOE in both instances.

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The FBI's willingness to defer to DOE as to the *initial* assessment of [deleted] was reasonable. KSAG, composed of representatives from within DOE, the Central Intelligence Agency ("CIA") and the Defense

Intellitence Agency ("DIA") was clearly better positioned than the FBI to initially assess any compromise.[500]

The AI, however, was a very different matter. The FBI's deference to DOE in the conduct of the AI was unfortunate and inexplicable. Unlike the deliberations of KSAG, which required expertise unique to DOE, the AI was essentially a foreign counterintelligence investigation, a matter which required expertise peculiarly within the expertise of the FBI.

There is no evidence of any debate within the FBI addressing the wisdom of deferring to DOE. DOE announced its intention to conduct an AI and sought an FBI detailee to support its inquiry. The FBI concurred in DOE's decision and detailed SA [deleted] to the AI. SA [deleted] maintained minimal contact with FBI-HQ. Essentially, the FBI simply awaited DOE's anointing of a suspect. [lines deleted] Remarkably, the FBI even closed its own preliminary inquiry on Wen Ho Lee in deference to DOE's AI.

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500 This does not mean that the FBI should not have monitored KSAG's work. It should have. It was invited to do so, and it declined.

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1. Notification to the FBI of thee decision to conduct an Administrative Inquiry

The decision to conduct an AI originated within DOE.[501] DOE's decision to conduct an AI was made with the full knowledge and consent of the FBI.[502]

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501 It is unclear who initially formulated the plan to conduct the AI within DOE. [Deleted] wrote an investigative plan dated June 28, 1995. [deleted] 8/4/99; [deleted] 8/10/99) [Deleted] identified someone who familiarized [deleted] with the need to conduct an internal inquiry. [Deleted] drafted [deleted] September 25, 1995 letter to the FBI formally noticing them of the AI's initiation. (Baker 2/2/00) Deputy Secretary Curtis recalled directing the initiation of the AI in November 1995, but this appears to have been more of a formality since the AI was already underway at that point. (Curtis 1/14/00)

502 The two agencies had previously defined their respective counterintelligence responsibilities. The Memorandum of Understanding (MOU) between DOE and the FBI, dated October 1992, controlled the coordination and conduct of counterintelligence activities. (FBI 20757 to FBI 20761) The MOU defined and coordinated responsibilities "between the agencies regarding alleged or suspected counterintelligence activities" and thereby established "an efficient and expeditious channel of information [which] should better protect United States national security." (Id.at 57)

The MOU imposed on DOE a requirement that the FBI be promptly notified: "At the time a DOE administrative investigation discloses information or allegations of possible intelligence activity or unauthorized contact on the part of DOE personnel with a foreign power, the matter will be promptly referred to the FBI. If the FBI declines primary investigative jurisdiction, DOE may elect to continue to pursue necessary leads as appropriate to resolve the allegation or facilitate administrative sanctions." Id. at 60.

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The FBI received numerous notifications from DOE of its concern [line deleted] DOE was concerned that it not violate any notification requirement with respect to the FBI.[503] (Trulock 10/12/99); [deleted] 8/4/99); [deleted] 8/10/99); (Curtis 1/14/00)

The FBI received at least three notifications of DOE'S suspicions prior the AI's initiation.[504] First, in July 1995, DOE briefed the FBI of its concern and provided a copy of its proposed investigative plan. Second, on September 25, 1995, DOE informed the FBI that the KSAG working group had concluded to a [line deleted] The same letter announces DOE's intention to conduct an AI and asks for the FBI's support in the form of a detailed agent. Third, on October 31, 1995, the FBI was briefed on the particulars of KSAG's assessment and was given a presentation outlining the AI.

The FBI could have assumed "primary investigative jurisdiction" at any point during these notifications. Instead, the FBI simply requested that it be kept apprised of developments and deferred any decision until the AI was concluded. In part, this was due

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503 The notification requirement on DOE is imposed by both the MOU and statute. Section 811 of the Intelligence Authorization Act for 1995, entitled Coordination of Counterintelligence Activities, requires that the FBI be immediately notified of any compromise of classified information. Section 811(c)(l)(A) states: "the Federal Bureau of Investigation is advised immediately of any information, regardless of its origin, which indicates that classified information is being, or may have been, disclosed in an unauthorizied manner to a foreign power or an agent of a foreign power...." This ongoing obligation also requires that the FBI be informed of all actions undertaken with respect to the compromise: "[F]ollowing a report made pursuant to subparagraph (A), the Federal Bureau of Investigation is consulted with respect to all subsequent actions which may be undertaken by the department or agency concerned to determine the source of such loss or compromise. . . " Section 811(c)(l)(B). DOE complied with this provision.

504 There may have been an additional notification. The OEI Kindred Spirit chronology includes an entry reflecting a meeting between DAD John Lewis and Trulock on June 23, 1995, that cannot be confirmed from the FBI's records.

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[line deleted] (See Lewis 7/6/99) At one point, DAD Lewis was reported to have observed that [lines deleted] DAD Lewis approved detailing a FBI agent to participate in the AI and deferred further action until the final report's production. (Lewis 7/6/99)

a. DOE'S first notification of the compromise to the FBI

OEI first notified the FBI of its preliminary concern and investigative plan in July 1995. On July 6, 1995, [deleted] CID, OEI, briefed SSA [deleted] on Kindred Spirit. OEI's investigative plan, dated June 28, 1995, was provided to the FBI either in advance of, or in conjunction with, this briefing. According to a DOE memorandum, "SSA [deleted] completely supported OEI's initial requirement to conduct a Damage Assessment to determine, to the extent possible, that the Peoples' Republic of China ("PRC"), had access to US warhead design information or that there was at least high probability that they had accessed said information. SSA [deleted] stated that at this point, there was insufficient evidence to warrant the initiation of an FBI full field investigation." (DOE 03487) SSA [deleted] requested the FBI be kept informed "of any significant developments." (DOE 03487) OEI's investigative plan articulated its intention to adopt a two-pronged approach to whether the Chinese had compromised classified nuclear weapons information. The first prong involved assembling a working group composed of weapons design experts to review and evaluate the intelligence and provide an assessment of the Chinese nuclear weapons program. [506] The second prong

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505 [lines deleted] The CIA did not provide the FBI a copy of the walk-in document until [deleted] It is possible, however, that SSA [deleted] might have seen a copy of the walk-in document before its formal release to the FBI. He says he did. ([deleted] 12/15/99)

506 A copy of OEI's investigative plan was in the FBI's files. This copy is signed by [deleted] and bears the handwritten date, June 28, 1995. SSA [deleted] made two comments on this plan. The first comment concerns [deleted] characterization of the

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involved conducting an AI to define the universe of possible suspects within DOE.[507] This prong would pursue leads "for the purpose of narrowing the scope of the inquiry to specific laboratories, periods of time and personnel who would have logically been involved in the weapons design development." (DOE 03206)

On July 13, 1995, Kenneth Baker, Acting Director, Office of Nonproliferation and National Security, and Trulock briefed DAD Lewis and SC [deleted] on DOE's preliminary assessment that the Chinese had penetrated DOE. This meeting followed [deleted] earlier briefing of SSA [deleted] "Trulock advised that he was

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working group's comprehensive review of the intelligence: "I would limit the scope or it will take too long. We only need, at least initially, a warm gun barrel." FBI 00336. The second comment concerns [deleted] suggestion [lines deleted] Id. [deleted] 12/15/99)

507 The deleted stressed that OEI never undertook to examine agencies or facilities outside DOE's umbrella due to their lack of jurisdiction and authority. ([deleted] 8/4,10/99) See also AI at 4; FBI 00528 ("the initial scope of this inquiry would be to identify PRC visitors/assignees to LANL/LLNL and other DOE locations/facilities which worked on the W-88, [deleted] Nevertheless, the FBI depended upon DOE to identify those agencies or facilities, outside the AI's scope, which received the compromised information. Without further notification, the FBI could not undertake that portion of any future investigation. [deleted] 12/15/99) The final AI report identified some, but certainly not all, DOE locations where a compromise might have occurred. Locations under the DOE umbrella, such as DOE Headquarters and the Albuquerque Operations Office, are listed as having the necessary information in the final AI report. (Al at 4 and 7: FBI-00528, FBI-00531) Beyond a recognition that sufficient records may not exist for DOE Headquarters, the AI failed to investigate these DOE locations. Other DOE venues, such as Pantex and SNL, previously identified as within the scope of the AI, are not mentioned in the final report. See DOE-02412 and DOE-02413 ("Identify all LANL, LLNL, & Pantex Personnel"); DOE-02423 ("PANTEX should be looked at also, but propose to do that (if deemed necessary) in early Jan 96"). No list of non-DOE venues was provided to the FBI. ([deleted] 12/15/99)

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[lines deleted] (AQI 02936) Trulock asked the FBI to participate in the OEI's evaluation of the matter by joining "DOE's damage assessment/administrative inquiry team." The FBI declined to participate at this stage of the DOE review.[508] "FBI-HQ declined until such time as DOE had a prima facie case of espionage." (AQI 02937)

b. DOE's second notification of the compromise to the FBI

DOE's second notification to the FBI occurred on September 25, 1995. A DOE letter, drafted by Trulock[509] and signed by Baker, announced the completion of the KSAG working group's evaluation: [lines deleted]

(FBI 00375) The letter also announced the initiation of an AI by DOE "to determine the facts and circumstances relative to the loss of the W-88 weapons design information." (Id.) DOE requested that the FBI temporarily assign an agent to DOE to "assist in the conduct of this preliminary investigation" and due to DOE's own "limited investigative authority." (Id.)

The FBI did not -- but should have -- asserted primary investigative jurisdiction at this time, given DOE's explicit representation that the Chinese had compromised classified warhead design information.[510]

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508 This decision would have significant consequences. FBI participation in KSAG, if only as an observer, would have permitted it to form its own judgment as to KSAG's assessment of the compromise.

509 (Baker 2/2/00; [deleted] 1/13/00) See also DOE 02310.

510 [lines deleted] There is no evidence DOE ever requested that the FBI assume control over the investigation, and DOE's letter does not make such a request of the FBI.

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OEI was not prepared to wait for the FBI's approval before beginning their AI, and OEI initiated the AI before receiving any response from the FBI.[511]

c. DOE's third notification of the compromise to the FBI

DOE'S third notification to the FBI occurred on October 31, 1995, when OEI briefed the FBI on the investigation's predicate. OEI also outlined the plan for the AI to the FBI at this meeting. (DOE 03479) OEI anticipated its plan would be acceptable to the FBI because "it included only those basic steps necessary to meet Attorney General guidelines for an '811 referral' threshold to the FBI." [deleted] DOE IG Interview 5/18/99) (DOE 2500) Deputy Secretary Curtis, [deleted] was informed "that the FBI has been briefed on the information and is on board (DOE 03337 to DOE 03339 at 39; Curtis 1/14/00)

2. Discussion

FBI's deference to DOE was a mistake. Once DOE made the initial determination that classified information had been compromised to the Chinese, a determination readily supported by the walk-in document, the FBI should have asserted primary investigative jurisdiction and taken over the matter. *It is impossible to identify any significant respect in which the investigation conducted during the AI was advantaged by having it done by DOE, rather than by the FBI.* The OEI had a single investigator, [deleted], and limited investigative authority.[512] Had the FBI taken over the

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511 OEI's investigator [deleted] sought permission to begin the AI without the FBI if necessary, "I am awaiting the FBI's approval to detail Supervisory Special Agent (SSA) [deleted] to assist this office on [Kindred Spirit]. I don't believe it is in our best interest to wait out the FBI decision on this matter." (DOE 02421) "I propose we actually begin the inquiry. . . on or about November 1, 1995, with or without the FBI detailee." OEI approved [deleted] request to begin without tfae FBI. (Id.)

512 [Deleted] himself, agrees with the assessment that the FBI should have opened its case in September 1995. Indeed, he viewed the subsequent Administrative Inquiry as a mechanism to get the FBI to do just that: "If they won't open a case on it,

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investigation, that investigator's institutional knowledge would have certainly been available to support it. Rather than [line deleted] the FBI should have asserted primary jurisdiction and, in September 1995, begun to interview KSAG members and develop an investigative plan of its own. By deferring its jurisdiction, the FBI permitted others to control the investigation from the outset. That control permitted OEI to define the focus of the initial investigation and thereby define the subsequent FBI investigation.[513]

C. The purpose of the Administrative Inquiry

Considerable confusion surrounds the AI's purpose. This confusion is largely responsible for the difference between what was planned and what was finally accomplished. The AI was originally described as a preliminary investigation limited to a discreet review and collation of the DOE records. It became a vehicle to select a single target who was claimed to be "the only individual identified during this inquiry who had opportunity, motivation and LEGITIMATE access."[514] AI at 38; FBI 00562. What began

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then I'll drag them into it." [deleted 10/25/99)

513 [Deleted] believes only OEI was capable of conducting this preliminary inquiry. He claimed that any investigation by the FBI within DOE would have been immediately alerting. [deleted] 8/4/99) This concern is overblown. Had the FBI assumed primary jurisdiction for this investigation, [deleted] would have undoubtedly supported it within DOE. Any investigation that the FBI could not safely undertake itself, it could have had [deleted] perform. The counterintelligence officers at the national laboratories work with the FBI on an ongoing basis and one more inquiry would not have been inherently alerting. See [deleted] interviews.

514 This is an empty statement lacking significant support in the AI report. Access and opportunity were shared by anyone with a "Q" clearance who participated in the W-88's design and traveled to China [deleted] Wen Ho Lee was not the only person who fit this profile. As to motive, the AI speculatively suggests that Wen Ho Lee's motive to pass the W-88 information to the PRC was to "enhance" his "stature" in the "eyes of high ranking PRC personnel." (AI at 37; FBI 561) This hardly narrows the class of potential suspects. Anyone who betrays this

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[lines deleted]

1. The FBI's understanding of the AI's purpose

The AI's purpose was first described to the FBI as an effort to develop "logical leads" to "narrow[] the scope of the inquiry to specific laboratories, periods of time and personnel who would have logically been involved in the weapons design development." (DOE 03206) The OEI's investigative plan, shared with the FBI by July 6, 1995, explained: "[a] critical element of this inquiry is the identification of personnel who worked on the various aspects of the design." (DOE 03206) The plan included comparing these employees against travel records to China. "Once [DOE] has identified a potential list of suspects, reviews of the suspects' foreign travel history, personnel security information, foreign contacts, etc., will be discreetly conducted and documented." (DOE 03207) The FBI understood the AI's purpose as the identification of DOE employees with access to the compromised information and a comparison of that list against their travel records and security files. In July 1995, the AI was described as a mechanical, discreet file review within DOE.

The AI began on September 25, 1995. (AI at 2; FBI 00526) In its letter to the FBI, DOE described the AI as a preliminary investigation with the broad purpose of "determin[ing] the facts and circumstances relative to the loss of the W-88 weapons design information." (FBI 00375) This description articulates a much

different and broader purpose than originally described to the FBI two months earlier. There is no evidence that the shift in DOE's articulated purpose for the AI triggered any discussion within the FBI.

The final description of the AI's purpose to the FBI occurred on October 31, 1995. The OEI briefed the FBI using a slide presentation to outline the AI. (DOE 2411-2417) One slide [lines deleted] (Id. at 12.) This slide identifies locations where the compromise may have occurred including: "LANL, LLNL, Pantex &

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country will likely gain favor in the country that benefits from the betrayal.

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HQ DOE." (Id.) The slide entitled "Investigative Plan - Initial Approach" identifies three tasks to be performed at each location: "Identify all PRC visitors to LANL, LLNL & Pantex; Identify all LANL, LLNL & Pantex Personnel with access to W-88; (and) Identify all LANL, LLNL & Pantex Personnel who traveled to PRC." The slide entitled "Link Analysis" suggests an effort to link PRC personnel with laboratory personnel. These slides suggest just four locations within DOE where the compromise might have occurred.[515] (Id.)

SA [deleted] summarized his understanding of the AI's purpose in early 1996. "[T]he 'KINDRED SPIRIT' investigation was begun [lines deleted] FBI-19296. SA [deleted] focus during the AI was on locations where a compromise of classified mformation may have occurred. He wrote a four-page investigative plan after returning from the last trip he made in support of the AI which outlined the future investigation he believed the FBI needed to conduct. SA [deleted] plan demonstrates his own belief that a broad investigation into the compromise was required *after* the conclusion of the AI. That however, would not happen.

2. OEI's understanding of the AI's purpose

The confusion over the AI process extended to OEI. [lines deleted]

[Deleted] exercised care during the AI to emphasize the preliminary nature of the inquiry. He stressed this point each time he was interviewed by the AGRT. [Deleted]

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515 These four locations include Pantex, but the AI never examined Pantex. The investigators never visited that location nor is Pantex mentioned in the final AI report.

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8/4/99, 8/10/99, 10/25/99) In preliminary documents, [deleted] was careful to avoid eliminating other suspects during this preliminary inquiry.[516] [Deleted] drafted an ambitious investigative plan and anticipated assembling lists of employees for the FBI's review and examination. He believed that the AI was the first step in what would become a far more extensive investigation by the FBI. [deleted] 8/4/99 and 8/10/99) In one interview with the AGRT, he expressed frustration as to the extent to which the AI has been portrayed as being more than it was intended to be: "It was just a stupid Administrative Inquiry."[517] [deleted] 8/10/99)

The AI process [remainder of paragraph deleted]

[lines deleted] 1/13/00; [remainder of paragraph deleted]

516 See, e.g., signed AI report at 84; DOE 00151 ("This by no means excludes any other DOE personnel as being possible suspects in this matter. The investigative team must conduct records reviews etc., at several other locations before this inquiry is concluded").

517 [Deleted] also described the AI as "just the 'opener,'" "the first card," "nothing" "just preliminary" and "shallow." [deleted] 8/10/99)

518 That may explain why he erroneously sought the ClA's permission instead of the FBI's, to proceed with the AI. (DOE 3440)

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D. The Administrative Inquiry's investigation

The AI spanned eight months from start to finish. Within those eight months only four trips were taken by one or both investigators. Two of the trips were made [deleted] alone and two were jointly made by [deleted] and SA [deleted][519]

1. Interviews conducted during the AI

Both investigators were sensitive that the AI not impair a subsequent full investigation by the FBI. The decision to conduct a discreet AI caused the investigators to severely limit their interviews at the national laboratories. This limitation resulted in avoiding the very scientists capable of explaining the broad dissemination of nuclear design information. These interviews would have caused the investigators to re-examine

519 The first trip was to LANL and the Albuqueraue Operations Office ("AL") on November 6 to November 9, 1995. This three-day trip was made by [deleted] alone to request the collection of relevant records at LANL and AL in anticipation to a future trip by both [deleted] and SA [deleted] (DAG 00808 to DAG 00809) From December 4 to December 7, 1995, a second three-day trip occurred, this time by both [deleted] and SA [deleted] to LLNL and the Oakland Operations Office ("OK") for the same purpose. (DOE-02436 to DOE 02437: FBI 00408 to FBI 00413) The third trip, spanning two weeks from February 13, 1996 to February 22, 1996, was also made by both [deleted] and SA [deleted] to LANL and AL to review LANL's records. They spent the first week at LANL generating a list of seventy employees who had traveled to the PRC and a shorter list of [deleted] who also had access to the W-88. The investigators then went to AL to review the security files for these employees identified at LANL. (DOE 03467) The final trip made in support of the AI, to conduct a similar records review at LLNL, was made by [deleted] alone on April 9, 1996 through April 18, 1996. (DOE 03467) In addition to these four trips, SA [deleted] traveled to Washington, D.C. twice in support of the AI. The first trip by SA [deleted] occurred on October 31, 1995, to attend the OEI briefing on the KSAG working group's assessment and OEI's slide presentation outlining the AI. The second and final trip occurred on December 19 1995, when SA [deleted] reviewed the intelligence reporting in the basement SCIF in the Forrcstal Building.

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underlying predicate. [Deleted] justified the AI's limitations generally and, in particular, the failure to examine Defense Programs and DOE Headquarters, by asserting that any investigation would have been immediately alerting. [deleted] 8/4/99) DOE would later state that "no inquiries were made at Defense

Programs elements or DOE Headquarters to preserve the limited knowledge of the inquiry. This was agreed to by DOE and the FBI at the early planning discussions." (FBI 19238)[520]

It is unclear why the presence of the two investigators at LANL and LLNL was any less alerting than their presence at other components under the DOE umbrella. The investigators should have obtained a list of the nuclear weapons experts who had participated in KSAG in support of the AI. These experts were already "alerted" to the compromise, having reviewed the intelligence reporting. [Deleted] attended portions of KSAG's meetings and could easily have obtained a list of those in attendance. There would have been multiple benefits from having these experts, each knowledgeable about the compromise's scope, serve as resources to guide the AI. These experts would have been available to respond to the investigator's questions at LANL, LLNL and SNL. By failing to dentify these experts and seek them out, the investigators relied exclusively upon [deleted] to inform their inquiry,[521] which was a mistake.

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520 This recollection fails to explain the omission, from the AI report transmitted to the FBI, of SA [deleted] comment that "[t]o complete the investigation, it will be neccssary to review W88 information atDOEHQ, DOE Albuquerque Ops Office, LLNL, SNL, and Rocky Flats, to determine what information was available and when. It would also be desirable to confirm that Pantex received no information about the W-88 within the time frame of this case." [lines deleted] The result was a final report which failed to explicitly alert the FBI to the investigation that was not conducted by OEI.

521 This error was repeated by the case agent when the FBI opened its own investigation on the Lees.

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Because the investigators conducted a discreet AI, few people were interviewed. The Contract Counterintelligence Officers ("CCIOs") at LANL, AL, LLNL and OK supported the inquiry at each facility. The CCIOs at LANL and LLNL each suggested that the investigators speak with scientists associated with their respective offices. At LLNL this scientist was [deleted] At LANL this scientist was [deleted] These were the only scientific resources utilized by the investigators beyond [deleted] The only other individual interviewed by the investigators during the eight-month AI was [deleted] This interview occurred on the suggestion of [deleted] at LANL. Beyond these three interviews, the investigators' entire effort consisted of a records review for two weeks at LANL and two weeks at LLNL.

a. [deleted]

In the first week of December 1995, [deleted] and SA [deleted] met with CCIO's [deleted] at LLNL. The investigators identified records they wanted assembled for their review during a future trip[522] and discussed their investigative plan. (DAG 00808) [lines deleted] (FBI 678) During [deleted] solo second trip in April 1996, he tasked [deleted] to locate documents at LLNL that could have been the source of the compromise at that location. [Deleted] reviewed LLNL's files [deleted]

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522 [Deleted] would make this return trip without SA [deleted] SA [deleted] had undertaken a new assignment and was unavailable. On April 9, 1996, [deleted] alone interviewed [deleted] to obtain the "salient information" captured in the AI. (See AI at 18; FBI 00542) [lines deleted] (AI at 39) This assumption incorporated a number of serious errors, discussed in Chapter 6.

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[lines deleted][524]

b. [deleted]

[Deleted] met with the AI's investigators at LANL on February 14, 1996. [Deleted], LANL, was concerned that the investigators lacked a good grasp of the broad dissemination of data associated with a warhead's development. [Deleted] arranged this meeting to educate both SA [deleted] and [deleted] on the wide dissemination of design information during the development of the W-88. [Deleted] own sense was that the investigators were focused on too narrow a group of locations where a compromise might have occurred. [deleted] 9/15/99) [Deleted] was generally familiar with both the W-88 and LANL's archives. [Deleted] depended entirely on the investigators to describe the compromise's scope which was unfortunate since the investigators, in turn, were depending on the inaccurate October 31, 1995 DOE briefing to the FBI. (See Chapter 6.)

[lines deleted]

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523 The scope of this search was problematic since [deleted] only searched a single vault for the "A" Division at LLNL. There are numerous other vaults at LLNL with W-88 documents. When interviewed, [deleted] estimated there could be over a hundred thousand documents in LLNL's vaults. He only examined one vault and never represented to [deleted] that there were no other W-88 documents at LLNL. He was asked to conduct a discreet search, which he conducted in the vault he thought most likely to have the material. [deleted]

524 The true consequences of that error must await the conclusion of the FBI's current investigative efforts.

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[deleted] notes reflect: [deleted] in the design and test phase, 5-6 years proceed. There is a large number of people [who] have access to the development. There is also the engineering group. At these stages the documents would be voluminous." [deleted] 00407-00408 at 7.) This observation, however, was never included in any draft of the AI report which the AGRT has reviewed. [Deleted] briefed the investigators [lines deleted]

Prior to [deleted] briefing, the investigators met with [deleted] (Santa Fe RA) on February 13, 1996. SA [deleted] notes of this meeting suggest [deleted] repeated OEI's inaccurate predicate at LANL. He told the investigators [lines deleted] (FBI 15869)

The next day the investigators used this briefing to describe the compromise's scope to [deleted] was advised that information [lines deleted] (FBI 02851) (SA [deleted] written

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525 SA [deleted] notes list [deleted] LANL, and [deleted] SNL, as familiar with the W-88's background. The investigators did not speak with either individual during the AI. Neither [deleted] were interviewed by the FBI until 1999, despite SA [deleted] presence at this meeting. Both men, when interviewed by the AGRT in 1999, lamented that they had not been sought out earlier in the investigation by the FBI. When the FBI did interview [deleted] in 1999, it fundamentally altered the FBI's understanding of the compromise's scope. [Deleted] as chair of KSAG, also would have dramatically impacted the FBI's understanding of the predicate. At a minimum, [deleted] would have alerted the FBI [lines deleted]

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report of this interview). This inaccurate statement was included verbatim in the Final AI report. (Al at 5; FBI 00529) [Deleted] relied upon the investigators' inaccurate description of the compromise's scope to guide his comments on the data's dissemination.

[Deleted] obtained for the investigators a list of the test shots involved in the development of the W-88. [Deleted] confirmed that the list of test shots in the Al[526] appeared to contain the shots he provided the investigators. [Deleted] obtained and assembled the names of the lead engineer, primary designer, secondary designer, radio chemists and others involved with each shot. He generated a lot of names. [Deleted] firmly believes Sandia National Laboratory ("SNL") was within the scope of any compromise of the W-88, regardless of how the compromise was defined. He recalls telling the investigators that SNL would have access to all the design information as SNL weaponized the W-88 and would have become a repository for nuclear weapon data after the weapon's development. [Deleted][527]

Had [deleted] been accurately briefed on the walk-in document's content, he could have begun to identify to the AI's investigators the large number of

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526 Like [deleted] was never shown the AI nor asked to review his interview for accuracy. There was *no* scientific review of the final AI report.

527 This recollection conflicts with the investigators' notes of the [deleted] interview (FBI 15870; [deleted] 00406) SA [deleted] written report of this interview states: [Deleted] was asked which other US Government agencies, facilities, or contractors would have had access to information about the W-88 [deleted] He said that, in addition to LANL, information about the W88 might have gone to the following elements: [lines deleted] (FBI 02852) The investigators did ultimately include SNL among the other venues requiring further investigation. The final edit, however, eliminated these locations from the AI report transmitted to the FBI.

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documents that would have had this information. [Deleted] could nave discussed the [lines deleted] *His opinion would have been markedly different had the scope of the compromise been accurately described to him.* He recalled explaining to the investigators [lines deleted] Locations which he discounted, based upon his erroneous understanding of the scope of the compromise, would not have been excluded if he had understood the compromise to have been more limited in scope. [deleted] 11/10/99)

c. [deleted]

On February 15, 1996, the investigators interviewed [deleted] in [deleted] Their interview was conducted under the ruse [deleted] Because many records were unavailable [deleted] suggested the investigators contact [deleted] The investigators asked [deleted] whether any LANL employee became close with the Chinese visitors. [lines deleted] (FBI 02857 to FBI 02858) The investigators did not pursue specific questions concerning [deleted] out of concern that such questions could be alerting.[529]

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528 [lines deleted] (AI at 6) (FBI 00530; FBI 02851)

529 SA [deleted] never interviewed [deleted] after receiving the final AI report.

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2. Records reviewed during the AI

The AI examined LANL and LLNL to identify all personnel who "had direct access to KINDRED SPIRIT information" and to review personnel security files and "all pertinent visitor and travel information." (DOE 02423) [Deleted] and SA [deleted] traveled to LANL and LLNL to review these assembled records. The Final AI report's structure reflects this investigation.[530] Although other locations are mentioned within the final AI report, they were not subject to a records review during the AI. This narrow focus during the Al has proven to be a major failure of this preliminary investigation into the compromise of classified information to the Chinese.

Throughout the AI investigation there is evidence that the investigators recognized the possibility that other locations within the DOE umbrella might have been the source of the compromise to the Chinese.[531] The suggestion, communicated to the FBI, that Pantex and SNL would be examined during the AI is misleading. The final AI report makes no mention of either Pantex or SNL. Other locations are mentioned, such as

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530 The report is divided into two substantive sections entitled: "AI conducted at Los Alamos National Laboratories & Albuquerque Operations Office, NM" (AI at 5; FBI 00529) and "AI conducted at Lawrence Livermore National Laboratories, CA." (AI at 18; FBI 00542)

531 "I believe PANTEX should be looked at also, but propose to do that (if deemed necessary) in early Jan 96" (DOE 02423; see also DOE 02411 to DOE 02417; DOE 03479 to DOB 03485) [deleted] advised that [deleted] and [deleted] would identify all personnel at the aforermentioned locations [LANL, SNL and AL] that had direct access to the compromised system during the time period in question. We will subsequently review personnel security files of the individuals identified and document all information obtained," (DOE 02438) DOE would later defend the AI in part by stating that "[t]he review at Albuquerque included SNL and Rocky Flats." (FBI 19236) There is no evidence that this occurred. The final AI report explicitly states that no Rocky Flats records existed to be reviewed at AL. (AI at 36; FBI 00560) The final AI report states that at AL the investigators "reviewed all available personnel security files *regarding LANL personnel*. . . who had access to weapons data." (AI at 9; FBI 00533) (emphasis added).

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DOE HQ and Rocky Flats, but only to note the absence of records (AI al 5 and 36) (FBI 00529. FBI 00560)

The investigators visited DOE'S regional offices in conjunction with their trips to LANL and LLNL. These visits however, were only to obtain files for LANL and LLNL employees and not to review any other facilities within the respective regions. The counterintelligence officer for the Albuquerque Operations Office noted that in advance of the investigators' visit he received a list of approximately twenty-five people for whom [deleted] wanted to review the personnel security files at AL. See DOE IG's report of the [deleted] interviews conducted on June 16, 1999 and July 13, 1999. (DOE 02881 to DOE 02882) The investigators were not reviewing the regional office's files for every DOE location, but only for a group of LANL employees. [deleted] recalled [deleted] discussing the need to review SNL and Pantex, but [deleted] does not believe that review ever occurred. [deleted] 9/10/99) The investigators' notes, provided to AGRT by [deleted] do not reflect the review of anyone emoloved at SNL Pantex or Rocky Flats. [deleted] 00001-00418)

E. SA [deleted] contribution to the AI

The detailed FBI agent, selected by FBI Headquarters, was SA [deleted] SA [deleted] is a senior FCI agent who had been assigned to the FBI field office [deleted] SA [deleted] a former [deleted] managing the

[deleted] program, has extensive experience in this area and was well suited for this investigation. [lines deleted] SA [deleted] is an experienced, professional agent very familiar with the long-tem investigations necessary in the foreign counterintelligence field. Although he devoted only *weeks* to this inquiry, his insights surpassed those of agents who devoted *years* to this investigation. SA [deleted] was the only FBI agent to review the underlying intelligence reporting and devise a broad investigative plan to investigate the compromise to the Chinese.

SA [deleted] understood his detail to DOE as assisting DOE in determining whether there was sufficient justification to open a full investigation in this matter. [deleted] 7/22/99) In support of that mission, SA [deleted] drafted thoughtful and

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thorough plan for the AI which *he* believed ought to be done. He sent it to FBI-HQ on December 13, 1995.

F SA [deleted] December 1995 AI plan envisioned a broad examination of the contacts between DOE and the Chinese. Rather than narrow any future investigation by the FBI, he sought to use the AI to create a depository of known facts upon which the FBI could build. The AI's "investigation would be developed along the following approach: (1) Catalog [deleted] (2) Catalog [deleted] (3) Catalog [deleted] (4) Catalog [deleted] (5) Build a time-line [deleted] (6) Catalog areas of research indicated by item five; (7) Look for matches between [deleted] in item five and items two, three, and four." (FBI 00408 to FBI 00413) SA [deleted] understood this investigation would not be "solved" by the AI. Instead, he anticipated developing resources for the anticipated full investigation.

The final AI was both more restrictive in its investigative efforts and more expansive in its accusatory reach.

Unquestionably, SA [deleted] most significant contribution to this investigation was not his December 1995 AI plan but his creation of a second plan, on or about March 4, 1996, for the investigation that he knew had to occur after the AI was completed. This plan represents the only substantial FBI effort prior to 1999 to outline a logical and comprehensive program for addressing and resolving the concerns triggered by the walk-in document.

SA [deleted] comprehensive investigative plan was shared with DOE. It was first edited by [deleted] included in [deleted] signed AI, and then deleted from the AI that was transmitted to the FBI, [deleted] SA [deleted] investigative plan was also

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shared with the FBI.[532] Copies of SA [deleted] investigative plan were not located in the FBI's files at Headquarters or FBI-AQ. Whether or no SA [deleted] or SSA [deleted] actually received SA [deleted] investigative plan, this much is certainly clear: after the full FCI investigation was initiated on the Lees, neither agent ever debriefed SA [deleted] on his work on, or his judgments concerning, the AI. [deleted] 7/22/99; [deleted] 12/14/99)

SA [deleted] investigative plan was completed by March 4, 1996. SA [deleted] first shared his plan with his FCI supervisor in Tampa, Florida. SSA [deleted] an experienced supervisory agent, approved the plan and directed SA [deleted] to forward it to both FBI Headquarters and Albuquerque. By routing slip dated March 4, 1996, SSA [deleted] "this looks like a viable game plan. Please ensure FBIHQs and AQ are apprised of it."[533] FBI 15868.

SA [deleted] investigative plan was structured around five questions: (1) [deleted].. (2) When and where was the information available in the United States?... (3) When did the Chinese obtain the information?...

(4) Who had access to the information in the US?... [and] (5) Who had opportunity/motivation to provide the information to the Chinese?" (FBI-19296 to FBI-19299) These questions intelligently frame an investigative plan to examine the compromise of classified information to the Chinese. [lines deleted]

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532 SA [deleted] recollects providing his plan directly to SA [deleted] in Sante Fe as the presumptive case agent and to SSA [deleted] as the [deleted] supervisory agent. Both SA [deleted] and SSA [deleted] do not recall receiving the investigative plan. The FBI has, however, recently discovered a misfiled copy of a draft of the AI report which includes much of SA [deleted] investigative plan. Also, on September 8, 1998, SC [deleted] received a copy of the investigative plan directly from SA [deleted] (FBI 2850)

533 Ironically, in 1999, when the FBI sent significant FCI resources to the Albuquerque field office to investigate this case, the Supervisory Special Agent placed in charge of this effort was SSA [deleted].

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[lines deleted] Had it been followed, OEI's mischaracterization of KSAG's conclusions might have been discovered years ago.

1. Question #1

SA [deleted] first question asked [deleted] SA [deleted] clearly anticipated the answer would be negative. The OEI briefing had claimed [lines deleted] See Chapter 6. Nevertheless, SA [deleted] believed that formal interviews of the experts was a prudent initial step for any full investigation.[534]

SA [deleted] first question was incorporated verbatim into [deleted] signed AI report, marked "Pending," with one exception. [Deleted] omitted SA [deleted] language recommending formal interviews of the experts. In the end, [line deleted]

2. Question #2

SA [deleted] second question asked *where* the compromised information was available. Again relying on the OEI's inaccurate briefing, and believing [deleted], SA [deleted] spoke to a broad as opposed to narrow compromise. Still, he believed the [deleted] window could be further narrowed during the FBI's full investigation. "To determine the specific date of the information that was passed (and therefore to be able to estimate when the information most likely was passed), it will be necessary to create a time-line [lines deleted]

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534 SA [deleted] wrote: [lines deleted] (FBI 19296)

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[deleted] Once this time-line is available, it must be compared with the sensitive source information to narrow the focus, if possible, on those persons who might have passed the information to the Chinese." (FBI 19296-97) Had this investigation been done, it would have caused the FBI to review the intelligence reporting and interview the nuclear design experts. Such an examination might have led the FBI to discover that it had been misinformed of KSAG's conclusions. This second section, absent certain material,[535] was

included in [deleted] signed AI report, marked "Pending," with one minor editorial change. (DOE 00149) The section was deleted in its entirety in the final AI report transmitted to the FBI.

3. Question #3

SA [deleted] third question sought to identify *when* the Chinese received the compromised information. He thought the FBI should identify the Chinese "elements and personnel" who worked on the Chinese warhead and obtain far more detailed information about the walk-in document.

[Deleted] signed AI report repeats SA [deleted] third question, but omits his language identifying the need for additional investigation.[536] (DOE 00149) While a

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535 SA [deleted] wrote: [lines deleted] (FBI 19297)

536 SA [deleted] wrote: [lines deleted] (FBI 19297)

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portion of SA [deleted] statement survived the final edit, see AI at 4 (FBI 00528), it is meaningless without this language. The value of SA [deleted] third question, had it been pursued by the FBI's full investigation, is that it would have ultimately revealed the inaccurate predicate briefed to the FBI and incorporated in the Final AI report.

4. Question #4

The fourth question represents SA [deleted] most significant investigative insight. Recognizing its importance, SA [deleted] devoted almost half of his plan to identifying the leads he believed still needed to be pursued. This question asked *who* had access to the information in the United States. In six paragraphs, SA [deleted] set leads to "complete the investigation." These leads called for investigation at LLNL, DOE-HQ, SNL, DOE Albuquerque, Rocky Flats and PANTEX to determine what W-88 information these entities had and when they had it. (FBI 19298, 19299) Every one of SA [deleted] recommendations for further investigation was deleted from the AI transmitted to the FBI.[537]

5. Question #5

The final question posed by SA [deleted] in his investigative plan asked who had the *opportunity and motive* to compromise the nuclear weapons information. He discussed possible scenarios involving the method of transfer to the Chinese of the compromised information. He concluded: "To complete this investigation, review specific persons who meet this criterion, per information from the facilities listed above. FBI-19299. The criterion identified are access and contact with the Chinese -- either through contact with Chinese visitors or through travel to China. SA [deleted] investigative plan thereby explicitly anticipated that suspects might be selected from *all of the facilities his investigative plan covered*, including PANTEX, SNL, Rocky Flats and

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537 [deleted] traveled to LLNL in April 1996 where he reviewed records and interviewed [deleted] also spoke with [deleted] at Rocky Flats and [deleted at AL. Incredibly, [deleted] believed he had covered many of SA [deleted] leads, thereby justifying their deletion for the AI report. [deleted] 10/25/99) [Deleted] effort to cover these leads was entirely inadequate.

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DOE HQ, as well as LLNL and LANL, of course. In [deleted] signed AI, the "opportunity and motive" question remains, but SA [deleted] language is removed. In the AI transmitted to the FBI, both are deleted.

SA [deleted] would never see the final AI, which identified the Lees as "the most logical suspects." [deleted] 7/22/99 [deleted] 12/14/99; [deleted] 8/10/99; [deleted] 10/26/99) Shortly after writing his investigative plan, SA [deleted] was given a new assignment by FBI-HQ and did no further work on the AI. He would not be told that his investigative plan was virtually ignored at DOE, at FBI-HQ, and at FBI-AQ.

F. The draft AI reports and the two complete AI reports

The final AI report was an OEI product. It was substantially modified within the OEI after an early draft was shown to SA [deleted] SA [deleted] never reviewed, approved, or even received a copy of the AI report transmitted to the FBI. His investigative plan was deleted. When interviewed by the AGRT, SA [deleted] was surprised by assertions made in the final AI report. [deleted] 12/14/99) The OEI listed SA [deleted] name on the face of the final report, yet failed to afford him the opportunity to sign off on the final version.

There are five versions of the AI report known to exist.[538]

They consist of: (1) a draft AI report given to SSA [deleted] at FBI Headquarters on March 13, 1996, (2) a draft AI report sent to [deleted] LLNL's CCIO, by SA [deleted] on March 22, 1996, (3) a draft AI report retrieved from a computer disk provided to the AGRT by [deleted] under the file name [deleted] (4) a complete AI report, signed by [deleted] misdated May 28, 1996, and marked "PENDING," AND (5) a second complete AI report, unsigned, marked "CLOSED," also dated May 28, 1996 which was the AI formally transmitted to the FBI. Each of these copies is different, although the second and third versions are almost identical. The first three draft AI reports are all incomplete on their face and do not purport to represent a final product.

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538 No additional drafts have been located and produced to the AGRT, nor any copies of the drafts containing the final edits.

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1. The first draft AI report on March 13, 1996

The first draft AI report was written by [deleted] and provided to [deleted] and SSA [deleted] SSA [deleted] received this draft on March 13, 1996. (FBI 21768)[539] This first draft included a preamble, interviews of [deleted] an edited version of SA [deleted] investigative plan, a list of Chinese visitors to LANL during [deleted] a long list of seventy LANL employees who traveled to the PRC during [deleted] and a short list of [deleted] employees including notes from their security files. This first unfinished draft was over forty pages long. Although this first draft AI report was written before any records were reviewed at LLNL, a trip to LLNL had clearly been contemplated.[540] Nevertheless, [deleted] cover note to SA [deleted] suggests the investigative work on the AI is complete. The note states: "[N]eed any additional comments you want to make. Once you complete your review/changes, please send it back to [deleted] who will give it to me. I'll throw [sic] a synopsis on it; a lead page and distribution." [deleted] 00420)

2. The draft AI report on March 22, 1996

On March 22, 1996, SA [deleted] sent by facsimile a copy of the unfinished draft AI report to [deleted] at LLNL. This second draft states: "At this early point in the inquiry, some LANL employees appear more suspect in this matter than others." This is followed by two additional pages that were absent in the first draft AI report. These additional pages state that no DOE employees are excluded as possible suspects and that "the investigative team must conduct records reviews etc., at several other locations

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539 The cover sheets to [deleted] and SA [deleted] are dated March 14, 1996. (DOE 02448 and [deleted] 00418) Although only the copy given to SSA [deleted] has been recovered, [deleted] confirmed that the copies given to [deleted] and SA [deleted] were identical. [deleted] 2/22/00)

540 A trip to LLNL was discussed in December 1995, when the investigators asked [deleted] to assemble records for such a review. It is unclear what the status of that trip was on March 14, 1996, when [deleted] forwarded this draft AI report to SA [deleted]

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before this inquiry is concluded."[541] (DOE 03615) (emphasis added). The second draft AI report then names Wen Ho Lee, Sylvia Lee and [deleted] as suspects.

3. The draft AI report retrieved from [deleted] computer disk

The third unfinished draft AI report came from a computer disk used by [deleted] and SA [deleted] to revise the AI. This disk included two computer files. The first file is labeled [deleted] and includes a draft of the AI essentially identical to the draft sent by SA [deleted] to LLNL's CCIO, [deleted]. The second file contains the AI report which [deleted] signed and which was marked "Pending."

4. The complete AI report, marked "Pending," and signed by [deleted]

The last two versions of the AI report are complete reports which include a cover page, a synopsis and a distribution list. Both completed versions are dated May 28, 1996.[542] The earlier of these two completed AI reports is marked "PENDING" and the final AI report is marked "CLOSED." The AI report marked "PENDING" represents the conclusion of the preliminary investigation within DOE, according to [deleted] did not anticipate [deleted] 8/10/99; [deleted] 10/25/99) The AI report marked "PENDING" is the only report signed by [deleted]

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541 This exact sentence is repeated by [deleted] in his signed AI report, marked "Pending," [deleted] In the AI transmitted to the FBI, the qualification that no DOE employees were excluded was left in, but the suggestion that the review at LANL was only an "initial 'scrub' of LANL personnel" was deleted. (DOE 3615, 151; FBI 560)

542 [Deleted] believes he dated stamped both completed versions by accident. [Deleted] cannot determine when he completed the signed version, but it obviously preceded the [deleted] transmitted to the FBI. [deleted] 10/25/99)

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The signed AI report is eighty-nine pages long and includes lists of Chinese visitors and employee travel to China for both LANL and LLNL.[543] The final AI report, marked "CLOSED," is forty-one pages long with four attachments.[544] (FBI 00525-FBI00577) After [deleted] signed the AI [lines deleted]

SA [deleted] made his last changes to the AI report in March 1996. [Deleted] then traveled to LLNL where he completed the records review and interviewed [deleted] added this material to the AI report, signed it as final and [deleted] signed AI report included both the Lees and [deleted] (discussed below) as suspects, although [deleted] focused primarily on the Lees.[545] (DOE 152)

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543 The inclusion of LLNL indicates that this fourth version was written after [deleted] return from LLNL, thereby dating it as having been written sometime between April 18, 1996 and May 28, 1996.

544 The four attachments are lists of Chinese visitors to LANL and LLNL and travel to China by LANL and LLNL employees. In [deleted] signed AI, they are incorporated into the body of the report. This change accounts for much of the difference in the length of the two reports.

545 The signed AI, marked "Pending," reads in part as follows: "[I]t is the opinion of the writer that Wen Ho Lee is the only individual identified during this inquiry who had, opportunity, motivation and LEGITIMATE access to both the W-88 weapons system information and the information reportedly received by the aforementioned sensitive source." (DOE 00155) This statement would also appear in the AI report transmitted to the FBI.

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5. The complete AI report, marked "Closed," and transmitted to the FBI[546]

[lines deleted] to the FBI on May 28, 1996. Although it bears both [deleted] and SA [deleted] names, it is signed by neither.[547]

[lines deleted]

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546 [paragraph deleted]

547 [deleted] attributes no significance to this omission. [deleted] 10/25/99)

[page 374]

[lines deleted]

a. The removal of the investigative plan

[line deleted] could not explain this removal. [deleted] 10/25/99) *This deletion created the inaccurate perception that the AI had exhausted leads at locations that were never ever visited, such as Pantex and SNL, and that the review was more thorough than it actually was at those locations that were visited.* [deleted] had begun the elimination of SA [deleted] investigative plan by largely excluding SA [deleted] various lists of things to do in his signed AI, marked "Pending." [deleted] By removing the plan, OEI oversold the AI as a more thorough and comprehensive document than it actually was.

SA [deleted] was aware of the selection of the Lees and [deleted] as suspects in the March 1996 AI drafts. The focus on these three individuals *was* premature, but occurred within the context of a draft AI report including his investigative plan. This focus was certainly less problematic. Even [deleted] signed AI report, concluding that Wen Ho Lee was the *only* individual identified during the AI with opportunity, motive and legitimate access, while certainly overstated, does not trigger the problem caused by the removal of SA [deleted] investigative plan from the AI report. It is the removal of the investigative plan that makes the selection of one suspect particularly misleading and inappropriate.

b. The Lees' selection as "the most logical suspects"

[Deleted] signed AI report, marked "Pending," explicitly cautioned that no DOE personnel were excluded as "possible suspects in this matter. The investigative team must conduct records reviews etc., at several

other locations before this inquiry is concluded. [lines deleted] DOE 00151. Although the AI report that went to the FBI states that

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no DOE personnel are excluded as possible suspects, the additional language discussing the additional reviews that must occur at several other locations was removed. In its place, the following appears: "However, based upon a review of all information gathered during this inquiry, Wen Ho LEE and his wife, Sylvia appear the most logical suspects. [lines deleted][548] (AI at 36) (FBI 00560)

c. The removal of [deleted's] name

The AI transmitted ot the FBI removed [deleted] from the list of preliminary suspects. Instead, [deleted] is listed as an anomaly "not believed to be directly related to this inquiry." (AI at 40) (FBI 00564) There was no subsequent investigative activity during the AI to justify or explain [deleted's] removal from the suspect class and the final AI report does not reflect any basis for removing [deleted] from the investigator's "initial 'scrub' of LANL personnel." (DOE 00151) Without further investigative input, [deleted] was summarily excluded as a suspect, leaving the Lees as the only highlighted suspects in the final report. There is no explanation why [deleted], thought to have had access for half a year, was not equally capable of compromising the classified information. The point here is not to suggest that [deleted] may be responsible for the compromise at issue. Indeed, it was recently established that [deleted] did not even accept [deleted] "Q" clearance and, therefore, did not have the access which the AI thought [deleted] had. [deleted] 9/16/99) Rather, the point here is that by excluding [deleted] for no *legitimate* reason, it appears that [deleted] was excluded for an *illegitimate* reason: to make the case against the Lees look stronger.[549]

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548 Like the other edits, we attribute this change [lines deleted] 10/25/99) However, it must be noted that the first time the phrase "most logical suspect" appears is not in the AI report transmitted to the FBI but in a May 2, 1996 memo from [deleted] (DOE 2407)

549 One other point that should be made about the signed [deleted] AI and the final AI delivered to the FBI concerns Rocky Flats, a possible location of the compromise. The AI report transmitted to the FBI discusses an unsuccessful effort to [continued...]

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G. Consequences

Despite serious deficiencies in DOE's final AI report, it was accepted *without reservation* by the FBI. SSA [deleted], who had received the unfinished draft containing much of SA [deleted's] investigative plan, never reacted to those suggestions. There is no evidence anyone within the FBI ever sought clarification or further input from SA [deleted] after the full FCI investigation was opened, and only the final AI [deleted] to SSA [deleted] was disseminated to the field. (See AQI 887-954) OEI's selection of the Lees was simply accepted by the FBI.[550] The FBI instituted a full investigation on the Lees on May 30, 1996. No other investigation was instituted, or even contemplated.

The selection and focus on just one suspect [and his wife] was wrong. It is not that Wen Ho Lee should not have been *a* suspect. It was that Wen Ho Lee should not have been the *only* suspect.

After all, the case against Wen Ho Lee could hardly be termed overwhelming. [Deleted] acknowledged this himself in a memo he sent to [deleted] seven weeks before the AI was delivered to the FBI: [lines deleted]

416-417) [deleted] added: "At this point in this investigation, we have not examined all available data, conducted all necessary interviews etc., to rule out or identify

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[...] obtain travel and visitor records for the Rocky Flats Field Office ("RF). There is no recommendation that further investigation occur at that location. (AI at 36; FBI 00560) SA [deleted] recommendation for future investigative steps at Rocky Flats was included in [deleted] signed AI report but [deleted]

550 The AI report was accepted and relied upon by the FBI without reservation or criticism until ASAC Will Lueckenhoff arrived in Albuquerque and raised serious concerns over the document. ASAC Lueckenhoff read the AI report and concluded it was "a piece of junk." The field [deleted] could easily be three hundred suspects. (Lueckenhoff 9/12/99)

[page 377] additional/possible suspects. It is therefore, premature to draw any conclusin, based solely on circumstantial evidence thus far obtained, that Mr. & Mrs. Lee are in fact, the perpetrators of the compromise."[551] (Id.)

A full investigation of Wen Ho Lee *was* warranted. There were substantial reasons -- reasons known to DOE during the AI -- to make Lee a subject of appropriate suspicion: (1) He had significant contact in the early 1980's [line deleted] (2) He had traveled twice to the PRC, where he had contact with PRC nuclear scientists; (3) He did have access [deleted] (4) SA [deleted] knew he was already the subject of an ongoing FBI preliminary inquiry; (5) His wife, Sylvia, had insinuated herself as a host for various PRC delegations; and (6) [lines deleted] Moreover,

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551 [Deleted's] reservations were soon allayed. After writing the memorandum to [deleted], dated April 5, 1996, which merely characterizes the Lees as "logical suspects," [deleted] went off to LLNL to conduct his review of records and to meet with [deleted]. It was during this trip that the consequence of the mischaracterization of the predicate would become excruciatingly apparent. [lines deleted] (FBI 559) The answer he provided [deleted] was March 1990 -- [deleted] FBI 560) [Deleted] actually thought he was answering a different question. See Chapter 6.) Thus, through this one terrible misunderstanding as to the essential nature of the predicate, an entire national laboratory and all its employees were excluded. [Deleted] returned to Washington and, two weeks later, wrote a new memorandum to [deleted] this time characterizing Wen Ho Lee as the "most logical suspect." (DOE 2407)

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Wen Ho Lee's name had surfaced repeatedly during the course of the AI. See Section "G" of this chapter.[552]

But Wen Ho Lee should never have been the *only* suspect. To suggest otherwise is to accept [deleted's] erroneous statement, in both the signed AI, marked "Pending," and in the AI transmitted to the FBI, that DOE had "exhausted all logical 'leads' regarding this inquiry" that it was legally permitted to accomplish. (AI at 38; FBI 562) This was not only wrong but misleading. Coupled with [deleted] of SA [deleted's] investigative plan, the message communicated to the FBI was that the FBI need look no further within DOE for a suspect. Wen Ho Lee was its man. That the FBI should never have accepted this message, *as is*, does not excuse the fact that it was given in the first place.

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552 It had surfaced, but apparently not sufficiently for the AI investigators to be explicitly informed by the FBI [deleted] There were hints of this. For example, on July 5, 1995, LLNL [deleted] told [deleted] that former FBI SA [deleted] had interviewed [deleted] several times about [deleted] (DOE 3208) [deleted] 10/25/99) [deleted] and he says he didn't know it. (Id.) DOE's Ed Curran says it was "outrageous" that the AI investigators had not been informed of this. (Curran 8/31/99)

Certainly, the investigators should have been told about this, and SA [deleted] -- who was quite familiar with [deleted] and was also familiar with the work SA [deleted] and [deleted] were doing on the AI -- should have been the one to tell them. Nevertheless, [lines deleted] it is hard to imagine that it would have made much of a difference. Had [deleted] occurred at the *behest* of the FBI, that would obviously be of significance. But it was just the reverse [lines deleted]

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The exclusive focus on Lee was only one of the problems with the AI. The other was its mischaracterization of the predicate. KSAG's written assessment, dated September 8, 1995, was reaffirmed on May 17, 1996 during a briefing to Deputy Secretary Curtis [deleted] KSAG identified [lines deleted] Yet that is precisely how the compromise is characterized in the AI transmitted to the FBI -- just 11 days after the KSAG briefing to Curtis. (FBI 526) [lines deleted] This inaccuracy led to fundamental errors in the focus of the AI. [lines deleted] That question would have yielded a far broader array of potential suspects.

The investigators who conducted the AI were not aware of the inaccurate predicate relied upon during their inquiry. [deleted] of the inaccurate predicate contained in the final AI report. [lines deleted] That begs the question. [deleted] The AI represented a formal communication to the FBI of *both* predicate *and* suspect. The FBI was not present during KSAG's evaluation of the intelligence, nor did [deleted] The FBI had been briefed [deleted]

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553 [deleted]

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scope of the compromise on October 31, 1995, bul that briefing was just as misleading as the AI itself. See Chapter 6.

But to say that DOE misled the FBI as to the predicate, and to say that DOE improperly focused its conclusion only on Wen Ho Lee, is only to describe half the problem. The other half was the FBI's unfortunate and unwarranted acceptance of DOE's description of the predicate, and its unhesitating and unquestioning acceptance of DOE's identification of Lee as "the most logical suspect."

Fundamental to any investigation is a solid understanding and appreciation of its predicate. The predicate is the foundation for any subsequent investigation. The FBI failed to confirm, or even make a serious effort to record, the predicate after receiving the final AI report. The three interviews that took place in September 1996, [deleted] were not remotely sufficient for a case of this magnitude. There *were* references in [deleted] FD-302 that, if pursued, could have led the FBI to the discovery of the problem with the predicate. They were not pursued. Similarly, the FBI *was* aware of [deleted] KSAG, and [deleted] another KSAG member, yet it never interviewed them. The FBI failed to ask for any written report that might have been generated at the conclusion of KSAG's review even though it knew by September 1996 that the KSAG had generated a set of "bullets" summarizing its conclusions.[554] In the same manner, the FBI uncritically accepted DOE's identification of Wen Ho Lee as *the* suspect. This act of deference to DOE is even more inexplicable than its acceptance of DOE's characterization of the predicate. After all, questions concerning the predicate

required outside expert assistance. 0n matters related to the identification of a suspect in a counterintelligence investigation, the FBI *was* the expert.

The AI, in short, was a deeply flawed product, whose shortcomings went unrecognized and unaddressed due to the FBI's own inadequate investigation. Had either the FBI or DOE done what it should have done, the FBI could have been investigating in the year 1996 what it is now investigating in the year 2000: the

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554 The bullets were explicitly referenced in a "Kindred Spirit" chronology created by DOE and given to the FBI on September 16, 1996. (FBI 674)

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[deleted] As to that, Wen Ho Lee was an appropriate subject of investigation. But, surely, he was not the only one.

H. The recent racial and ethnic allegations against the Administrative Inquiry

Allegations of racial bias have been made in the media to explain the AI reports' selection of Wen Ho Lee. These allegations have been largely, although not exclusively, attributed to Robert Vrooman former Contract Counterintelligence Officer (CCIO) for LANL.[555] Vrooman's allegation is that Wen Ho Lee was targeted based on his ethnicity.[556]

The AI *is* based upon a flawed predicate and it *does* make a premature selection of Wen Ho Lee as the sole suspect. The lack of a methodical and thorough investigation into the compromise of classified information creates a vacuum that invites

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555 See Far Eastern Economic Review, "Wen Ho Lee: A Witchhunt?" January 20, 2000 ("Vrooman . . . said Lee was singled out because of his ethnicity"); Washington Post, "The Federal Page," December 20, 1999 ("Vrooman said federal investigators targeted Lee. . . largely because he was a Chinese American"); Chicago Sun-Times, "Ousted Nuke Expert in Legal Limbo," September 23, 1999 ("Vrooman stated publicly that Lee was unfairly singled out because of racial bias.").

556 [paragraph deleted]

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such allegations. The situation is made worse by a poorly written final report with numerous inconsistent statements as well as unsubstantiated assertions. It is very difficult to defend such a woefully inadequate and cursory investigation. Nevertheless, the AGRT has seen no evidence that the selection of Wen Ho Lee was based upon an investigation of Chinese Americans to the exclusion of any other group of potential suspects. The AI had many serious problems. Racism was not among them.

1. How Wen Ho Lee came to be identified as a suspect

It is obviously critical to the resolution of an accusation of "ethnic targeting" to examine just how it was that Wen Ho Lee came to be suspected in the first place.

The first reference to Wen Ho Lee's name in OEI's "Kindred Spirit" paperwork is on June 6, 1995, just days after Trulock received the memorandum from [deleted] that set KSAG into motion. Lee's name appears on

a handwritten note[537] which appears to have been made in connection with a meeting that day between Trulock [deleted] (DOE 1865, 2038, 1850-1852) A number of other names are listed on the note. These names are not restricted to Chinese surnames. (DOE 1854)

The second recorded reference to Wen Ho Lee's name was during a STU III telephone conversation between [deleted] and LLNL [deleted] on July 5, 1995. [Deleted] identified four names in this conversation relevant to compromises to the PRC. These names included [deleted] and Wen Ho Lee. Listed under [deleted] summarized [deleted] information:

> Friend of [deleted] activities. [Deleted] visited [deleted] on numerous occasions at LLNL. [Deleted] was assigned to LANL in weapons design work. Trips took place in early 1980-81. [Deleted] had numerous

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> 557 Neither [deleted] nor [deleted] could identify whose handwriting is on the note. [deleted] 2/23/00)

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> personal contacts with PRC national on a fairly frequent basis, also with Taiwanese persons. His wife Sylvia Lee also had frequent contacts with PRC Nationals and seemed to be a magnet for PRC post Doc's assigned to LANL, where she worked in ES&H related fields -- no weapons work. SA [lines deleted]

DOE-03208.

This document is extremely significant. By tying Wen Ho Lee to the subject of a prior FBI counterintelligence investigation, it became inevitable that Wen Ho Lee would always be at or near the top of the suspect list.

On or before October 31, 1995, if not before, SA [deleted] also became aware that Wen Ho Lee was the subject of an ongoing preliminary inquiry being conducted by SA [deleted] Indeed, SSA [deleted] and SA [deleted] asked SA [deleted] to avoid interviewing Wen Ho Lee because he might be a suspect in the AI.[558]

In December 1995, Wen Ho Lee's name came up again, this time from LLNL scientist [deleted] During SA [deleted] and [deleted] December 1995 trip to LLNL, [deleted] shared his own mental list of problem employees with the investigators. When interviewed in 1999, [deleted] could only recall providing the investigators Wen Ho Lee's name. He raised this name, and maybe others, because of Lee's contacts with [deleted].

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> 558 SA [deleted] wrote a memo to the file concerning this communication: "Lee could be the subject at some point of Albuquerque case 'Kindred Spirit'.... Because of this possibility, SA [deleted] requested that no interviews of Lee be conducted at this time. It is noted that SA [deleted] will be conducting a review, along with DOE-OCI, in efforts to identify a 'Kindred Spirit' subject. Once SA [deleted] completes his review, Albuquerque will make a determination as to future investigation of Lee." (AQI 02978 to AQI 02979)

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In February 1996, Wen Ho Lee's name came up again and this time, not a little bit ironically, from [deleted] recollects that at some point during SA [deleted] and [deleted] trip to LANL in February 1996 for the purpose of reviewing LANL employee records, [deleted] mentioned the Lees and [deleted] to SA [deleted] and [deleted] He recalled they were very interested in the information. [Deleted] said he mentioned the Lees after seeing their names on two lists that the investigators were compiling concerning LANL employees who had traveled to China and those who had significant contact with Chinese visitors to LANL. "I saw the Lees on the list. He should have been on the list. I was probably responsible for Lee's name coming up." [deleted] 9/15/99) [Deleted] conceded that the Lees were the only names he raised with SA [deleted] He did not identify any other LANL employee or share information concerning any other name on either list. The specific information [deleted] shared concerning the Lees involved [lines deleted] and the 1982 contact between Wen Ho Lee and [deleted][559] [deleted] 9/15/99)[560]

In short, Wen Ho Lee's name came to the AI's investigators' attention repeatedly and it did so not because he was a Chinese American but for two principal reasons: (1) Wen Ho Lee's involvement with [deleted] and (2) the existence of an ongoing PI on Lee.

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559 This is corroborated in part by [deleted] and SA [deleted] notes of the February 13, 1996 meeting at LANL. [deleted] 00409; FBI 15869) Both sets of notes identify Wen Ho Lee and his wife Sylvia Lee. [Deleted's] notes record that [lines deleted] 00409)

560 [Deleted] claims he had a second meeting with [deleted] the same day [lines deleted] thought it might have been a joke, whioh is how he took it at the time since he took no action after hearing the comment. [deleted] 9/15/99) [Deleted] denies ever making this comment. [deleted] 10/25/99)

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2. [Deleted] June 1995 investigative plan

At first blush, the claim of ethnic targeting might appear to find support in an an investigative plan written by [deleted] in June 1995. In part the plan reads as follows:

> An initial consideration will be to identify those US citizens, of Chinese heritage, who worked directly or peripherally with the design development. (NOTE: This is a logical starting point based upon the Intelligence Community's evaluation that the PRC targets and utilizes ethnic Chinese for espionage rather than persons of non-Chinese origin.)

(DOE 03206)

There are two reasons, however, why this memorandum does not support an allegation of racial bias: First, [deleted's] proposal was never implemented. The AGRT is not aware of any review having been conducted that focused exclusively on Chinese Americans. Second, to the extent that [deleted] was simply acknowledging the fact that the PRC specifically targets ethnic Chinese for espionage purposes, that point was consistent with the view of veteran FCI investigators.[561] [deleted] 2/23/00; [deleted]

The AGRT would also note the existence of a "Note to File" dated November 15, 1995, concerning a [deleted] Secretary Charles Curtis on China's Nuclear Weapons Program. It contains the following statement: "Curtis noted that there are seven Chinese restaurants in Los Alamos." We have no idea what this statement means, why it is in this memorandum, or whether it was even said. Curtis does not recall saying it (Curtis 4/11/00) We do not read it so to suggest that DOE intended to focus its inquiry on ethnic Chinese.

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561 Even [deleted] conceded that he understood that the PRC targeted Chinese Americans. [deleted] 9/15/99)

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3. The AI's acquisition of names

The manner in which [deleted] and SA [deleted] acquired their universe of potential suspects is also indicative of a lack of targeting of ethnic Chinese. Records were collect [sic] based upon those with access to W-88 information, those who traveled to the PRC and those who hosted PRC visitors. Under the protocol established to guide the inquiry, the investigators reviewed every file. No group of files was ever assembled consisting of only Chinese American employees. Nor were the records subjected to a filter to extract Chinese Americans. [Deleted] and SA [deleted] explained that while they were familiar with the PRC's propensity to target ethnic Chinese, they did not exclude anyone from their preliminary review. (See [deleted] 2/23/00; [deleted]

4. The final AI report transmitted to the FBI

The final report includes suspect lists generated at LANL and LLNL. Together these lists identify thirty-two individuals. The composition of these lists do not suggest that the AI improperly focused upon Chinese Americans. While the lists do not give an individual's race, they do include each individual's place of birth. Other identified factors are race neutral, such as clearance level, marital status, dates of employment and such. [lines deleted] Of the twenty LLNL employees also identified in the body of the report, six were born in China (including one United States citizen born to United States State Department employees), one in Taiwan, one in Hong Kong, one in Germany, one in Japan, one in Canada and the remaining nine in the United States. Significant investigative themes are prominent among the identified factors given for each listed employee, such as employment problems, divorce, security infractions, failed polygraph examinations, possible prior affiliation with the Communist Party and extensive, foreign travel and foreign connections.

[Deleted] did advise the AGRT of his particular concern that the AI's short list of [deleted] excluded persons who, in [deleted's] opinion, should have been included. The only name [deleted] could identify when interviewed by the AGRT was [deleted] He described [deleted] as a [deleted] in that [lines deleted]

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[lines deleted]

It is not clear to the AGRT why [deleted] did not make the list [deleted] But this much can certainly be said; (1) [Deleted] *is* listed in one of the AI attachments as a LANL employee who [deleted] and had " [m]oderate access to weapons data." (DOE 91); and (2) Given the numerous and substantial inadequacies of the AI, and its many gaps, the omission of a particular name can hardly be attributed to racial bias.

5. Other indications of a lack of racial bias

The AGRT has conducted numerous interviews of individuals who had contact with SA [deleted] and [deleted] during their work on the AI. None indicated evidence of racial bias.[563]

The investigators themselves, [deleted] and SA [deleted] denied [deleted] SA [deleted] noted that he never observed any such behavior on [deleted's] behalf and felt the work in support of the AI was done in a professional manner. [deleted] 12/14/99 [lines deleted] based upon his efforts to deflect attention from his [lines deleted]

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562 [Deleted] emphasized that [lines deleted] He believes that Wen Ho Lee might have [lines deleted].

563 These interviews included those of [deleted]

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[lines deleted]

Finally we would note that the AGRT interviewed SA [deleted] the agent assigned to conduct the preliminary inquiries on the other [deleted] identified in the body of the AI report. SA [deleted] is an experienced agent with [deleted] in the FBI including time on both the Inspection Staff and Administrative Summary Unit which adjudicates Office of Professional Responsibility misconduct investigations. SA [deleted] indicated that he is not aware of, nor has he seen any evidence of, ethnic bias in the selection of [deleted][564]

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564 SA [deleted's] own criticism of the AI report's selection of [deleted] stems from the report's presumption that a "Q" clearance and employment within a LANL division automatically means the subject had actual access to classified information on the W-88. This assumption is inaccurate.

Transcription and HTML by FAS

Wall Street Journal
May 17, 1999
Letter to the Editor, p. A27

Looking for Spies in Nuclear Kitchen

In regard to the alleged spying and security violations of Los Alamos ("Senate Panel Approves Two Measures to Fight Espionage in Nuclear Labs," May 4): In my opinion those who are screaming the loudest in Washington have little knowledge or understanding with regard to the issues at hand. The Chinese nuclear establishment, most of whom have studied in the West, are extremely competent. They may indeed be curious as to what the U.S. has developed with its technology, but we also have been curious as to what *they* have developed and fielded. From time to time they have been in our kitchen looking for recipes and we have poked around in theirs. Our general public has no knowledge as to how successful we have been, and their population is also in the dark with regard to their successes.

We in the U.S. fund our intelligence-gathering organizations – the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency – very generously, and each service has its own intelligence organization. If they aren't trying to get other nation's codes and if they aren't successful, why do we have them? The answer is they are, but we don't talk about it and neither do those who have been violated.

As long as any nation has a demonstrated nuclear capability and a means of delivering its bombs and warheads it doesn't really matter whether the warheads are in a little smaller or painted a color other than red, white and blue. I suspect information published in the open by the National Resources Defense Council has been as useful to other nations as any computer codes they may have received by illegal means.

Being able actually to use information from any of the national laboratories' codes requires a great deal more knowledge than following a cake recipe. It's even questionable as to whether the Chinese computers are compatible with the weapon codes at our national laboratories. It is a fact that scientists, especially those involved with the design of nuclear weapons, have always been reluctant to make "Dutch" copies of other laboratories' designs. Ideas are welcome, but copying seldom, if ever, occurs.

The design of the W88 – the most advanced U.S. nuclear warhead, used in the Trident system – is actually quite old. The basic test was done by the Los Alamos Scientific Laboratory (not National Laboratory) when I was director, and I retired 20 years ago. It is a "delicate" and neat package. Having a computer printout as I remember them would give the general idea, but actually being able to manufacture the total system from a computer code is a different matter. No nation would ever stockpile any device based on another nation's computer codes. Maybe for security reasons the originator has included a "virus" that would result in a dud if the codes were to be followed exactly. Not an unreasonable concept.

In any event, whether or not China or any other nation has profited from this information, if indeed they have received it, will be known only if they conduct a nuclear test in the right yield range. If China doesn't resume testing, no harm will possibly have been done other than to our egos.

HAROLD M. AGNEW

New York

National Counterintelligence Center

AMERICAN REVOLUTION TO WORLD WAR II

After the National Counterintelligence Center designed and conducted several iterations of a seminar on The Evolution of American Counterintelligence, it became apparent that a well-thought out reader would be ideal to complement the lectures. We concluded that the great abundance of literature on counterintelligence and intelligence is, ironically, one of the main obstacles to understanding our discipline. Most of the current books and articles concern the numerous espionage cases that have plagued our profession over the past few years. The more famous, or infamous, the spy, the more books written. Only a few books endeavored to scrutinize counterintelligence but the treatment was uneven.

Our reader's three volumes cover counterintelligence's past and present. Nevertheless they form a whole: the first volume provides material elucidating counterintelligence's antecedents from the American Revolution to World War II. Volume two focuses on World War II while volume three begins with the Atom Bomb spies and concludes with the latest espionage cases. History is more than background; it is the framework of the present.

We have taken material from official government documents, indictments from several espionage cases, and articles written by professors, scholars and counterintelligence officers. We have abridged some selections while trying not to change the sense of the original but we have not altered the original usage of the English language.

Each chapter in the three volumes has an introduction, which sketches out the main trends and characteristics of the period in question. There is a chronology with each chapter for volumes one and three, but volume two only has one chronology to

cover the entire period. At the end of each chapter is a selected bibliography. We hope this will help you get a sense of the period as a whole. The reader is not all-inclusive and people may disagree with our selections, but at least we hope to have provided sufficient material to entice our colleagues to do further research.

Counterintelligence is a fascinating and challenging discipline. Our response to these challenges is determined, not by the requisites of the immediate situation but by our historical legacy. Thus we urge that the materials presented in the three volumes be read, not as background to the present, but as part of the present itself.

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

The American Revolution and the Post-Revolutionary Era: A Historical Legacy

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Introduction

From 1774 to 1783, the British government and its upstart American colony became locked in an increasingly bitter struggle as the Americans moved from violent protest over British colonial policies to independence. As this scenario developed, intelligence and counterintelligence played important roles in America's fight for freedom and British efforts to save its empire.

It is apparent that British General Thomas Gage, commander of the British forces in North America since 1763, had good intelligence on the growing rebel movement in the Massachusetts colony prior to the Battles of Lexington and Concord. His highest paid spy, Dr. Benjamin Church, sat in the inner circle of the small group of men plotting against the British. Gage failed miserably, however, in the covert action and counterintelligence fields. Gage's successor, General Howe, shunned the use of intelligence assets, which impacted significantly on the British efforts. General Clinton, who replaced Howe, built an admirable espionage network but by then it was too late to prevent the American colonies from achieving their independence.

On the other hand, George Washington was a first class intelligence officer who placed great reliance on intelligence and kept a very personal hand on his intelligence operations. Washington also made excellent use of offensive counterintelligence operations but never created a unit or organization to conduct defensive counterintelligence or to coordinate its activity. This he left to his commanders and to committees established in the colonies.

When the Revolution was over and a new nation emerged, there continued to be ample opportunities to create a counterintelligence service. Spy scares, conspiracies and European meddling occurred repeatedly. But it isn't until the Civil War period that an effort is made to create a federal agency to conduct counterintelligence.

This chapter provides the legacy for America's use of counterintelligence in future years.

Counterintelligence

Probably the first patriot organization created for counterintelligence purposes was the Committee (later called a Commission) for Detecting and Defeating Conspiracies. It was made up of a series of groups established in New York between June of 1776 and January of 1778 to collect intelligence, apprehend British spies and couriers, and examine suspected British sympathizers. In effect, there was created a "special service" for New York which had the power to arrest, to convict, to grant bail or parole, and to jail or to deport. A company of militia was placed under its command to implement its broader charter. John Jay has been called the first chief of American counterintelligence because of his role in directing this Committee's work.

Nathaniel Sackett and Colonel William Duer were particularly successful in ferreting out British agents, but found their greatest success in the missions of one of the dozen or so agents of their own, Enoch Crosby. Crosby, a veteran of the Continental Army, had been mistaken by a Westchester County Tory as being someone who shared his views. He confided to Crosby that a secret Tory military company was being formed and introduced him to the group. Crosby reported the plot to the committee and was "captured" with the group. He managed to "escape" and, at Committee direction, infiltrated another secret Tory unit. This unit, including Crosby, was also taken and he "escaped" once more. He repeated the operation at least two more times before Tory suspicions made it necessary for him to retire from counterintelligence work.

Another successful American agent was Captain David Gray of Massachusetts. Posing as a deserter, Gray entered the service of Colonel Beverly Robinson, a Tory intelligence officer, and became Robinson's courier. As a result, the contents of each of Robinson's dispatches were read by the Americans before their delivery. Gray eventually became the courier for Major Oliver DeLancey, Jr., the head of the British secret service in New York. For two years, Gray, as DeLancey's courier to Canada, successfully penetrated the principal communications link of the British secret service. Upon completing his assignment, Gray returned to the ranks of the

Continental Army and his name was struck from the deserter list, where George Washington placed it at the beginning of the operation.

Colonel Benjamin Tallmadge, a senior intelligence officer under Washington, is credited with the capture of Major John Andre, who preceded DeLancey as chief of the British secret service in New York. Although Tallmadge declined to discuss the episode in his memoirs, it is said that one of his agents had reported to him that Major Andre was in contact with a "John Anderson" who was expecting the surrender of a major patriot installation. Learning that a "John Anderson" had passed through the lines "en route to" General Benedict Arnold, the commander at West Point, Tallmadge had Anderson apprehended and returned for interrogation. "Anderson" admitted to his true identity—he was Major Andre—and was tried, convicted and executed as a spy. Arnold, learning that Andre had been taken and that his own traitorous role no doubt was exposed, fled West Point before he could be captured, and joined the British forces.

General Washington demanded effective counterintelligence work from his subordinates. On March 24, 1776, for example, he wrote: "There is one evil I dread, and that is, their spies. I could wish, therefore, the most attentive watch be kept ... I wish a dozen or more of honest sensible and diligent men, were employed . . .in order to question, cross question etc., all such persons as are unknown, and cannot give an account of themselves in a straight and satisfactory manner ... I think it is a matter of importance to prevent them obtaining intelligence of our situation."

Paul Revere and the Mechanics

The first patriot intelligence network on record was a secret group in Boston known as the "mechanics." The group apparently grew out of the old "Sons of Liberty" organization that had successfully opposed the hated Stamp Act. The "mechanics" organized resistance to British authority and gathered intelligence. In the words of one of its members, Paul Revere, "In the Fall of 1774 and winter of 1775, I was one of the upwards of thirty, chiefly mechanics, who formed ourselves into a Committee for the purpose of watching British soldiers and gaining every intelligence on the movements of the Tories." According to Revere, "We frequently took turns, two and two, to watch the (British) soldiers by patrolling the streets at night."

Through a number of their intelligence sources, the "mechanics" were able to see through the cover story the British had devised to mask their march on Lexington and Concord. Dr. Joseph Warren, chairman of the Committee of Safety, charged Revere with the task of warning John Adams and John Hancock at Lexington that they were the probably targets of the enemy operation. Revere arranged for the warning lanterns to be placed in the Old North Church to alert patriot forces at Charleston, and then set off on his famous ride. He completed his primary mission of notifying Adams and Hancock. Then Revere, along with Dr. Samuel Prescott and William Dawes, rode on to alert Concord, only to be apprehended by the British en route. Dawes got away, and Dr. Prescott managed to escape soon afterward and to alert the patriots at Concord. Revere was interrogated and subsequently released, after which he returned to Lexington to warn Hancock and Adams of the proximity of British forces. Revere then turned to still another mission, retrieving from the local tavern a trunk belonging to Hancock and filled with incriminating papers. With John Lowell, Revere went to the tavern and, as he put, during a "continual roar of Musquetry . . . we made off with the Trunk."

Fortunately, when interrogated by the British, Revere did not have his travel orders from Dr. Warren; the authorization was not issued to him until two weeks later. And when Paul Revere filed a travel voucher for his famous ride, it was not until August, some four months later, that it was approved—and when it was approved, his per diem payment was reduced from five shillings a day to four.

Paul Revere had served as a courier prior to his famous "midnight ride," and continued to do so during the early years of the war. One of his earlier missions was perhaps as important as the Lexington ride. In December of 1774, Revere rode to the Oyster River with the intelligence report that the British, under General Gage, intended to seize Fort William and Mary. Armed with this intelligence, Major John Sullivan of the colonial militia led a force of four hundred men —all in civilian clothing rather than militia uniform—in an attack on the fort. The one hundred barrels of gunpowder taken in the raid were ultimately used by the patriots to cover their retreat from Bunker Hill.

Benjamin Church [1]

In late 1768, British troops commanded by General Thomas Gage occupied Boston, Massachusetts to curb the widely separated incidents of mob disorder that troubled the city following the enactment of the Townsend Acts. The Acts, which levied custom duties on the import of glass, lead, paints, paper and tea, was the latest in a series of burdensome taxation measures the British Parliament tried to impose on the colonies. Skirmishes occurred between Gage's troops and the civilian population in opposition to the tax. On 5 March, 1770, five men, "the first to defy and the first to die," were felled by British gunfire in what is termed the "Boston Massacre." From that moment, wrote Daniel Webster, "we date the serverence of the British empire."

Benjamin Church

PHOTO

Paul Revere's now famous engraving of the incident stirred emotion of protest in the hearts of the colonists, and Samuel Adams' well-orchestrated propaganda effort made the men martyrs and a symbol of the patriot cause. In response to the growing anger, General Gage strengthened the Boston garrison. When 1775 began, Gage had almost forty-five hundred soldiers in the city. The patriots were not idle during this time frame. They raised and drilled additional militia units throughout Massachusetts and continued to gather arms, ammunition and other military supplies which they cached at secret storehouses in the countryside.

Gage was aware that continued flare-ups between the British and the colonists could ignite into a war and he wanted to avoid precipitating such action. He also knew that to avoid a fight he needed military intelligence on the militia units within Massachusetts. Gage, who also served as colonial governor of Massachusetts, established a network of spies among the patriots. These spies provided information, sometimes in great detail, on the military preparations of the patriots. For example, in March 1774, one of his secret agents reported the patriots had stockpiled weapons and ammunition at Cambridge. On 1 September that year, the British successfully raided the Cambridge warehouse. The patriots, knowing that they needed information to avoid losing their munitions, created a small surveillance committee within the Sons of Liberty in Boston. The

Sons of Liberty were secret organizations within the colonies, started in 1765, to organize opposition to the Stamp Act.

During the winter of 1774-75, the 30 members of the surveillance committee met regularly at the Green Dragon Tavern on Union Street in Boston. Members of the group regularly patrolled Boston's streets at night to detect British military preparations and other activity. They constituted an early warning system for the patriots by identifying possible British raids into the countryside which would allow their colleagues to move their military stores to new secret locations before British troops arrived. For example, in December 1774, the committee acquired intelligence that General Gage arranged to fortify a British arsenal at Portsmouth, New Hampshire with two regiments, intelligence that drove the Sons of Liberty to raid the installation before the British arrived and haul off about a hundred barrels of gunpowder and several cannons.

The leadership of the Mechanics, as the Green Dragon group is now sometimes called, consisted of Dr. Joseph Warren, Samuel Adams, John Hancock, Paul Revere, Dr. Benjamin Church, and one or two others. It is believed that Warren, a prominent Boston physician and later a major general who was killed at Bunker Hill, was leader of the group. Church, another physician and political leader, was also a member of the Boston Committee of Correspondence and Safety, the latter body responsible for control of the militia. A minor poet as well as a medical man, Church was a prolific author of Patriot propaganda and was famous for the oration he delivered in commemoration of the Boston Massacre on the third anniversary of that event.

Dr. Church was also one of General Gage's informers, a British double agent and probably the most valuable spy the British had in America at the time. Church was a native of Newport, Rhode Island. He graduated from Harvard in 1754 and went to England to study medicine at the London Medical College. Possibly in 1768, he returned to America with an English wife and began practicing medicine in Raynham, Massachusetts. Still accustomed to living a life of indulgence, which he acquired in London, Church kept a mistress and built an elaborate summer home. His penchant for free spending did not match his income from his medical practice. To compensate and obtain additional money, Church added spying to his professional resume.

No one knows when Church began his double agent career. "Whether he was driven by his debt or by doubt that the patriots could win, Church had apparently begun spying in 1771, while Samuel Adams was struggling to keep the cause alive. The next year, Thomas Hutchinson [2] had passed along gratifying news to Francis Bernard [3] in London that the man [4] who had written insultingly against Bernard had come over to the government's side."[5] Another writer states "It is not possible to pinpoint the exact date that Church began his spying for Gage, but a reasonable guess is 1774. In that year, Paul Revere was aware that the activities of his secret group, of which Church was a part, were known to General Gage. According to Dr. Savage of Barnstable, Massachusetts, who was training with Church at the same time, the latter's finances suddenly improved. Previously, Church had been financially pressed, built a mansion in Raynham which appeared beyond his means and acquired a mistress; classic indicators for counterintelligence."[6]

Paul Revere, who had his own spies within General Gage's command, knew that the Mechanics had been penetrated. Revere received information in November 1774 from his source that the

proceedings of at least one meeting at the Green Dragon were known to Gage within 24 hours after the meeting. The only problem was the source could not provide Revere with the identity of the traitor. "We did not then distrust Dr. Church," he later remembered, "but supposed it must be some one among us." The only security measure the Mechanics adopted was to have each member swear on a Bible at every meeting at the Green Dragon that he would not divulge the group's secrets; an admirable procedure but hardly counterintelligence.

On April 14, 1775, Lord Dartmouth, British secretary for the colonies, sent secret instructions to Gage pressing him to take some forceful action against the patriots, such as arresting their leaders, before the situation in Massachusetts reached "A riper state of Rebellion." Gage ignored Lord Dartmouth's direction. Instead, Gage decided to capture the patriot military stockpile that Dr. Church and several other agents reported were located in Concord. In fact, the General's intelligence was so comprehensive he knew the exact location of the military stockpile within the town. Gage issued secret orders to Lt. Col. Francis Smith to proceed with a 700-man force to destroy the patriot ammunition and supply stores.

The surveillance committee obtained information on the destiny of the troops and sent Paul Revere and William Dawes to alert the patriots. They were later joined by Dr. Samuel Prescott. On the way to Concord, they encountered a mounted British patrol. Dawes escaped but had to return to Boston, Revere was captured and taken to Lexington where he told the British everything and then was released. Prescott managed to evade the patrol and get the message to Concord.

When Col. Smith and his troops arrived at Concord, he found 70 Minute Men waiting for him on the Common. Ordered repeatedly to leave the Common area, the Minute Men began to leave but ignored a British order to leave their weapons behind. A shot was fire from within the British ranks, followed by a volley from the British platoons. The gunshots killed eight patriots and wounded 10 others. Only one British soldier was wounded in the return fire. Smith destroyed a few military supplies in Concord and then began his return to Boston.

On his way back, he encountered patriot militiamen who continually assaulted his troops. British reinforcements at Lexington saved Smith and his troops from a complete disaster but it wasn't until all the British troops arrived in Charlestown, where British men-of-war were in the harbor, that Smith could feel comfortable. The British lost 73 killed, 174 wounded and 26 were missing while the American militia suffered 93 dead, wounded or missing. Following the battles of Lexington and Concord, the American militia men surrounded Boston and began a siege, which lasted until March 1776.

On April 21, 1775, after the patriots had driven the British troops back into Boston, Church crossed the patriot lines at Cambridge and entered the besieged city to meet with Gage. It is probable that Church ignored the security risks to his espionage role for Gage because he was more concerned about maintaining contact and getting paid. Paul Revere recalled 23 years after this happened that Church told the Committee of Safety that he was going into Boston. Dr. Warren, the president of the committee, told Church that the British would hang him if he was caught but Church was adamant about going. Warren then told Church that he needed to have a cover story for being in Boston and both men devised the story that Church was there to obtain needed medicines.

According to Revere, Church returned in a few days to Cambridge. He told the committee he had been arrested, taken before Gage, and then held for several days for interrogation but set free. Revere said that after Church's arrest later by Washington, Revere met with Deacon Caleb Davis and the two of them began to discuss Church. Revere said that "He (Davis) received a Bilet for General Gage-(he then did not know that Church was in Town)-when he got to the General's House, he was told the General could not be spoke with, that He was in private with a gentleman; that He waited near half an Hour, when General Gage & Dr. Church came out of a room, discoursing together, like persons who had been long acquainted." Davis further added that Church "went where he pleased, while in Boston, only a Major Caine, one of Gage's Aids, went with him." Revere also said that he "was told by another person, whom I could depend upon, that he saw Church go into General Gage's House, at the above time; that He gout out of the Chaise and went up the steps more like a man that was acquainted than a prisoner."[7]

On May 24, 1775, Dr. Church wrote to Gage advising him that the Massachusetts Provincial Congress was sending him to consult with the Continental Congress in Philadelphia. His mission was to appeal to the Congress to embody the various New England militias, currently laying siege to Boston, as its own army. Neither Gage nor Dr. Church saw the opportunities presented by having a British double agent handle such an important and sensitive assignment. Church was in a unique position to spread havoc within the patriot ranks by feeding false or misleading information to the Continental Congress and/or working to defeat the assignment. The only thing Church complained about to Gage was that he would be prevented from reporting to Gage for some time.

Church's handling of the Provincial Congress was so successful that soon after his return to Cambridge, the Massachusetts militias laying siege to Boston were converted into the Continental army under the command of George Washington. So impressive was Church that the Continental Congress appointed him director general of the army's hospital at Cambridge and chief physician of the Continental army at a salary of four dollars per day and granted him the authority to hire four surgeons and other medical staff.

In espionage and counterespionage, luck plays an important role. For Church his luck began to run out when he received a letter in cipher from his brother-in-law, John Fleming, a Boston printer and bookseller. In his letter, Fleming urged Church to repent his rebellion against the British government and return to Boston, where Fleming believed Church would be pardoned for his crime. Fleming told Church to reply no matter what his decision and to write his response in cipher, addressing the letter in care of Major Cane (one of General Gage's aides) and send it via Captain Wallace[8] of the H.M.S. Rose, a British warship then stationed near Newport, Rhode Island.

Church replied, but it is not clear whether he believed he was writing to his brother-in-law or to General Gage. Since all communications between Church and Gage ceased when Church departed for Philadelphia, it is possible Church saw Fleming's method of communication as a secure means of resuming his profitable espionage role with the British commander-in chief. In his response to Fleming, Church provided some exaggerated information on American military strength and some inaccurate reports of military plans, all framed within an impassioned plea to the British to adopt a more reasonable colonial policy.

Unable to take the letter directly to Newport, Church asked his mistress to take it there. Church told her to deliver the letter to Captain Wallace of the H.M.S. Rose, or to the Royal Collector, Charles Dudley. If neither of these men were available, she was instructed to give it to George Rome, a known Tory and a rich merchant and ship owner. Not familiar with the Newport environs, the mistress went to Godfrey Wainwood,[9] a local baker, whom she had known in Boston and believed to be a Tory.

She asked Wainwood to take her to any of the three individuals but he made an excuse not to do so. Exasperated, she then asked Wainwood to deliver the letter for her. Wainwood agreed but deposited the letter on a shelf and forgot about it until late September 1775, when he received a pressing inquiry from the woman expressing her concerned that "you never Sent wot yo promest to send." Realizing that only the British could have known that the letter was not delivered, Wainwood became suspicious.

Some historians claimed that part of Wainwood's suspicions is based on the fact that the letter was in cipher, but cipher was used by many people, including Thomas Jefferson for personal letters during the colonial days. What caused Wainwood's suspicions is the British officer as the recipient of the letter. Instead of doing as the woman requested, Wainwood took the letter to Henry Ward, Secretary of the Colony, who wrote a letter of introduction and sent Wainwood with Church's letter to General Nathaniel Green, commander of the Rhode Island contingent of the Continental army. Greene, accompanied by Wainwood, went to see General Washington.

When Washington examined the letter he saw that it was dated July 22, (1775) on the outside and when unfolded showed it addressed to Major Cane in Boston. The ciphered contents were unreadable. Wainwood explained that before the outbreak of hostilities between the British and the Americans, he had fraternized with the woman, who was of easy virtue. Upon Washington's orders, the woman was seized and brought to Washington's Headquarters.

"I immediately secured the Woman," Washington reported in a letter to the president of the Continental Congress, "but for a long time she was proof against every threat and persuasion to discover the Author, however at length she was brought to a confession and named Dr. Church."[10] Washington told James Warren and Major Joseph Hawley the details of the woman's story and ordered them to go to Cambridge to arrest Church and get his papers.

In a few hours, Church appeared under guard and submitted to questioning. According to Washington's letter, he "readily acknowledged the Letter. Said it was designed for his Brother Fleming and when deciphered wou'd be found to contain nothing Criminal." Church offered no justification why he tried to send the letter to Boston by way of a British warship off Rhode Island when he have easily sent it under a flag of truce into the city from Cambridge. He also could not explain why he wrote it in cipher and refused to provide the key to decipher the message.

Washington informed the Continental Congress that a search of Church's papers failed to find the cipher key or any other incriminating evidence, but added that he was told that a confident of Church had been to Church's home and probably removed all the incriminating items before Washington's men arrived to conduct the search. Washington then turned his attention to finding the key to the cipher letter.

An amateur cryptanalyst stepped forward in the person of Reverend Samuel West, who happened to have been a Harvard classmate of Church. A second person, Elbridge Gerry, a member of the Massachusetts Provincial Congress and the Committee of Safety, who would later be the fifth vice-president of the United States, teamed with Colonel Elisha Porter, a colonel in the Massachusetts militia, to conduct a separate cryptanalytic attack on the cipher.

Church had used a type of cipher known as a monoalphabetic substitution, one of the easiest ciphers to solve (Edgar Allen Poe explains the technique in his short story *The Gold Bug*). Both West and the Gerry-Porter team provided Washington with identical translations of the letter: (see insert entiled *West and Gerry-Porter Letter Translation*).

West and Gerry-Porter Letter Translation

To Major Crane in Boston, on his Magisty's Service

I hope this will reach you; three attempts have I made without success. In effecting the last, the man was discovered in attempting his escape, but fortunately my letter was sewed in the waistband of his breeches. He was confined a few days during which time you may have guess my feelings. But a little art and a little cash settled the matter.

Tis a month since my return from Philadelphia. I went by the way of Providence to visit mother. The committee for Warlike Stores made me a formal tender of 12 pieces of cannon, 18 and 24 pounders, they having to a previous resolution to make the offer to General Ward. To make a merit of my services, I sent them down and when they received them they sent them to Stoughton to be out of danger, even tho' they had formed the Resolution as I before hinted of fortifying Bunker's Hill, which together with the cowardice of the clusmy Col Gerrish and Col Scammon, were the lucky occasion of their defeat. This affair happened before my return from Philadelphia. We lost 165 killed then and since dead of their wounds, 120 now lie wounded. The chief will recover,. They boast you have lost 1500, I suppose, with equal truth.

The people of Connecticut are raving in the cause of Liberty. A number from this colony, from the town of Stanford, robbed the King's stores at New York with some small assistance the New Yorkers lent them. These were growing turbulent. I counted 280 pieces of Cannon from 24 to 3 pounders at King's Bridge which the committee had secured for the use of the colonies. The Jersies are not a whit behind Connecticut in zeal. The Philadelphians exceed them both. I saw 2200 men in review there by General Lee, consisting of Quakers and other inhabitants in uniform, with 1000 riffle men and horse who together made a most warlike appearance. I mingled freely and frequently with the members of the Continental Congress. They were, united, determined in opposition, and appeared assured of success. Now to come home; the opposition is become formidable; 18 thousand men brave and determined with Washington and Lee at their head are no contemptible enemy.

Adjutant General Gates in indefatigable in arranging the army. Provisions are very plenty. Cloaths (sic) are manufacturing in almost every town for the soldiers. Twenty tons of powder lately arrived at Philadelphia, Connecticut and Providence. Upwards of 20 tons are now in Camp. Salt Petre is made in every colony. Powder Mills are erected and constantly employed in Philadelphia and New York. Volunteers of the first fortunes are daily flocking to camp. One thousand riffle men in 2 or 3 days recruits are now levying to augment the army to 22 thousand men. Ten thousand militia are now appointed in this government to appear on the first summons.

The bills of all the colonies circulate freely and are readily exchanged for cash. Add to this that, unless some plan of accommodation takes place immediately, these harbours will swarm with privateers. An army will be raised in the middle Provinces to take possession of Canada. For the sake of the miserable convulsed empire, solicit peace, repeal the acts or Britain is undone. This advice is the result of warm affection to my king and to the realm. Remember, I never deceived you. Every article here sent you is sacredly true.

The papers will announce to you that I am again a member for Boston. You will there see our motley council. A general arrangement of offices will take place, except the chief which will be suspended buy for a little while to see what part Britain takes in consequence of the late continental petition. A view to independence grows more and more general. Should Britain declare war against the colonies, they are lost forever. Should Spain declare against England, the colonies will declare a neutrality which will doubtless produce an offensive and defensive league between them. For God's sake prevent it by a speedy accommodation.

Writing this has employed a day. I have been to Salem to reconnoitre, but could not escape the geese of the Capital. Tomorrow, I set out for Newport on purpose to send you this. I write you fully, it being scarcely possible to escape discovery. I am out of place here by choice; and therefore, out of pay, and determined to be so unless something is offered my way. I wish you could contrive to write me largely in cipher, by the way of Newport, addressed to Thomas Richards, Merchant. Inclose it in a cover to me, intimating that I am a perfect stranger to you, but being recommended to you as a gentlemen of honour, you took the liberty to inclose that letter, intreating me to deliver it as directed, the person, as you are informed, being at Cambridge. Sign some fictional name. This you may send to some confidential friend in Newport, to be delivered to me at Watertown. Make use of every precaution or I perish.

Washington confronted Church with the deciphered text. In response, Church said he only sought to impress the British with the strength and determination of the Patriots and wanted to discourage General Gage from carrying on further military action. He asserted the letter was not an intelligence report. General Washington was not

persuaded by his explanation, particularly since the last line read "Make use of every precaution, or I perish."

Washington convened his officers to discuss what to do with Church. They all agreed that the issue should be presented to the Continental Congress. Washington noted in his letter that he wanted Congress to review the 28th article of war to determine if it applied to Church."[11] On orders of the Continental Congress, Church was confined at Norwich, Connecticut.[12] Within a year or two-there is some confusion over the date in the record-he was released and permitted to depart on a schooner for the West Indies. Neither the ship nor the doctor was heard from again. Presumable both were lost at sea.

The full extent of Church's espionage activities on behalf of the British remained a mystery to Washington and the other patriot leaders. The only evidence they had was the intercepted letter. From the letter they could surmise that Church had previously provided intelligence to Gage but they did not know how much or on what topics. It was only when historians found Church's earlier reports among General Gage's papers did Church's double agent role become clear.

It appears Church may have been a volunteer walk-in or a defector-in-place, not a well-planned recruitment operation by Gage. Fortunately for the patriot's cause, Gage was mainly interested in the military intelligence Church provided. Gage failed to see the political importance Church offered to the British. For in Church, Gage had a penetration of the Patriot's inner circle in Massachusetts, a spy who sat at the secret meetings of the Committee of Correspondence and Safety, who was a trusted member of the Mechanics, and who even served briefly as liaison with the Continental Congress, but was never exploited for his political reporting or used to conduct political sabotage. It was a major shortsightedness of Gage. Church's espionage did have one positive benefit for counterintelligence, it lead to the enactment of the first espionage law in the colonies.

Intercepting Communications

The Continental Congress regularly received quantities of intercepted British and Tory mail. On November 20, 1775, it received some intercepted letters from Cork, Ireland, and appointed a committee made up of John Adams, Benjamin Franklin, Thomas Johnson, Robert Livingston, Edward Rutledge, James Wilson and George Wythe "to select such parts of them as may be proper to publish." The Congress later ordered a thousand copies of the portions selected by the Committee to be printed and distributed. A month later, when another batch of intercepted mail was received, a second committee was appointed to examine it. On the basis of its report, the Congress resolved that "the contents of the intercepted letters this day read, and the steps which Congress may taken in consequence of said intelligence thereby given, be kept secret until further orders..." By early 1776, abuses were noted in the practice, and Congress resolved that only the councils or committees of safety of each colony, and their designees, could henceforth open the mail or detain any letters from the post.

James Lovell is credited with breaking British ciphers, but perhaps the first to do so was the team of Elbridge Gerry, Elisha Porter and the Rev. Samuel West who successfully decoded the intercepted intelligence reports written to the British by Dr. Benjamin Church, the Director General of Hospitals for the Continental army.

When Moses Harris reported that the British had recruited him as a courier to carry messages for their Secret Service, General Washington proposed that General Schuyler "contrive a means of opening them without breaking the seals, take copies of the contents, and then let them go on. By these means we should become masters of the whole plot..." From that point on, Washington was privy to British intelligence pouches between New York and Canada.

Deception Operations

To offset British superiority in firepower and troops, General Washington made frequent use of deception operations. He allowed fabricated documents to fall in the hands of enemy agents or to be discussed in their presence. He allowed his couriers—carrying bogus information-to be captured by the British, and inserted forged documents in intercepted British pouches that were then permitted to go on to their destination. Washington even had fake military facilities built. He managed to make the British believe that his three thousand man army was outside Philadelphia was 40,000 strong! With elaborate deception, Washington masked his movement toward Chesapeake Bay—and victory at Yorktown—by convincing the British that he was moving on New York.

At Yorktown , James Armistead, a slave who joined Lafayette's service with his master's permission, crossed into Cornwallis' lines in the guise of an escaped slave, and was recruited by Cornwallis to return to American lines as a spy. Lafayette gave him a fabricated order that supposedly was destined for a large number of patriot replacements—a force that did not exist. Armistead delivered the bogus order in crumpled dirty condition to Cornwallis, claiming to have found it along the road during his spy mission. Cornwallis believed him and did not want to believe he had been tricked until after the battle of Yorktown. Armistead was granted his freedom by the Virginia legislature as a result of this and other intelligence services.

Another deception operation at Yorktown found Charles Morgan entering Cornwallis' camp as a deserter. When debriefed by the British, he convinced them that Lafayette had sufficient boats to move his troops against the British in one landing operation. Cornwallis was duped by the operation and dug in rather than march out of Yorktown. Morgan in turn escaped in a British uniform and returned to American lines with five British deserters and a prisoner!

The Hickey Plot [13]

On 21 June 1776, General George Washington authorized and requested the Committee to Detect Conspiracies to arrest David Matthews, the Tory mayor of New York City, and confiscate his papers. Matthews, accused of distributing money to enlist men and purchase arms for the British cause and corrupting American soldiers, was residing at Flatbush, on Long Island, near General Greene's encampment. Washington transmitted the warrant drawn by the Committee to General Greene on the 21st with directions that it should be executed with precision exactly at one o'clock of the ensuing morning by a careful officer. Greene dispatched a detachment of men who took Matthews into custody but found no incriminating papers.

Matthews' arrest was the result of hearings conducted from 19 to 21 June 1776 by the Committee to Detect Conspiracies under the able

leadership of John Jay. Until Jay was appointed to head the Committee, it had put off real efforts to uncover any information concerning activities or persons still loyal to the king.

During the hearings, conducted at Scott's Tavern on Wall Street, the Committee first heard testimony from Isaac Ketchum, a counterfeiter who had been arrested and was incarcerated in the City Hall jail. Ketchum wanted to work a deal with the Committee; in exchange for his information he wanted to be set free. The Committee agreed.

According to Ketchum, two prisoners by the name of Thomas Hickey and Michael Lynch, who were in jail on suspicion of counterfeiting, attempted to recruit him for the British. Hickey and Lynch both said they abandoned the American cause and secretly joined the British side. They indicated that others had also secretly agreed to serve the British. Ketchum further told the Committee that Hickey and Lynch were recruited to the British cause by an individual name "Horbush." The Committee at first was unable to identify Horbush but soon realized that Ketchum probably meant "Forbush," which is a variant of the name Forbes. The Committee then quickly identified Forbes as Gilbert Forbes, a well-known gunsmith who owned "The Sign of the Sportsman" shop on Broadway. The Committee also determined that Hickey was a sergeant in Washington's personal guards.

Two days after Ketchum's testimony, the Committee heard from William Leary, a prominent local businessman. Leary told the American authorities that he was in the city hunting for a runaway indentured worker of his who had disappeared. Leary successfully found the worker but later lost him. As he was walking around the city, he accidentally met another former employee James Mason. Mason, believing that Leary had left the company, asked Leary if he was in New York to join the other men. Leary, not knowing what Mason was discussing, feigned agreement. Mason, joined by several others, began to recruit Mason into a conspiracy but suddenly stopped when they became suspicious of him.

The Committee interviewed Mason who provided additional details about the Loyalist plot. He informed the Committee that men were being recruited to join a special Tory corps and had received pay from Governor Tryon. A Sergeant Graham, an old soldier, formerly of the royal artillery, had been recruited by Tryon to prowl around and survey the grounds and works about the city and Long Island. Based on his information, a plan of action was conceived. Upon arrival of the fleet, a man-of-war would cannonade the battery at Red Hook. While doing so, a detachment of the army would land below the cannonade and by a circuitous route surprise and storm the works on Long Island. The ships would then divide with some sailing up the Hudson River and the others up the East River. Troops were to land above New York, secure the pass at King's Bridge and cut off all communications between the city and the country. Upon a signal, artillerymen who were conspirators were to turn their cannon on the American troops, the ammo stores were to be blown up and King's Bridge was to be cut to prevent the Americans from escaping.

Under pressure of interrogation, Mason revealed the names of several of Washington's guards: Hickey, William Green (drummer), James Johnson (fifer), and a soldier named Barnes. Gilbert Forbes was the paymaster, giving the men ten shillings a week. Mason also said New York mayor Matthews contributed 100 British pounds to the plot. Mason also identified three taverns as favorite hangouts of the conspirators; The Sign of the Highlander, Lowrie's Tavern, and Corbie's Tavern. Corbie's Tavern, near Washington's quarters, was a

rendezvous site for the conspirators. Thomas Hickey was supposedly recruited here. Hickey recruited Green the drummer and Johnson the fifer. According to a conversation overheard at Corbie's Tavern, Washington was to be assassinated when the British army landed, as part of a plan for a surprise attack on the core of the Continental Army.

The Committee halted further depositions and went to notify Washington. The information was sufficient for Washington to issue the warrant for Matthews' arrest. Since Hickey and Lynch had already been returned to Washington's Headquarters, they were arrested by Washington's troops. A Court-martial was convened on 24 June 1776 and Hickey was charged with "exciting and joining in a mutiny and sedition, and of treacherously corresponding with, enlisting among, and receiving pay from the enemies of the United Colonies." Hickey pleaded not guilty.

The army produced four witnesses to testify against Hickey. Greene confirmed that Hickey had accepted funds to enlist in the Loyalist plot. Gilbert Forbes also said that he gave Hickey money. Ketchum repeated the hearsay evidence he presented to the Committee and a fourth person, William Welch said that Hickey had tried to recruit him. The only defense Hickey offered was that he was trying to cheat the Tories out of their money. As to having his name placed on board the British warship, he said he agreed to it as a precaution should the British defeat the Americans and he was taken prisoner, then he would be safe.

After a short deliberation, the officers found Hickey guilty as charged and sentenced him to death. On 27 June, Washington and his Council of Officers met. They reviewed the transcript of the trial and agreed with the sentence. On 28 June 1776 Hickey was hanged. He was the only conspirator to be executed; 13 others were imprisoned. Matthews was held as a prisoner but escaped to London. After the war he testified he had formed a plan for taking Washington and his guard but it was never realized.

Minutes Of The Committee For Detecting Conspiracies

(Fishkill), December 23rd, 1776

Present: Leonard Gansevoort Esqr. Chairman; John Jay, Zephaniah Platt, Nathaniel Sacket, Esqrs.

Resolved that Enoch Crosby assuming the name of do forthwith repair to Mount Ephraim and use his utmost art to discover the designs, places of resort, and route, of certain disaffected persons of that quarter, who have formed a design of joining the enemy, and that for that purpose the said Enoch be made acquainted with all the Information received by this Committee concerning this plan, and that he be furnished with such passes as will enable him to pass there without interruption, and with such others as will enable him to pass as an emissary of the enemy amongst persons disaffected to the American Cause.

Resolved that Enoch Crosby be furnished with a horse and the sum of 30 dollars in order to enable him to execute the above resolution.

Resolved that Mr. Nathaniel Sackett be requested to give such instructions to Enoch Crosby as he shall think best calculated to defeat the designs of the persons above mentioned.

Ordered that the Treasurer pay Enoch Crosby 30 dollars for secret services. . .

Resolved that Nathaniel Sacket Esqr. be requested to furnish Mr. Enoch Crosby with such clothing as he may stand in need of.

NOTES

1. This article was written by Frank J. Rafalko, Chief Community Training Branch, National Counterintelligence Center.

2. Thomas Hutchinson came from a prominent New England family. In 1737, despite his family's admonishment to him about going into politics, he was elected to the Massachusetts House of Representatives. He later served as Chief Justice of the colony and then royal governor.

3. Francis Bernard was the nephew of Lord Barrington, the secretary of state for war in London. Barrington arranged for Bernard to be appointed as royal governor of New Jersey, but after two years Bernard moved to Massachusetts to become royal governor there. He was recalled to London in 1769.

4. Dr. Benjamin Church.

5. A.J. Langguth, Patriots The Men Who Started the American Revolution, Simon and Schuster, New York, 1988, p. 311.

6. Edmund R. Thompson, ed., Secret New England Spies of the American Revolution, The David Atlee Phillips New England Chapter, Association of Former Intelligence Officers, Kennebunk, Maine, 1991, p. 17.

7. Allen French, General Gage's Informers, Greenwood Press, New York, 1968, p. 166-167.

8. Capt. James Wallace.

9. Godfrey Wainwood or Wenwood, Letter from Washington to the President of Congress, October 5, 1775.

10. Letter from George Washington to the President of Congress, October 5, 1775.

11. The 28th article of war provided that anyone caught communicating with the enemy should suffer such punishment as a court martial might direct. Unfortunately for those who favored hanging Dr. Church, article 51 stated that such punishment was limited to thirty-nine lashes, or a fine of two months pay, and/or cashiering from the service.

12. Letter from George Washington to Governor Jonathan Trumball, November 15, 1775 in which Washington inserted the resolve of Congress he received from John Hancock regarding Church.

13. This article was written by Frank J. Rafalko, Chief Community Training Branch, National Counterintelligence Center.

CONTINUE CHAPTER 1

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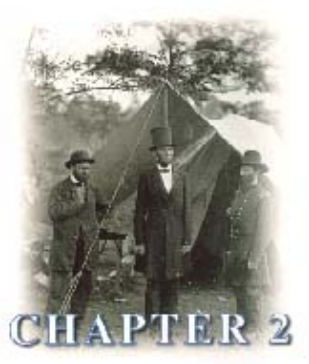

The Civil War: Lack of a Centralized Direction

Introduction

Six weeks after the election of Abraham Lincoln as President, South Carolina seceded from the Union. In February 1861, six other states (Louisiana, Texas, Georgia, Alabama, Florida and Mississippi) followed. They formed the Confederate States of America. When President Lincoln called for 75,000 volunteers after Fort Sumter was fired upon in April, 1861, Virginia, Arkansas, North Carolina and Tennessee joined the Confederacy. The Civil War had begun.

When hostilities began, neither the North nor the South had any significant intelligence or counterintelligence capability. Generals operated their own espionage rings and personally recruited and directed their spies. In Washington, President Lincoln was concerned. He only had to look outside his window to realize that the capital was penetrated and surrounded by southern sympathizers. Although Maryland stayed loyal to the Union, many of its citizens favored the southern cause.

To protect the federal government, Secretary of State William H. Seward took the initiative. Under his directon, southern spies, sympathizers and others were arrested and detained as threats to the government. When General George McClellan was appointed commander of the Union Army, Allan Pinkerton and his detectives replaced Seward in his role as counterintelligence chief. Pinkerton was very effective in stopping the flow of intelligence out of the capital to the Confederacy.

In November 1862, Lincoln removed McClellan and replaced him with General Ambrose Burnside. With McClellan's dismissal, Pinkerton left Washington and his counterintelligence role to protect the city was given to Lafayette Baker. At the time, Baker was working for the War Department, targeting contraband channels. Like Pinkerton, Baker was successful in neutralizing southern agents and sympathizers.

The Confederacy did not formerly establish a Secret Service Bureau until 30 November 1864; the war would be over on 9 April 1865. The full extent of the Confederacy's counterintelligence operations and activities remain a mystery because Judah Benjamin, the Secretary of State for the confederacy, burned all espionage records as the Union Army entered Richmond.

William H. Seward[1]

When the Lincoln Administration suddenly found itself faced with open hostilities and accompanying espionage and spy intrigues in 1861, one of the first officials to react to the situation was Secretary of State Seward. His organization combined both the police function—pursing individuals with a view to their incarceration and prosecution—and the intelligence function—gathering information regarding the loyalty and political views of citizens without any particular regard for possible violations of the law. In combining the two tasks, of course, their distinction often became lost. One commentator notes:

> *The Government's first efforts to control the civilian population were conducted by the Secretary of State for reasons both personal and official. William H. Seward, the "Premier" of the Cabinet, had an unquenchable zeal for dabbling in everyone else's business. In addition, since the establishment of the Federal Government the office of the Secretary of State had been somewhat of a catchall for duties no other executive agency was designed to handle. With the war, and the new problem of subversion on the home front, Seward soon began to busy himself about arrests of political prisoners, their incarceration, and then the next step of setting up secret agents to ferret them out.*[2]

There are no informative records as to how or why the initial arrests of political prisoners and the creation of a secret service fell to Secretary Seward. It is entirely likely that he requested these duties. The more important consideration, however, concerns the extent to which he responsibly carried out these obligations. According to one of the Secretary's biographers:

> *Arrests were made for any one of many reasons: where men were suspected of having given, or intending to give, aid or comfort to the enemy in any substantial way,—as by helping in the organization of troops, by supplying arms or provisions, or selling the bonds of the states in secession; by public or private communications that opposed United States enlistment or encouraged those of the Confederacy; by expressing sympathy with the South or attacking the administration; by belonging to organizations designed to obstruct the progress of the war—in fact for almost any act that indicated a desire to see the government fail in its effort to conquer disunion.*[3]

But the question was not simply one of fact. The manner and nature of the arrest and detention of political offenders raised a number of due process considerations.

The person suspected of disloyalty was often seized at night, searched, borne off to the nearest fort, deprived of his valuables, and locked up in a casemate, or in a battery generally crowded with men that had had similar experiences. It was not rare for arrests regarded as political to be made by order of the Secretary of War or of some military officer; but, with only a few exceptions, these prisoners came under the control of the Secretary of State just as if he had taken the original action.

William H. Seward
PHOTO

For a few days the newcomer usually voiced varied reflection and loud denunciation of the administration. But the discomforts of his confinement soon led him to seek his freedom. When he resolved to send for friends and an attorney, he was informed that the rules forbade visitors, except in rate instances, that attorneys were entirely excluded and the prisoner who sought their aid would greatly prejudice his case. Only unsealed letters would be forwarded, and if they contained objectionable statements they were returned to the writer or filed in the Department of State with other papers relating to the case.

There still remained a possibility, it was generally assumed, of speedy relief by appeal to the Secretary in person. Then a long narrative, describing the experiences of a man whose innocence was equaled only by his misfortunes, was addressed to the nervous, wiry, all-powerful man keeping watch over international relations, political offenders, and affairs generally. The letter was read by the Chief Clerk or Assistant Secretary, and then merely filed. A second, third, and fourth petition for liberation and explanations was sent to the department—but with no result save that the materials for the study of history and human nature were thereby enlarged; the Secretary was calm in the belief that the man was a plotter and could do no harm while he remained in custody.[4]

To rectify this situation, two important steps were taken in February 1862. On St. Valentine's Day, an Executive order was issued providing for the wholesale release of most political prisoners, excepting only "persons detained as spies in the service of the insurgent, or others whose release at the present moment may be deemed incompatible with the public safety."[5] In addition, a special review panel, consisting of Judge Edwards Pierrepont and General John A. Dix, was established to expedite releases under this directive.[6]

With regard to intelligence activities, Seward apparently employed Allan Pinkerton for such operations during the summer of 1861, "but did not keep him long, perhaps because he felt that the detective was too close to the President, and Seward wanted his own man, whose loyalty would be direct to him."[7] A listening post was sought in Canada for purposes of checking on the activities of Confederate agents and to monitor the trend of sentiment in British North America during the secession crisis.[8] Former Massachusetts Congressman George Ashmun was appointed special agent to Canada for three months in early 186l at a salary of $10 a day plus expenses. Seward advanced $500 cash on account. Another operative, Charles S. Ogden, took residence in Quebec and additional stations were subsequently established at Halifax and St. John's, among other seaports.[9]

A domestic network also came into being while the Canadian group struggled to recruit confidential agents.

Seward's "Secret Service Letter Book" for 186l was full of inquiries dispatched to friends and trusted official associates throughout the country asking them to discover persons who could be put on important investigating tasks. He wanted "a discreet and active" man for the Northern frontier, to arrest spies seeking entrance from Canada, and offered to pay such a man $100 a month. A little later he appointed a special agent at Niagara Falls, to examine the persons coming over the Suspension Bridge, and seize and hold any whom seemed suspicious. He sought, without immediate results, a good man for Chicago and another for Detroit. He authorized the United States Marshall at Boston to employ two detectives for two-month's time, each at $150 a month. This was particularly urgent; therefore let the Marshall consult the governor of the State, "and take effective measures to break up the business of making and sending shoes for the Rebel Army."[10]

Almost unnoticed, Seward's intelligence or-ganization began to grow; though its agents often proved to be ineffective amateurs. Shortly, however, professionalism, discipline, and a careful sense of mission came to the Secretary's spy corps in the person of Lafayette Charles Baker.

Allan Pinkerton [11]

Allan Pinkerton (1819-1884), a Scottish immigrant, is best known as the founder of the Pinkerton detective agency, one of the most famous organizations of its kind. Pinkerton emigrated to Chicago in 1842 and moved to Dundee, Kane County, Illinois in 1843. After apprehending a gang of counterfeiters, he was appointed deputy sheriff of Kane County in 1846 and immediately afterward of Cook County, head-quartered in Chicago. There he organized a force of detectives to counter theft of railroad property, and in 1850 he established the North Western Police Detective agency, later renamed Pinkerton's National Detective Agency.

A group of Union spies.
PHOTO

Members of the Bureau of Military Information, Army of the Potomac.
PHOTO

Pinkerton also was an important player in intelligence gathering during the Civil War years of 1861 and 1862 when he organized a system of obtaining military information in the Southern states. Pinkerton recorded his exploits as a Union operative, under the nom-de-plume of Major E. J. Allen, in the book, The Spy of the Rebellion: Being a True History of the Spy System of the United States Army During the Late Rebellion, published in 1883. Unfortunately for the historian, the book was published after Pinkerton lost his records during the Chicago fire of 1871. The majority of his narrative relied upon his few remaining notes, official reports, and his memory of events that had occurred 20 years before. The book also served the purpose of refuting claims that Pinkerton's spies had provided inflated numbers of Confederate troops, a claim that has become an accepted part of Civil War history.

Pinkerton felt the need to defend his spy system's record during the first years of the war and his close association with Major General George B. McClellan. Pinkerton had been well acquainted with McClellan before

the Civil War, during his years as railroad detective when McClellan was president of the Ohio and Mississippi Railroad.

Pinkerton began his intelligence activity before President-elect Lincoln's arrival in Washington, D.C. for his inauguration in 1861. Pinkerton had received a letter from Samuel H. Felton, the president of the Philadelphia, Wilmington and Baltimore Railroad, warning of a plan to disrupt Lincoln's trip by destroying rail transportation between Washington, D.C. and cities in the west and north. In response, Pinkerton dispatched surveillance agents along the roads, selecting places where intelligence indicated there were secessionist supporters. He also employed two agents to infiltrate secessionist groups, one of whom learned of plans to assassinate Lincoln as he passed through Baltimore, Maryland.

These agents established their credibility through ethnic ties, collegiate studies, foreign travel, knowledge of foreign languages, familiarity with local customs and prominent individuals, vocal support for secessionist causes, and participation in secret secessionist societies. They discovered that the conspirators, in league with members of the Baltimore police force, planned to assassinate Lincoln as he rode in an open carriage for a half-mile between the Northern Central Railroad Station to the Washington depot.

Pinkerton Letter

Chicago, April 21st 1861
To His Excellence
A Lincoln, Pres. of the U-S

Dear Sir

When I saw you last I said that if the time should ever come that I could be of service to you I was ready-If that time has come I am on hand.

I have in my Force from Sixteen to Eighteen persons on whose courage, Skill & Devotion to their Country I can rely. If they with myself at the head can be of service in the way of obtaining information of the movements of the Traitors, or Safely conveying your letters or dispatches, or that class of Secret Service which is the most dangerous, I am at your command-

In the present disturbed state of Affairs I dare not trust this to the mail-so send by one of My Force who was with me at Baltimore-You may safely trust him with any message for me-Written or Verbal-I fully guarantee his fidelity-He will act as you direct- and return here with your answer.

Secrecy is the great lever, I propose to operate with-Hence the necessity of this movement (If you contemplate it) being kept Strictly Private-and that should you desire another interview with the Bearer that you should so arrange it-as that he will not be noticed.

The Bearer will hand you A Copy of A Telegraph Cipher which you may use if you desire to Telegraph me-

My Force comprises both Sexes-All of Good Character-And well Skilled in their Business.

Respectfully yours,

In a tale with as many twists and turns as any good spy novel, Lincoln is secretly whisked from a public appearance in Harrisburg, Pennsylvania, by a special train to Philadelphia, then through the "lines of treason" in Baltimore and safely on to Washington, D.C. Key to the success of this plan was Pinkerton's arrangement to have the telegraph lines out of Harrisburg cut so that news of Lincoln's abrupt departure was contained. He also detained two journalists by force of arms from immediately reporting the plan and assumed responsibility for the security of the railroad tracks, on which the special train traveled.

The identity of Pinkerton's infiltrated agents was closely held and led to an incident that added to the credibility of his chief operative, Timothy Webster. Webster had become well entrenched among secessionist groups in the Baltimore area, frequently socializing with them and carrying letters through Union lines for them. He played his role so well that another secret service agent, who was not aware of his identity and activities, arrested him in Baltimore. Webster had to contact Pinkerton to obtain his release.

His escape, arranged by Pinkerton, increased Webster's standing among the Southern sympathizers and allowed him to continue his successful spy
operations. He became a trusted emissary of the Confederate government, delivering letters and other communications to relatives in the North.

These documents were first inspected by Pinkerton's service before being delivered and in this way served two purposes. Webster not only won the trust of the Confederate authorities, but he also provided the federal government with valuable information. In one case, the intercepted documents revealed the presence of a Confederate spy ring in the Provost Marshal's office in Washington, D.C.

John C. Babcock (center standing) pictured while a member of Pinkerton's organization. Standing with him are (left) Augustus K. Littlefield and (right) George H. Bangs. Seated (left) William Moore, Secretary to War Secretary Stanton and Allen Pinkerton.
PHOTO

When General George B. McClellan was given command of the Army of the Potomac in November 1861, Pinkerton came to Washington with him. It was at this time that Pinkerton was given the responsibility for security and counterintelligence within the nation's capital. How Pinkerton was going to handle this new assignment was spelled out in a letter to McClellan. In it, Pinkerton wrote:

> *In operating with my detective force, I shall endeavor to test all suspected persons in various ways. I shall seek access to their houses, clubs, and places of resort, managing that among the members of my force shall be ostensible representatives of every grade of society, from the highest to the most menial. Some shall have the entree to the gilded salon of the suspected aristocratic traitors, and be their honored guests, while others will act in the capacity of valets, or domestics of various kinds, and try the efficacy of such relations with the household to gain evidence. Other suspected ones will be tracked by the "Shadow" detective, who will follow their every foot-step, and note their every action.*

> I also propose to employ a division of my force for the discovery of any secret traitorous organization which may be in existence; and if any such society is discovered, I will have my operatives become members of the same, with a view to ascertaining the means employed in transmitting messages through the lines, and also for the purpose of learning, if possible, the plans of the rebels. All strangers arriving in the city, whose associations or acts may lay them open to suspicion, will be subjected to a strict surveillance.[12]

Another counterintelligence technique used by Pinkerton was the double agent. As Pinkerton wrote:

> In war, as in a game of chess, if you know the moves of your adversary in advance, it is then an easy matter to shape your own plans, and make your moves accordingly, and, of course always to your own decided advantage. So in this case, I concluded that if the information intended for the rebels could first be had by us, after that, they were welcome to all the benefit they might derive from them.[13]

Another of Pinkerton's agents infiltrated the Southern bureau of intelligence in Richmond, managed partly by the Confederate government and
partly by wealthy merchants in Richmond and Baltimore. This bureau was said to employ about 50 persons to carry information across Union lines. Pinkerton's agent, George Curtis, gained access to the "subterranean headquarters" of this bureau, which actually were located above ground in a Richmond hotel, by claiming to be a dealer in contraband material. According to Pinkerton, Curtis was such an excellent spy that the "subterranean headquarters, with its corps of operatives, never did the Union cause any practical harm, but a great deal of good, in furnishing intelligence of the movements and intentions of the rebel forces."

Pinkerton's memoirs also recount how his service used women and slaves as spies. Mrs. E. H. Baker, a former resident of Richmond who had moved north at the war's start, was one notable woman agent. Returning to Richmond in Pinkerton's service, she renewed an acquaintance with a Confederate officer and his wife, and learned of a planned test of a submarine battery. She pursued this lead and asked to be invited to the test of a small working model of the Merrimac. She immediately carried news of the test back to Pinkerton who alerted General McClellan and the Secretary of the Navy. Pinkerton saw this incident as changing the destiny of the Union in the face of this "infernal machine."

Pinkerton stopped working with the Union Army after General McClellan was removed as commander, although he continued to investigate government fraud cases. In 1865 he severed his connection with the Secret Service and returned to Chicago to pursue his detective profession. What he provides in his memoir is his case that his wartime agents operated heroically in the service of their country.

NOTES

1. Dr. Harold Relyea, Analyst in American National Government, Government and General Research Division, Congressional Research Center, Library of Congress, for the Select Committee on Intelligence and printed in *Supplemental Reports on Intelligence Activities, Book VI, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, United States Senate, 1976.

2. George Fort Milton. *Abraham Lincoln and the Fifth Column*. New York, the Vanguard Press, 1942, p. 48.

3. Frederick Bancroft. *The Life of Williams H. Seward (Vol. 2)*. New York, Harper and Brothers, 1900, p. 260.

4. Ibid., pp. 261-262.

5. See Richardson, op cit. (Vol. 7), pp. 3303-3305.

6. The correspondence of this panel and lists of those released at its direction may be found in Fred C. Ainsworth and Joseph W. Kirkley, comps. *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series II (Vol. 2). Washington, U.S. Govt. Print. Off., 1897.

7. Milton, op. cit., p. 49.

8. See John W. Headley, *Confederate Operations in Canada and New York*, New York and Washington, The Neale Publishing Company, 1906; also of related interest is James D. Bulloch, *The Secret Service of the Confederate States in Europe*, New York, Thomas Yoseloff, 1956; originally published 1884.

9. Milton, loc. cit.

10. Ibid., pp. 50-51.

11. This article was written by Louise Sayre, National Security Agency.

12. Allan Pinkerton, *The Spy of the Rebellion*, New York, G.W. Carleton and Company, 1883, pp. 247-248.

13. Ibid., pp. 429-430.

CONTINUE CHAPTER 2

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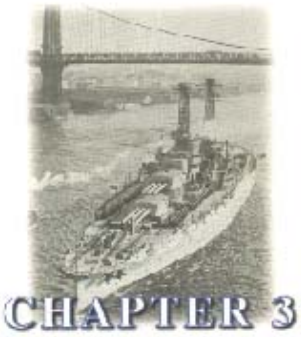

Post Civil War to World War I

The Office of Naval Intelligence: A Proud Tradition of Service

A Tardy Awakening

The Underside of the Mexican Revolution: El Paso 1912

Imperial Germany's Sabotage Operations in the US

Department of State and Counterintelligence

From Robert Lansing, With Enclosure

From Robert Lansing

From Walter Hines Page

Counterintelligence: Pre-World War I

Counterintelligence in World War I

War Department General Order

From Albert Sidney Burleson

From Newton Diehl Baker

The Witzke Affair: German Intrigue on the Mexican Border, 1917-18

The Espionage Act May 16, 1918

From Edward Mandell House

Introduction

At the end of the Civil War, counterintelligence fell by the wayside as the Federal Government focused on the reconstruction of the South. The only practitioners of the discipline were the private detective agencies which, before the American entry into World War I, did a booming business from an increase in demand for strikebreakers and labor spies. By 1917 there were nearly three hundred detective agencies across the country investigating labor activity.

The Pinkerton Detective Agency's unsavory history in industrial labor quarrels led Congress in 1893 to proscribe the hiring of private detectives by any Federal agency. In World War I, however, the demand for professional operatives was so great and the private detective companies so available that Military Intelligence deliberately violated the law.

For many years, after it was organized in July 1865, the Secret Service was the only detective force in the Federal Government, other than a Division of Special Agents of the Office of the Secretary of the Treasury, the investigations of which were concerned primarily with customs matters. When the short-lived Spanish-American War came along, it was the Secret Service and not the newly established War Department's Military Intelligence (MI) or Navy's Office of Naval Intelligence (ONI) which received money from Congress for increased counterintelligence activities. The

The Red Scare Period

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Post Civil War Bibliography

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Service investigated spy leads from MI, ONI, and also from the Post Office, the Justice Department and from U.S. Senators. They also conducted an operation to break up a spy system operated by the Spanish Government in Canada.

Until 1908, when the practice was prohibited by law, Secret Service agents were engaged in special investigations for other departments. They were not permitted to resume this practice until World War I, when the President was authorized to direct the use of the Service wherever necessary. Agents then conducted investigations for alleged pro-German sympathizers and spies in 1918-19 and suspected infractions by firms and individuals of laws, regulations, and orders governing exports during the war.

The Mexican revolution and counterrevolutions of 1914 posed exceptional problems for American counterintelligence. The buying and transporting of weapons from the border states into Mexico, Mexican intelligence operating in the states, and German schemes to use Mexico against the United States during World War I, were some of the threats facing the meager counterintelligence resources of the U.S. Government.

The most famous activity to occur in the border region was Poncho Villa's raid on the small New Mexico town of Columbus, where several soldiers and civilians were killed. Furious over this brazen violation of American sovereignty, President Wilson ordered General John Pershing to pursue Villa. Pershing's efforts became known as the Punitive Expedition.

During this expedition, human intelligence (HUMINT) and signals intelligence (SIGINT) took on new proportions. Although an embryo intelligence staff had been organized in 1903 as part of the General Staff of the Army, it was up to Pershing to organize his own field intelligence network. He started an "Information Department" which employed a network of agents who reportedly penetrated Villa's camp. He also intercepted and deciphered Mexican communications. "By tapping the various telegraph and telephone wires and picking up wireless messages," according to Pershing, "we were able to get practically all the information passing between various leaders in Mexico."

When World War I began, no single federal agency had any substantial investigative capability, and the modern concept of a counterintelligence community did not exist. The counterintelligence efforts of the Secret Service, the Bureau of Investigation (later Federal Bureau of Investigation), and War Department's Military Intelligence and Navy's Office of Naval Intelligence were insignificant and not coordinated. In fact, these agencies were totally unprepared to deal with the disingenuous espionage and sabotage ring organized in the United States by German Ambassador Johann von Bernstorff.

During the war these agencies expanded and new federal offices emerged, many with intelligence departments. In this atmosphere, interagency competition became

particularly acrimonious, first between the Department of Justice and the Secret Service, and later between Justice and Military Intelligence. This situation was noted by the Secretary of State who offered his department as the "clearinghouse" of information obtained from each of these agencies. However, an agreement concluded in 1918 shared the counterintelligence mission between Justice, State, Army and Navy.

The Office Of Naval Intelligence: A Proud Tradition Of Service[1]

During the period immediately following our Civil War, the United States Navy found itself in a state of disarray and woefully incapable of protecting the nation. Along with ships and men, the ravages of conflict destroyed naval strength and readiness, leaving few seaworthy ships when peace finally arrived.

Yet fueled by the indomitable American spirit and spurred with challenge, there arose a class of naval officer who recognized the need for rebuilding a United States Navy that had come to be ignored in the postwar period by government and citizen alike.

The change that came was wholly owed to a recognition amongst the officer class that emerging technological and educational advances had to be adopted if the service was ever to fulfill its duty to the nation. It was precisely during this time and for those reasons that our nation's first organized agency devoted entirely to intelligence collection and associated activities was founded.

Years before, the U.S. Navy had come to recognize the importance of capitalizing on intelligence to counter enemy plans and movements during both the Revolutionary War and the War of 1812; however, those efforts were best characterized as disorganized and fragmented to such a degree as to be ineffectual.

On 23 March 1892, the Office of Naval Intelligence (ONI) was created with the signing of General Order 292 by William H. Hunt, Secretary of the Navy, and became the first U.S. Government agency devoted solely to the systematic collection of information regarding foreign military affairs.

Originally subordinate to the Bureau of Navigation, ONI would routinely acquire information from military attaches posted abroad or naval officers making cruises to foreign ports, where numerous collection opportunities were presented to command staff personnel. Whether it was charting foreign passages, rivers or other bodies of water, touring overseas fortifications and building yards or conducting other naval related activities as necessary, naval personnel busied themselves collecting information for ONI regarding the strengths and weaknesses of any alien power that could someday pose a threat to U.S. national security interests.[2]

ONI quickly gained an enviable reputation and for three decades was considered by U.S. government officials to be the most authoritative and reliable source of information regarding foreign military affairs. Even so, a great deal of information collected by this organization, especially that dealing with European shipbuilding advances and associated industrial improvements, would never be put to substantive use.

In fact, volumes of valuable data frequently lay totally wasted and squirreled away in various navy bureaus because ONI lacked the capability in its infancy to render. In-depth analysis that would have insured the material was more thoroughly understood and better used. ONI's shortcomings were recognized as especially critical when it was finally realized that the United States, with a fleet of wooden sailing ships, was quickly shrinking to inferiority in the face of European navies producing iron hulled men-of-war with rifled guns and metal turrets.[3]

General Order No. 292

Navy Department
Washington, March 23, 1882

An "Office of Intelligence" is hereby established in the Bureau of Navigation for the purpose of collecting and recording such information as may be useful to the Department in time of war, as well as peace.

To facilitate this work, the Department of Library will be combined with the "Office of Intelligence" and placed under the direction of the Chief of the Bureau of Navigation.

Commanding and all other Officers are directed to avail themselves of all opportunities which may arise to collect and forward to the "Office of Intelligence" professional matters likely to serve the object in view.

William H. Hunt Secretary of the Navy

During its early days, ONI was officially tasked by the Department of the Navy to collect specifically categorized information deemed essential to the U.S. defense. To fulfill this duty, the Secretary of the Navy mandated that naval officers who could objectively and skillfully collect and report matters of interest to the Navy be chosen for service with ONI in Washington, D.C., posted to any one of several naval attaché positions at U.S. foreign legations, or appointed as special aides to senior military personnel posted abroad. Generally all would restrict their collection to information that was publicly available and could be acquired through overt means like open source publications, from foreign officers with whom the naval attaché or aide might associate and through contacts with knowledgeable political or industrial figures.

Initially, the military and naval attaché system formally established by passage of Congressional Law on 22 September 1888, allowed for the posting that following year of five officers to Berlin, Paris, London, Vienna and St. Petersburg.

Within five years this rudimentary intelligence network expanded modestly and attaché personnel came to be posted in Rome, Brussels, Madrid, Tokyo and Mexico City. For years, the number of naval officers assigned such duties remained limited and at a fixed level or, in some cases, attaches would only be posted to a foreign nation in times of international tension or strife.

It became the primary responsibility of naval attaches to visit naval bases, shipyards, industrial sites and any other commercial or government facilities associated with building, supporting or directing foreign commercial and military maritime efforts. Though officially

instructed to perform their duty in an open manner, our former attaches sometimes found it necessary to employ covert measures and the use of "secret agents" to gather information that would be unavailable by any other means.

Even as it was successful in certain regards, the attaché system was probably no more than moderately effective due to a continual lack of funding and because the posts were difficult to fill with line officers, who generally did not regard such duty as prestigious or career enhancing.[4]

Initially, ONI was more concerned with collecting information regarding the characteristics and weaponry of foreign vessels than with tactics, movements, dispositions or the intentions of those navies. However, by 1915, when it became one of nine subdivisions organized into the Office of the Chief of Naval Operations, ONI would assume responsibility given it by the Navy "General plan" to develop and gather all manner of information on the Navy's possible adversaries.

The plan allowed for certain collection to be done by covert means and by 1916 the first undercover operation, termed Branch Office, had commenced activity in New York City under the control of ONI. Staffed by naval reservists on active duty or civilian volunteers working without pay, the Branch Office garnered some impressive successes in the field of counterespionage while protecting U.S. persons and properties from subversion and sabotage in the wake of growing world conflict.

Simultaneous to these endeavors, a separate organization called the Aides for Information was developing and employing personnel who were locally assigned to the staffs of fifteen Naval District Commandants.

Individuals affiliated with this effort routinely searched passengers on incoming vessels, provided security at docks, warehouses and factories, investigated subversive activity and executed other necessary duties during this extraordinary period to protect the Navy and country from possible foreign inspired subversion. With Branch Offices centrally controlled from Washington, while aides were supervised by their respective districts it was inevitable that confusion, conflict and duplication arose to such an extent that all investigative activities came to be consolidated under the District Aides.

The War Years

The preeminent concern of ONI when our nation finally declared war on Germany and its allies was the ferreting out of individuals deemed a threat to
the U.S. Navy or national security. Often working on tips provided by a variety of government agencies or patriotic organizations or on information acquired from private citizens swept up by the furor of the time, ONI pursued and worked tirelessly against all those suspected of subversive activity.

ONI operations became quite skilled at a variety of investigative techniques like surveillance and wiretapping and at one point it was actively involved in some 15,000 subversive investigations each week. The identification and neutralization of subversive elements became especially important to ONI after being assigned responsibility for protecting those war plants executing U.S. Navy contracts. ONI field agents routinely checked those plants for physical security, indications of labor unrest that would affect production, loyalty of factory workers and managers and the identification and elimination of anyone who could pose a threat to that company's vital work for the U.S. Navy.

There is no question that ONI did materially contribute to our nation's security and war-making capacity during this trying time although there was a certain amount of attendant frustration. In its enthusiasm to seek out individuals posing a possible threat to national security, ONI could be blame for periodically engaging in "witch hunts" or using questionable methods that would later be judged an affront to justice. Intolerance for different tactics or the needs of other government agencies led ONI into repeated conflicts with Army Intelligence and the U.S. Justice Department. Eventually, Rear Admiral Leigh V. Palmer, Chief of the Bureau of Navigation was forced to comment in August 1918, "...ONI might be pursuing suspects a bit too enthusiastically."

The Director of ONI at that time was further warned, apparently in the interest of fairness, "…to permit people accused of misdeeds to explain their actions before Naval Intelligence recommended dismissal, arrest or internment."[5]

During the First World War, ONI assigned four times the personnel and resources to domestic security work, as it did on foreign collection, after deciding that protecting the home front was its most important mission.

Yet in all fairness, it should be recalled that ONI traditionally considered its primary responsibility to be the collection, evaluation and dissemination of foreign intelligence that was of interest to the U.S. Navy. With our nation's declaration of war and involvement in armed hostilities, ONI was quickly forced to adopt many new responsibilities, like domestic security, without the luxury of extensive planning or very much forethought. Considering the seriousness of the time and overall circumstances, it is not entirely surprising that ONI would be chastised for being a bit too over zealous as it attempted to executive its duties in what was thought to be the most effective manner.

As had traditionally been the case, the bulk of all foreign intelligence collection continued to be performed by those naval attaches posted to U.S. diplomatic establishments in foreign countries. During the war years, naval attaches were forced to rely on the use of agent networks to insure the development of necessary and ever-increasing amounts of information. Emphasis was placed on the development of covert capabilities and the establishment of a global spy network that enlisted a string of agents throughout Latin American and the Far East.

The Lean Years

Some of these networks proved to be quite effective and lent themselves to the development of valuable information while others suffered poor organization and management, producing little other than scant or erroneous information that had disastrous effects at times.

The end of World War I brought a general demobilization and the country's desire to rapidly return to normalcy. With the Armistice signed and our country at peace, few could give reason to the need for maintaining other than a modest military.

Though not completely expendable, ONI with a war machine to support, came to be ignored in large part by the Department of the Navy which cut funding for personnel or operations and pared the organization back in all aspects to its barest minimum. Several years would elapse until 1926 when a limited effort was undertaken to establish groups of volunteer reserve intelligence officers whose goal became the gathering of information on individuals and activities that could pose a threat to U.S. naval security.

The intent was to create a cadre of personnel who could be called upon to render service in time of national emergency and by the beginning of 1927, some such groups had been created and started to operate in a manner that would be refined during the ensuing several years. Yet the mood of our nation was slow to change and it remained the strongest wish of many citizens that we continue to isolate ourselves from problems and entangling involvement with other nations.

Naturally, few could see the need to collect foreign intelligence and during these years such assignments continued to be regarded as especially undesirable by the regular Army and Navy officers given such responsibilities.

Though ONI by 1934 remained a small and neglected organization with only twenty-four officers and a clerical staff of eighteen, attitudes were slowly beginning to change in certain quarters of government where it was considered necessary to begin collecting more earnestly, information relating to the naval strength, war making capabilities and national intentions of certain foreign powers.

The chief source of this information continued to be the naval attaché system which had generally proven itself to be competent and capable in the past.
Additionally, a certain amount of data was collected by persons assigned to intelligence staffs of each Naval District although their contribution was quite often weakened by routinely being assigned too many diverse or non-intelligence activities. When the national ambitions of the Axis Powers finally brought Europe and the Far East to war, President Roosevelt mandated in June 1939, that ONI be responsible for the investigation of sabotage, espionage and subversive activities that pose any kind of threat to the Navy.

By the fall of 1940, a selective call-up of intelligence reservists for investigative and counterintelligence duties began, and following our entry into World War II, the Navy's investigative arm was manned almost entirely by reserve officer personnel.

A Tardy Awakening

For some time before the spring of 1914, events along the southern border of the United States had plainly foreshadowed an unfavorable turn in American relations with Mexico. President William H. Taft, therefore, on 21 February 1913, directed the movement of an Army division to the Galveston-Texas City area in order to be prepared to meet any eventuality. Because the War Department General Staff had already gained considerable experience from the similar but poorly planned and executed venture of some two years earlier, this troop concentration was accomplished in a comparatively smooth manner. The anticipated crisis, though, came to an unexpected head on the Gulf Coast rater than along the border, with the Mexican authorities at Tampico seizing a United States navy launch and holding its crews and passengers as prisoners. While these personnel were soon released, apologies and amends in strict compliance with the demands of the commander of the Atlantic Squadron were not forthcoming, so the entire Atlantic Fleet was moved into a position of readiness off Vera Cruz. A small naval force was also put ashore within that city to prevent the landing of an arms shipment destined for Mexican Army use. Military skirmishes promptly occurred and there was consequent loss of life on both sides.

Thoroughly aroused by these provocative developments, Congress

jointly resolved, effective 22 April 1914, that the President was fully justified in utilizing the armed forces of the United States to support the enforcement of his demands for redress against the Mexican Government.[6] Due principally to prior staff planning by the Joint (Army-Navy) Board, a reinforced brigade of Army troops under the command of Brig. General Frederick Funston was then successfully transported from several different American ports to disembark without major incident at Vera Cruz on 26 April 1914. This force proceeded to remain in Mexico until November of that same year.

Brigadier General Frederick Funston
PHOTO

Even though these significant military operations were taking place far to the south, the unsatisfactory military intelligence situation in Washington showed little real improvement. Only one bright spot had appeared on the horizon, with General Wood approving an order which stated that all units operating along the Mexican border would detail carefully selected officers to act, in addition to their other duties, as intelligence officers for collecting "such information as is possible from refugees and other sources, without leaving the limits of the United States."[7] The main obstacle continuing to stand in the way of any fruitful results from a program of this nature, however, was the fact that the War Department still lacked a staff agency capable of properly processing information derived therefrom. Besides, the officers involved could hardly be expected to put forth much of an effort as long as they were being called upon to perform their intelligence tasks in addition to their normal troop duties.

An event of enormous future portent from the military intelligence standpoint occurred on 18 July 1914, when Congress authorized the formation of an Aviation Section within the Army Signal Corps.[8] While airplanes had previously been utilized on an experimental basis for reconnaissance during maneuvers near New York City in 1912 and an aviation school was already functioning at College Park, Maryland, this legislative enactment served measurably to stimulate further air development throughout the United States Army.[9] It would thus not be long before the eyes of military commanders could be extended over undreamed of distances in seeking information about the enemy and terrain but this same improved capability would also generate a number of complex problems dealing with command, communications and logistics, so as to alter completely the entire existing military intelligence system.

Congress was at this time still appropriating separate funds each year for "Army War College Expenses" and "Contingencies, Military Information Section, General Staff Corps."[10] With the departmental military intelligence agency forming an integral part of the War College Division of the General Staff, this outmoded fiscal arrangement naturally provoked a large number of upsetting administrative difficulties. Wanting to respect Congressional wishes in the matter but also desiring to insure that the War College officials would have full control of both funds, it was decided to alter the departmental organization by splitting the War College Division up into a "Military Information Section" and an "Army War College Section." From this, it might be reasonable to assume that all the work performed by the Division, except that which was connected with operating the War College itself, would now bear directly upon military information activities. Such was not the case, however, because the so-called Military Information Section of the War College Division in May 1915

actually consisted of ten different standing committees, designated as follows:

Military Preparation and Policy *War Plans*
Organization, Equipment and Training
Regular Troops
Militia
Militia Education
Military Information and Monographs
History
Library and Map Room
Legislation[11]

According to a statement made by the Chief of the War College Division when this two-section was first adopted, the primary function of the new Military Information Section would be "to do current General Staff work."[12] It thus becomes readily apparent that the departmental military intelligence agency had finally reached the end of its disastrous journey down the road toward total extinction. The remnants of the original agency were now effectively buried within the Military Information and Monographs
Committee of a misnamed Military Information Section comprising a regular part of the War College Division. Moreover, the members of this standing committee were principally engaged in handling current staff action papers of many different kinds. There was no appropriate agency in being therefore, that could be counted on to supervise a suitable military intelligence collection program, process any information obtained from a collection program, or conduct counter-intelligence activities to satisfy the needs of the War Department and Army at large. This was the vital element so plainly missing in the general staff organization toward the close of 1915, even though the earth-shaking assassination at Sarajevo had already taken place more than a year before.[13]

When World War I suddenly broke out in Europe during the summer of 1914, the War Department found itself right in the midst of a determined campaign, launched earlier by General Wood himself, to reduce the number of Army officers serving on detached service.[14] This drive had been occasioned mainly by a severe shortage of officers that kept reappearing whenever important maneuvers were planned, since there was no adequate provision in the existing tables of organization to compensate for an ever-growing number of officer positions requiring duty away from troops. It carried very serious implications from the standpoint of military intelligence operations because all the military attaches and observers, as well as the officers attending foreign schools, came under this detached service classification. Even as late as February 1914, the Chief of the War College Division had forwarded to his superiors a most amazing official opinion to the effect that he considered American military attaches unnecessary in Spain, Italy, Austria and Belgium; Switzerland warranted a retired officer only; Russian remained doubtful; and the Balkan States and Turkey were merely of temporary importance.

This last item was apparently in reference to the Balkan Wars of 1912-13. An effort had been made in December 1912 to introduce a large group of American officers into the combat area, including a four-officer cavalry board headed by Brig. Gen. Edward J. McClernaud, to function as official military observers on the Balkan Allies side against the Turks. When the Bulgarian government refused to permit the presence of these observers, the cavalry board return to the United States. During a subsequent campaign, however, two of the other officers did manage to gain permission to visit "certain points of

interest" in Serbia and were then able to secure a considerable amount of valuable military information.[15]

A Counterintelligence Officer of the American Expeditonary Force and Belgian Intelligence questions a suspected enemy agent.
PHOTO

Furthermore, in the event that the United States Army was called upon to perform any extensive field operations, five military attaches, four of them from Europe, plus all nine student officers stationed in France and Germany, could be quickly relieved and returned to the United States for troop duty.[16]

This threatening intelligence personnel situation commenced to clear up right after the start of the war in Europe because the departmental authorities promptly realized the tremendous importance of obtaining as much information as possible about the combat operations in order to keep the United States fully abreast of all the latest military developments. The matter actually came to an immediate head during the opening days of the hostilities, when the American Military Attaches in Paris and Vienna, both requested permission to take to the field with their respective host armies and function in the capacity of military observers. This memorandum wisely concluded that it would be much better for the American military attaches in Europe to remain at their regular posts and execute intelligence tasks within the capital cities, while other officers, especially selected due to their technical ability and physical stamina, were detailed to act as observers in the field.[17]

General Blackjack Pershing leading the Mexican Punitive Expedition to capture Poncho Villa in 1916.
PHOTO

By November 1914, therefore, in addition to the thirteen military attache posts already established, which now included Austria, France, Germany, Great Britain, Italy, Japan, and Russia, American military observer groups were found to be operating with the combatant forces of France, Germany, Austria and Japanese. Two American military observers were also accepted by the Rumania Army early in 1916.

With this expanded military observer program resulting in a sizeable expenditure of extremely scarce War Department funds, Congress was soon persuaded to increase by $15,000 the appropriation under "Contingencies, Military Information Section, General Staff" for that particular purpose during FY 1916.

Apparently all went well with these several American military observer groups except the one which was initially formed in France. In that country, despite repeated complaints on the part of the officers directly concerned, the French authorities consistently refused to permit non-Allied personnel to accompany their armies in the field and thereby accomplish any worthwhile military observations. When this frustrating restriction was continued, the entire American group in France signed a "round robin" letter dated 19 July 1916 and addressed to the Chief of the War College Division, asking that they be granted the status of a Military Mission. They would then not only be able to operate independently of the United States Military Attaché in Paris but also acquire additional prestige for dealing with the recalcitrant French authorities.[18] While this move was strongly opposed by Lt. Col.

Spencer Cosby, the American Military Attaché, it duly received official approval and the necessary inter-government negotiations were completed in November 1916.[19] No real improvement seems to have come from the change, though, because as late as 29 December 1916, the Chief of the American Military Mission in France was still complaining that the privileges being offered to his personnel by the French Army for observing under field conditions were "practically the same as those extended to small unimportant countries, such as, for example, Ecuador and Siam.[20]

Poncho Villa (second from left) with two of his Generals, Toribio Ortega and Juan Medina. On Villa's right is Rodolfo Fierro, AKA the "Butcher."
PHOTO

Mexican border incidents were now again on the rise. These disturbances reached a critical peak early in March 1916, when the Mexican bandit leader Pancho Villa crossed the international boundary and launched an attack against Columbus, New Mexico, killing both US soldiers and civilians. With the revolutionary Mexican Government under Provisional President Carranza having thus proved itself incapable of protecting American lives and property along the border, it was decided to organize a Punitive Expedition under Brig. Gen. John J. Pershing, for the specific purpose of entering Mexico and capturing Villa.[21] This turned out to be an exceedingly difficult military task, especially in view of the fact that General Pershing's orders not only called for him to proceed against Villa and his followers but also directed him to pay scrupulous regard at all times to Mexican sovereignty.[22] The latter proviso became increasingly embarrassing after military contacts were developed with Mexican Federal troops following a relatively large scale skirmish with Villistas on 29 March 1916, near Guerrero, some 250 miles south of the border. From then on, clashes between the two regular forces stemmed chiefly from a growing hostile attitude taken by the Carranza government toward the continued presence of American troops in Mexican territory. The Punitive Expedition was finally withdrawn, effective 5 February 1917, with Poncho Villa still remaining at large but his military capabilities having been effectively curtailed.

As an experienced cavalry officer, General Pershing was fully aware of the direct relationship that must always exist between adequate reconnaissance and the security of a military command. He further recognized that the ultimate success or failure of his isolated expedition into Mexico would hinge largely upon an ability to secure timely and dependable information about the forces opposing him, as well as the terrain over which he would have to operate. Since he had previously held military intelligence and general staff duty assignments, he also realized the necessity for keeping the War Department properly informed on his current military situation. He thus took prompt steps to appoint as his intelligence officer Maj. (later Brig. Gen.) James A. Ryan, 13th Cavalry, an officer he considered well-qualified for directing an efficient field intelligence organization and one who was already proficient in the Spanish language.[23] Similarly, carefully chosen military intelligence personnel from both the War Department and the Southern Department were ordered to serve at his expedition headquarters. The net result of all this intelligence appreciation was that frequent and copious information reports were sent back to the War Department, mostly in the forms of telegrams. Although an officer of the War College Division had been detailed to read these reports, this was apparently the only positive action taken in connection with them.

As a matter of fact, it remains very doubtful that the bulk of them ever found their way into the War College files.[24]

The interior of an Intercept Station operated by the Signal Corps on the Mexican Border in 1918.
PHOTO

General Pershing was given tactical control of the First Squadron, Aviation Section, Signal Corps, stationed at San Antonio, Texas, to assist him in solving his difficult reconnaissance problems and to utilize as a supplementary means of communications.[25] Because of the low power of the eight available airplanes, however, in contrast to the high altitude and long distance required for flights over Mexican territory, this service did not prove to be of "material benefit" for either of these purposes.[26] On the other hand, his intelligence organization seems to have made full and excellent use of native agents hired to provide the command with needed information concerning both the Villistas and Carranzistas.[27] Approximately 20 Apache Scouts were also engaged in performing local reconnaissance and tracking missions.[28]

While these historic events were taking place in Europe and Mexico, the unsatisfactory situation with reference to the submerged status of the departmental military intelligence agency continued to remain essentially unchanged. On the other hand, military information was still flowing into Washington from a steadily increasing number of established collection sources throughout the field. Most of this material sooner or later did find its way to the Military Information Committee of the War College Division, but the problem of properly processing it had admittedly become more than its limited membership could manage. Since the Committee was also unable to give any due consideration to the matter of publishing military information for use by the Army at large, this important phase of the intelligence effort was likewise being noticeably neglected.[29]

Recognizing that this failure to disseminate available military information to the Army was a major deficiency, the departmental officials attempted early in 1916 to take one remedial step which had some rather embarrassing repercussions. Acting upon a suggestion from the Chief of the War College Division himself, arrangements were made with the Commandant of the Command and Staff School at Fort Leavenworth, Kansas, to have certain intelligence reports, forwarded to that institution for the purpose of preparing intelligence publications for appropriate Army distribution. The first publication issued under this new system, however, brought forth a strong note of protest from the British government because the information upon which it was based had been given to the American Military Attaché in London only after securing his solemn promise to maintain an utmost secrecy in the matter. Hence, this promising experimental program was abruptly cancelled.[30]

The dangerous state of affairs, relative to the manner in which the War Department was failing to fulfill its military intelligence responsibilities, during this period of ever-worsening international relations, was not permitted to go unchallenged by the few experienced intelligence officers remaining assigned to the War College Division.

As a matter of fact, they kept forwarding strenuous complaints on the subject to the Chief of Staff at regular intervals. One of the most comprehensive and forceful presentations along such lines was prepared by Maj. (later Maj. Gen.) Ralph H. Van Deman of the General Staff Corps, who had been an early member of the original Military

Information Division, and had later played a key role in connection with Army intelligence operations in the Far East. As a true intelligence zealot he became gravely perturbed when, following his arrival in May 1915 for duty within the War College Division, he observed how the War Department was neglecting to execute its basic military intelligence mission. During March 1916, he drew up a detailed summary of historical facts bearing upon the problem and concluded therefrom that the reestablishment of a separate Military Information Section without further delay was plainly indicated. This study was then not only promptly approved by Brig. Gen. H.H. Macomb, Chief of the War College Division, but also forwarded to the Chief of Staff with an added comment that he personally believed the time had now come to effect a sweeping reorganization of the entire General Staff structure on a totally new basis.[31]

Col. Ralph M. Van Deman became the first Chief of the War Department's Intelligence Organization when it was established in World War I.
PHOTO

Although no immediate improvement resulted from these particular War College Division recommendations, the Chief of Staff soon did authorize one important action, long advocated by the military intelligence officials, which was deliberately aimed at achieving a better coordination of effort for collection activities in the field. A general order was thus published, on 25 April 1916, directing as follows:

> 1. Department commanders will establish and maintain an intelligence office at their headquarters to operate under the personal supervision of the Department chief of staff.
>
> 2. This will also arrange for the detail of intelligence officers at such posts and field detachments of their subordinate commands as is deemed necessary by the circumstances.
>
> 3. Each Department intelligence, insofar as its intelligence duties are concerned, will be considered a branch of the War College Division.
>
> 4. The Department chief of staff is authorized direct communication in intelligence matters with the War College Division but all military information will first be brought to the attention of the Department commander before being forward thereto.
>
> 5. The duties of the intelligence officers will consist generally of collecting and preparing military information for use by the headquarters to which they are attached but, in addition, they should keep the superior headquarters properly informed.
>
> 6. Department intelligence officers will set up a complete file and index of all maps, reports, communications, and other intelligence data in accordance with subsequent instructions to be issued from the Office of the War Department Chief of Staff. Moreover, all intelligence items

will be regarded as confidential until released by authority of the Chief of Staff.

This general order did initiate several progressive steps in the direction of improving intelligence collection practices for the United States Army but it also represented a distinct compromise with reference to the key question of what direct command authority, if any, the departmental military intelligence agency should exercise over intelligence personnel operating in the field. Even though it included a statement that the department intelligence offices would function as "branches" of the War College Division, the strict application of this particular provision of the original statement remained clear, however, with the intelligence officials in Washington recalling the completely dependent status of the previous Havana and Manila Branch Offices, and wanting to form an Army-wide military intelligence system along parallel lines.

During 1915, when the Nation was simultaneously faced with the threat of further trouble in Mexico and the growing possibility of becoming directly involved in the European War, the matter of military reform again came under active consideration.[32] Secretary of War Lindley M. Garrison had already instructed the War College Division of the General Staff to prepare a broad study covering the entire field of America military policy. This study, which was finished in 1915, then led to a thorough airing of that politically explosive subject in Congress.[33]

With these Congressional discussions still in pro-gress, Garrison chose to resign in order to register a sharp protest over President Wilson's refusal to accept his proposal for the establishment of a Federal Reserve force which could favorably supplement an enlarged Regular Army and improved National Guard.[34] This personal sacrifice on the part of a notably courageous Secretary of War served to dramatize the issue of military reform and helped materially to insure Congressional passage of a new and comprehensive National Defense Act in June 1916. The Act not only called for the creation of an Army of the United States to consist of a Regular Army, Volunteer Army, Officer's Reserve Corps, Enlisted Reserve Corps, National Guard while in the service of the United States, and other land forces authorized by law, but also permitted an increase in the strength of the Regular Army up to a total of 175,000 by means of annual increments extending over the next five years.

Meanwhile, on 9 March 1916, Newton D. Baker was appointed the new Secretary of War. Although possessed of a strong pacifist background and, like Secretary Elihu Root, without any previous experience in military matters, Baker was destined to be regarded as one of the truly great American Secretaries of War. This seems all the more noteworthy because, during a lengthy term of office, from 9 March 1916 to 4 March 1921, his extraordinary talents were constantly taxed to the utmost by the terrific demands of World War I and its complicated aftermath. When he first assumed office, for example, he was immediately faced with the tremendous task of revitalizing a newly-created Army of the United States under legislative authority granted to him by an untried National Defense Act that had been optimistically designed to mature over a lengthy period of five years. Actually, of course, it was to be less than one year before the war clouds descended upon the country in full force.

The National Defense Act of 1916 did represent a forward advance of major proportions for providing the War Department with badly needed legislative assistance in solving some of its more important national

defense problems but it also included several unfavorable stipulations which were pointedly aimed at the Army General Staff. Unfortunately, these same stipulations could only serve to handicap the proper execution of the Act itself. One of them, for example, specified that not more than half of the officers detailed to the General Staff Corps "could be at any time station or assigned to or employed upon any duty in or near the District of Columbia." Although the Act also granted an increase of 18 officers for the General Staff Corps, this expansion was scheduled to come in annual increments extending over a five-year period.

CONTINUE CHAPTER 3

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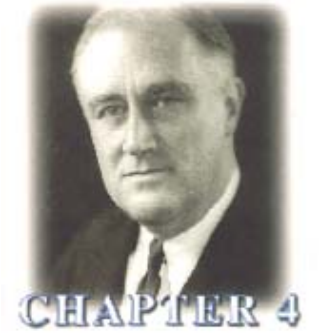
AMERICAN REVOLUTION TO WORLD WAR II



Counterintelligence Between the Wars

Introduction

The "war to end all wars" was over and the United States was poised on the threshold of world leadership, when the American people retreated into a period of isolationism. They wanted to forget the war, and its destructive influence on the nation's psyche, and forget the world's problems. Americans wanted to be happy and enjoy life.

Enter the "Roaring Twenties." Depicted in movies by speakeasies, gangsters, dapper college boys and flapper girls dancing to the new, electrifying jazz, it displayed an era of happy, carefree Americans enjoying a materialistic lifestyle. That image disguised the many problems facing the nation. Most Americans still harbored deep-rooted bias against foreigners immigrating to the United States. To them, these refugees from abroad were undercutting their dreams of a good life by willing to work for low wages. They also brought the evils associated with the Old World and the new evil of communism.

A "Red Scare" began to sweep the country. American business leaders alleged that there was more to the growing strikes across the nation than workers desiring higher pay. They accused the foreign "Reds" and anarchists, Bolsheviks, Communists and Socialists of plotting to destroy the American way of life. Hysteria increased. Government leaders said that unless these anarchists were stopped, a Red revolution would subvert America.

In June 1919 a bomb exploded outside the home of Attorney General, A. Mitchell Palmer, which killed the bomber. A search of the body found leaflets, which suggested a foreign conspiracy. Almost six months later, Palmer, using the Bureau of Investigation and citizen volunteers, launched a series of raids on "radical" meetings. Thousands of people were arrested without cause. Palmer was a hero but as the raids and the abuses committed by the raiders continued, American public opinion shifted. In the end, Palmer and the Bureau of Investigation were rebuked.

There were cries that the Bureau of Investigation be stripped of its investigative authority and that the Secret Service be given this role. Instead, a new Attorney General, Harlan Fiske Stone, decided that the Bureau was needed but had to operate under strict legal guidelines. Stone fired William Burns, chief of the
Bureau, and abolished the General Intelligence Division, headed by J. Edgar Hoover. Hoover was then made acting director and later director of the Bureau.

Further, after World War I ended, the military did not want to terminate its cryptographic and decoding activities. Working with the Department of State, a Cipher Bureau was established in New York with secret funds provided by State. This bureau became known as the "Black Chamber." Using cooperative liaison contacts in Western Union Telegraph Company and the Postal Telegraph Company, the Black Chamber was given access to diplomatic cable traffic. The Chamber operated until the new Secretary of State, Henry Stimson, withdrew State Department's funding in 1929. The military then transferred the Chamber's functions to the Army Signal Corps.

In the early 1930s, a special committee, led by New York Congressman Hamilton Fish, was authorized by the House of Representatives to investigate communism. After almost a year of study, the committee concluded that the federal intelligence community had no authority to deal with the growing problem of communist activity. The committee recommended that the Department of Justice severely crackdown on communists but the recommendation fell on deaf ears.

In 1934 Congress granted the Bureau of Investigation the power to make arrests but required the Bureau to obtain a warrant from the Judiciary prior to making the arrest. To obtain the warrant, the Bureau was required to show reasonable grounds for suspecting the person to be arrested and the Judiciary had to agree with the grounds.

In 1938, Texas Congressman Martin Dies, who headed a special committee to investigate subversion in the United States, continued to shove the Roosevelt Administration and the FBI to be more active in the investigation of communists and Nazis. The FBI informed Congressman Dies and his committee that it had commenced "building up a system of internal security" since early 1935.

There was an ardent desire by the counterintelligence community to counter this newly perceived threat but the old arguments surfaced as to what government entity

would be in charge. President Roosevelt, also feeling the heat from the Dies Committee, directed the creation of the modern federal counterintelligence system. He temporarily solved the mistrust and discord that plagued the counterintelligence community in a series of presidential directives that gave the FBI the mantle of lead agency to investigate and conduct domestic surveillance against individuals and organizations posing a threat to the United States.

Having gained the advantage over the Army's Military Intelligence Division and Navy's Office of Naval Intelligence, Hoover would never waive his primary role. This would have serious consequences when the Office of Strategic Services is formed during World War II and the Central Intelligence Agency is created in 1947.

The Corps of Intelligence Police From 1917 To World War II

During World War I the Intelligence Section, American Expeditionary Force, recommended and the War College Division sanctioned the establishment of the Corps of Intelligence Police. Authority for such action was contained in the provisions of Section II of an Act of Congress (approved 18 May 1917) giving the President the power to increase the Army to meet the national emergency. This Corps of fifty men in the rank of sergeant of infantry was to report for counterespionage duty under the Commanding General, American Expeditionary Force. On 13 August 1917, War Department General Orders officially established the Corps of Intelligence Police.

A French-speaking officer with experience in police work was given the mission of recruiting the men. He traveled to New Orleans and New York City where he advertised in the local newspapers for men who could speak French to do intelligence work in France. He accepted all candidates who could pass the Army physical examination and answer a few simple questions in French.

On 25 November 1917, the Corps of Intelligence Police, fifty strong, arrived in St. Nazaire, France. Some were sent to British Intelligence at Le Havre for further training. The others were assigned to the rear area under the control of General Headquarters or were merged with divisional intelligence sections. The Le Havre Detachment worked at copying British suspect lists and counterespionage summaries and began indexing these lists. This training continued until a short while before the Armistice.

In January 1918, the Corps opened its office in Paris and began work on its central card file, securing names from British, French, and American sources. At the end of the war this file contained some 50,000 names.

The first actual counterespionage work was done at St. Nazaire where enemy agents were reported to be active. Agents apprehended by the Corps of Intelligence Police were immediately turned over to French authorities for disposition. Civilians were screened, travelers checked, and passports examined. In addition to work of a counterespionage and security nature, the Corps of Intelligence Police also did investigative work for the Department of Criminal Investigation by conducting fraud and graft investigations. Members of the Corps of Intelligence Police were assigned to the American Peace Delegation in Paris. One

detachment was assigned to guard President Wilson's residence while he was in France.

In January 1918, authorization was granted to increase the Corps gradually to an eventual strength of 750 men. One year later, there were 405 agents on duty with the American Expeditionary Force. However, the allotted 750 vacancies were never filled because of the Armistice and demobilization of the Corps.

Meanwhile, during the years 1917-1918, the work of the Corps of Intelligence Police in the continental United States was carried out under the Chief of the War College Division, General Staff. On 28 November 1917, the Corps was increased to 300 men, 250 of whom were to work within the United States. In March 1918, with the abolition of the War College Division of the General Staff, the Corps of Intelligence Police was transferred to the control of the Military Intelligence Branch of the Executive Division of the General Staff.

The next increase in strength came in an order from The Adjutant General dated 4 September 1918. This was deemed necessary because of the rapid increase in the number of investigations being conducted throughout the United States and the territorial departments.

However, these goals were never reached, for by January 1920, of a total of 600 men who had been on duty in the Corps of Intelligence Police, only 18 remained. This caused serious concern among those who saw the menace of failing to provide a permanent place for the Corps of Intelligence Police in the organization of the Army. Many saw the necessity for such personnel, in New York, Washington, and the Western and Southern Departments for investigation and guard duties of a strictly confidential nature. Therefore, authority was requested to detail not more than 24 sergeants of the duly authorized organizations of the Army for intelligence service. These were to be evenly divided among the Eastern, Western, and Southern Departments, and the District of Columbia. The Adjutant General granted the authority for such action on 7 February 1920. These men were to be subject to the orders of the Department Commander in whose territory they were assigned, except for the six men on duty with the Western Department who were to be subject to the orders of the Director of Military Intelligence. However, this order did not create a permanent status for the Corps of Intelligence Police in the organization of the Army.

A series of memoranda, prepared by the Director of Intelligence, pointed out the necessity for such a body of men, requested a permanent organization for the Corps of Intelligence Police, and set forth the quotas for the Corps Areas and Departments. The quota of 45 sergeants allotted by the resultant order was not as great as had been desired by the various Corps Areas and Departments, but it did give the Corps of Intelligence Police a permanent foothold in the organization of the Army.

Duties of the Corps of Intelligence Police were outlined by the War Department in the spring of 1921. All individuals who might be suspected of operating against the Military Establishment were to be closely observed. In addition, the Corps of Intelligence Police was directed to report on radical activities in political and industrial fields. This was a tremendous assignment for a handful of men whose number was reduced to a mere 30 in 1922 when the Army was cut to 125,000 men.

The policy of isolationism that swept the country at that time made it impossible to increase the Army in general and the Corps of Intelligence Police in particular. Although there was important work for

the Corps, the policy of the Army prohibited the Corps of Intelligence Police from growing large enough to control subversive activity or directly affecting, the Military Establishment. However, in 1926, when it became clear that the Corps of Intelligence Police would have to expand rapidly in an emergency, a "Mobilization Plan" for the Corps was drawn up. The initial strength of the Corps was set at 250 men with provision for increments as the mobilization progressed. The functions of the personnel were outlined more clearly, and a promotion plan formulated.

Despite the best intentions of the men who were aware of the real value of the Corps of Intelligence Police, a further decrease occurred in 1926, which brought the total to 28; and in November 1933, strength was decreased to 15. This curtailment of essential personnel was effected as an economy move in the days of the depression. It was argued that the grades held by the men were too high for the clerical duties they were performing. It was even suggested that other military personnel or civilian employees replace the Corps of Intelligence Police in certain localities. To this, the Philippine Department answered:

> *"This Department presents a special case in that its distance from the homeland, its close proximity to World Powers, its heterogeneous mixture of foreigners, and the uncertainty of the future, all tend to emphasize the importance of keeping the Commanding General fully informed at all times. In order to perform this important duty, the scope of the organization charged with its execution is wide and varied...All of the present members of the Corps of Intelligence Police are men of proven ability, loyalty, and experience... Were any of these agents replaced by civilians or military personnel, it would confront this office with the necessity of building a new organization and discarding one which has reached its present state of efficiency after years of intelligence effort and experience."*

From 1934 to 1939, with but a single increase of one man authorized for work in the Philippine Department, the Corps of Intelligence Police existed precariously with its small quota. Meanwhile, continued reports indicated that Japanese and Nazi activity were on the upswing in the Panama, Hawaiian, and Philippine Departments. Finally, in June, 1939, President Franklin D. Roosevelt issued a proclamation which stated that the control of all matters of an espionage, counterespionage, and sabotage nature would be handled by the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Division of the War Department, and the Office of Naval Intelligence of the Navy Department. The Directors of these three agencies were ordered to function as a committee to coordinate their activities.

One year later, the chiefs of the three agencies involved drew up an agreement as to jurisdiction, with particular emphasis given to foreign operations. Further revision of this agreement, defining clearly the work to be handled by each agency, was made in February 1942. This has become known as the Delimitations Agreement of 1942.

Expansion of the Corps began almost immediately. In June 1940, authorization was granted to bring in an additional 26 men. In December 1940, the allotment was increased to 188 men. Although some difficulty was experienced in recruiting, because of a lack of definite standards of qualifications, it was soon established that only men of the highest integrity with a high school education or better would be selected. On 20 February 1941 a total of 288 men was reached. A total of 18 agents was allotted to the important Panama

Canal Department. By 31 May the over-all total swelled to 513, and by 17 February 1942 the Panama Canal Department alone could count 59 men on duty there.

In January 1941, the office of the Chief of the Corps of Intelligence Police-Sub-Section, Investigating Section, Counter Intelligence Branch, Military Intelligence Division, was established. On 24 February 1941, the Corps of Intelligence Police Investigators School became operational in the Army War College and, after two classes, was moved to Chicago. By April, Technical Manual 30-215 (Tentative) was published, thereby creating a definite and consistent procedure of training for all personnel in the Corps.
On 6 December 1941, the eve of Pearl Harbor, the Corps of Intelligence Police was a permanent organization of the Army, organized under the direction of the Assistant Chief of Staff, G-2, General Staff. It had authorization for 513 enlisted men, and had begun the task of expanding its work under the policies set forth in the Delimitations Agreement. Suddenly the days of begging for men and money had come to an end. The problem was now to grow as rapidly as possible, procure and train men, and do a professional job simultaneously.

Memo to Director of Naval Intelligence

United States Asiatic Fleet
U.S.S. Huron, Flagship
Manila, P.I.
24December 1923

From: Commander in Chief
To: Director of Naval Intelligence

Subject: Orange[1] Radio Code

1. Information has been received from a reliable military source that considerable progress has been made in the Department of Military Intelligence, Washington, in breaking certain Orange Radio Codes.

2. If the above information is true, the Commander in Chief considers it of vital importance that all such data be available in his SECRET files prior to any emergency that may arise.

3. Should the above information be sent to the Commander in Chief, and if the Director of Naval Intelligence considers it advisable, the mailing envelope will be kept sealed and the seal unbroken until such conditions arise that make it advisable to open it.

4. In connection with the above, it is considered highly desirable that an officer who has completed the Orange language course be made available for duty in the Asiatic Fleet. One such officer is at present on duty on board the flagship, but he is at present under orders to the United States, and his departure will leave no one who is able to speak or translate Orange language.

Thos. Washington
Army's Domestic Intelligence

Under the terms of the National Defense Act of 1920, the six territorial departments of the Army within the continental limits of the United States, were superceded for purposes of administration, training and tactical control by nine corps areas. Likewise, for inspection, maneuvers, war mobilization and demobilization, these same corps areas were further grouped into three larger army areas with the commanding officers and staffs for them to be named from time to time only as necessity arose. The overseas territorial commands, however, continued to remain officially designated as departments.

Subsequent War Department orders also required that there should be an "Assistant Chief of Staff for Military Intelligence" included on the staff of the Commanding General of each Corps Area and Department. This, of course, would have been a particularly appropriate time for the War Department authorities to describe in detail the specific duties assigned to these Corps Area and Department Military Intelligence officers, as well as to establish beyond any doubt their precise relationship to the Assistant Chief of Staff G-2 in Washington. Unfortunately for all concerned, though, these two important steps were not properly taken.

Both the MID officials and the Corps Area Intelligence officer soon felt the need for additional information to provide the latter with effective guidance in the conduct of their assigned duties. It was finally decided, therefore, to furnish each Corps Area and Department Headquarters with six hastily revised copies of a pamphlet that had been prepared during 1918 for use by the field intelligence offices in order to form a divisional intelligence service. This obsolete wartime pamphlet was given the new title of "Provisional Instructions for the Operations of the Military Intelligence Service in Corps Areas and Departments" but it still contained a number of references to approved wartime methods for investigating individuals and groups who might become involved in domestic disorders within the United States. Its issuance under peacetime conditions thus plainly presaged future difficulties for the departmental military intelligence agency.

Following the conclusion of World War I, most of the experienced intelligence personnel within the War Department felt strongly that MID should continue to follow the growth of all significant radical movements either at home or abroad, so as to discharge fully its basic military intelligence responsibilities.[2] This action appeared to be even more essential in view of the possible need for a sudden commitment of Federal troops in the event of major domestic disturbance[3] and because of the constantly increasing efforts by various extremist groups to subvert members of the armed
forces. There was no desire on the part of these same officials; however, to examine in any way the political beliefs or other private opinions held by military personnel.[4] That was one reason why an agreement had been concurred in calling for the War Department to relinquish all previous activities connected with military graft and fraud investigations and to turn the entire function without delay over to the Department of the Justice.[5]

Despite every possible effort by the department intelligence authorities to execute their domestic intelligence responsibilities in a manner calculated to avoid outside criticism, they were steadily forced on the defensive. Important segments of the American public were in no mood to countenance any military intelligence activities which they could construe as being an intrusion into their own private affairs, while left wing socialist and pacifist organs remained constantly on the alert to publish in sensational style whatever evidence that came to light point toward military intelligence involvement in such matters.[6] In the MID

annual report for the fiscal year ending 30 June 1921, the military security mission assigned to the Negative Branch was most carefully defined as consisting only of the following non-operational tasks:

> 1. Observation of movements within the United States whose object is the overthrow by violence of the government of the United States, or the subversion of the loyalty of the personnel of the military establishment.
>
> 2. Observation of the activities based on foreign countries the object of which is the overthrow of the United States by force.
>
> 3. Study of the measures necessary for carrying out the counter-espionage service in the military establishment in time of war."[7]

The problem of how best to acquire needed information on important radical movements in the United States during peacetime, without stirring up a public furor or encroaching upon the established authority of the Department of Justice, continued to remain an exceedingly vexatious one for the military intelligence authorities to solve. It already had become clearly evident that it no longer be practicable for MID to perform any actual investigations of American individuals engaged in radical activities, even though their activities were closely related to military subversion or might bear directly upon the possible use of Federal troops in domestic disturbances.[8] The only practicable course of action appeared to lie in working out some sort of an arrangement wherein MID could regularly receive from the Department of Justice "sufficient information on individuals to enable it to have full knowledge of radical and interracial movements" developing within the United States. Necessary steps were taken toward the end of 1920, to initiate a series of conferences between the responsible officials of MID and the Department of Justice on domestic intelligence matters.[9] When these exploratory talks proved to be successful, a formal agreement was jointly signed by Maj. W.W. Hicks, Chief, MI4 and J. Edgar Hoover, which said:

> 1. The Department of Justice will transmit to MID eleven additional copies of its General Intelligence Bulletin, for distribution to each of the Corps Area and Department Intelligence Officers of the Army. Also, after having been officially designated to the Department of Justice by MID, these same Corps Area and Department of Intelligence officers will be granted full access by the Divisional Superintendents of the Department of Justice to their field reports. Such reports, however, are to be examined at the Department of Justice field offices and not removed therefrom by the military intelligence personnel.
>
> 2. MID will furnish to the Division of Investigation enough extra copies of its "G-2 Weekly Situation Survey" for distribution to the nine Divisional Superintendents of the Department of Justice in the field.[10]

Upon completing this noteworthy agreement with the Army intelligence authorities, Hoover took the occasion to declare:

> *"I sincerely hope that the plan which we have devised for a more thorough and effective cooperation will be satisfactorily carried out and if there is any matter which should arise in connection with the arrangements do not*

hesitate to bring the same to my attention as I am particularly desirous of establishing a thorough cooperation between our two services."[11]

Although the MID officials did manage in this way to remain for the time being comparatively well- informed regarding the domestic intelligence situation, problems of an extremely embarrassing nature kept coming up on the subject at frequent intervals. These problems were derived principally from the fact that many of the Corps Area G-2's were still conducting undercover investigations along the lines described in their previously issued "Provisional Instructions for the Operation being of the Military Intelligence Service in Corps Areas and Departments." Since activities of this type had already caused a large amount of adverse public comment to be directed against the United States Army, the Director of Military Intelligence, in June 1922, secured permission from the Office of the Chief of Staff to rescind that offending pamphlet. At the same time, the Corps Area Commanders were specifically instructed, as follows:

The Assistant Chiefs of Staff, G-2 of Corps Areas should be charged with such of the specific duties of the Military Intelligence Division enumerated in paragraph 9, AR 10-15, as are applicable within their respective boundaries. They should be required to make studies from an opponent's point of view of possible operations on the frontier contiguous to their areas, as such studies are necessary for the formulation of mobilization and defense plans. In general, except for the supervision of all activities concerning Military Topographical Surveys and Maps, the collection of information pertaining to our own territory is a function of staff sections or branches other then G-2.[12]

This noticeably vague letter describing the duties of the Corps Area G-2's fell far short of constituting a suitable official directive for delimiting their operations within the domestic intelligence field. Questionable intelligence practices continued in most of the Corps Areas, especially because all the higher tactical headquarters of the Army were still being required to maintain an up-to-date emergency plan covering the possible commitment of their troops in local civil disturbances.[13] It was finally considered necessary, therefore, to dispatch another letter on the same subject to the Corps Area Commanders, in December 1922 as follows:

The Secretary of War is much concerned at reports from time to time of the activities of intelligence officers in the United States. It is obvious that the American people are very sensitive with regard to any military interference in their affairs. Harmless and even readily justifiable inquiries arouse suspicion and opponents of the Army are very apt to quote such acts as forms of Russian or Prussian military supervision. During the World War it became necessary to investigate individuals, groups and corporations…. All investigations ceased shortly after the Armistice but the general idea was kept alive by the seeking of information preparatory to the drafting of the various local War Plans White. The result is that in the minds of civilians and those of many officers as well, the word "intelligence" is associated with the investigations and inquiries mentioned above.[14]

While this more strongly worded communication seemed to put across the desired point effectively to the Corps Area G-2's themselves, it failed to solve the problem of curbing activities of the more enthusiastic

intelligence officers at post, camps and stations, or members of the Military Intelligence Section of the Officers Reserve Corps (M.I. Reserve) who were sponsoring semi-private investigations of radical groups on their own. As long as these individuals kept operating, it probably would be only a matter of time when one of them would undertake some embarrassing project and put military intelligence right back on the front pages of the so-called liberal press. An incident of this sort did take place, derived from a circular letter written by 1st Lt. W.D. Long, Post Intelligence Officer, Vancouver Barracks, Washington, and addressed to all "County Sheriffs of the State of Oregon."[15]

Sent out on his own initiative and without the knowledge or sanction of his commanding officer, the letter contained the following highly explosive statements:

The Intelligence Service of the Army has for its primary purpose the surveillance of all organizations or elements hostile or potentially hostile to the government of this country, or who see to over-throw the government by violence.

Among organizations falling under the above heads are radical groups such as the I.W.W., World War Veterans, Union of Russian Workers, Communist Party, Communist Labor Party, One Big Union, Workers International Industrial Union, Anarchists, Bolsheviki, and such semi-radical organizations as the Socialists, Non-partisan League, Big Four Brotherhoods, and the American Federation of Labor.[16]

As might well be expected, when this circular letter was reproduced in such news organs as *The Nation* and *The Labor Herald*, a violent storm erupted. The affair not only received prominent editorial coverage throughout the country but also caused a deluge of protesting letters to reach the President and Secretary of War, many of them signed by politically influential labor leaders.[17] Secretary of War John W. Weeks ordered the immediate relief of Lt. Long from his military duties[18] and instructions dispatched to all Corps Area Commanders for them to take whatever steps were necessary to insure that no intelligence officer would be appointed in the future at any post, camp or station unless the assignment was specifically prescribed under an existing table of organization.[19] Furthermore, whenever a table of organization did call for the assignment of such an intelligence officer, his responsibilities were to be limited strictly to training troops in their combat intelligence duties.[20]

Still remaining at hand, however, was the ticklish problem of curbing unofficial investigative activities on the part of individual M.I. Reserve officers. This matter was soon handled by addressing a War Department letter to all listed members of the M.I. Reserve and forwarding it to them through their respective Corps Area Commanders. The letter first emphasized that the mere fact of an appointment in the M.I. Reserve did not automatically give the individual permission to perform military security investigations and then went on to forbid the actual conduct of any operations of such type unless they had been directly authorized by the War Department. It also warned each M.I. Reserve officer against taking any personal advantage of his military commission to promote some unofficial investigation in which he might be privately engaged.[21]

These various strictures on domestic intelligence activities were originally applied with equal force both within the overseas Departments and the Corps Areas. It was not long, though, before the intelligence officials of the overseas departments started to complain that they were being seriously hindered by them in the execution of

their primary missions. For example, on 16 February 1924, the Assistant Chief of Staff G-2, Hawaiian Department, protested that owning to the peculiar racial conditions existing throughout his area and the absence of any other governmental agency capable of keeping him properly informed about the domestic situation, it was necessary for him to carry out investigations similar to those described in the recently rescinded War Department countersubversive pamphlet. He requested permission, therefore, to continue maintaining "the close watch and supervision that is now being kept on our alien and other racial groups" in Hawaii.[22] Despite the admitted special conditions in his area, the MID authorities chose to reply to him most indefinitely as follows: "You must appreciate that both the letter and spirit of the recent instructions are opposed to investigation activities by military authorities and contemplate them only when absolutely necessary in the interest of national defense or when civilian agencies do not function."[23]

The G-2's of the Panama Canal and Philippine Departments likewise expressed themselves as being thoroughly dissatisfied with the new domestic intelligence situation. The former commented that "a G-2 should be able to give warning of approaching trouble and not wait until trouble starts to find out what it is all about," while the latter felt that in the Philippine area it was "essential that the G-2 be fully informed of the political situation at all times and to do this it is necessary to carry on a modified form of espionage.[24]

On 8 March 1924, the Assistant Chief of Staff G-2, Sixth Corps Area, finally made the rather telling point that he could hardly be expected to devise a suitable counterespionage system for his command under the existing War Department Mobilization Plan unless he was granted access to some effective form of official guidance in the matter. When he further requested that the rescinded provisional instruction pamphlet be reissued to him for such purpose, the action was approved by the Deputy Chief of Staff but only with the proviso that all the returned copies would be clearly stamped "To Be Used Solely in the Preparation of War Plans."[25]

A discouraging climax to the entire postwar domestic intelligence effort occurred early in April 1925. By the time it had become completely apparent to Col. (later Brig. Gen.) James H. Reeves, the Assistant Chief of Staff G-2, War Department General Staff[26], that MID was not receiving enough information under the approved system to fulfill its assigned military security responsibilities for developing the War Department General Mobilization Plan. He believed that the Corps Area Commanders should again be required to forward periodic reports to the War Department "relative to groups and organizations which might be involved in internal disorders or in aiding an enemy." To accomplish this action, he had a letter drafted in MID for dispatch to all the major unit commanders that slightly modified the restrictions that were already in force covering the collection of such information. When this proposed letter was submitted to the Chief of Staff for his approval, it came back with the following unfavorable notation inscribed on it:

> ***DISAPPROVED:*** *G-2 in liaison with Department of Justice should keep in good touch with general situation without calling on Corps Area Commanders.*
>
> *By order of the Secretary of War*
>
> */s/ D.E. Nolan*

D.E. NOLAN
Major General
Deputy Chief of Staff[27]

A marked deterioration in the performance of basic counterintelligence responsibilities within MID was now plainly evident, with irresistible pressures generated by a hostile public opinion having forced the departmental military intelligence authorities to adopt an essentially negative approach to the whole problem. During 1927, 1928, and 1929, therefore, with reference to domestic intelligence, the following carefully worded paragraph appeared as a regular part of the G-2 Annual Report:

The collection of information by G-2 regarding the radical situation in the United States is confined to that which appears in the public press. The information collected is studied in connection with the possible effect of the radical situation upon the execution of any existing or proposed war plans. It
is also studied in connection with the effect upon the efficiency of the Army of the United States at the present time, especially with reference to the military training in schools, colleges and activities of pacifists and radicals.[28]

It was during this particular period that M/Sgt. John J. Mauer, Corps of Intelligence Police, was put in personal charge of all MID activities bearing upon Communist activities and the subversion of Army personnel. He continued to supervise these operations until 18 January 1943, when he was finally forced to transfer to an inactive reserve status "by reason of physical disqualification." His duties were considered to be so ultra-secret that even many members of his own MID branch had no true idea of who was or what he was actually doing. Under his efficient direction, the cellular organization commencing at company level, which had been introduced into the Army in World War I to detect subversives, was first reestablished and then revitalized.

During 1929, in compliance with a provision of the War Department General Mobilization Plan, the MID Operations Branch completed a new "Regulations for Counter Espionage in Time of War." These regulations were promptly approved by the Chief of Staff but with the stipulation that they would be issued only to key field commanders who might have a definite need for them in the appropriate development of their respective mobilization plans.

Early in 1931, with the Nation already in the midst of a severe economic depression and the threat of serious domestic disturbances mounting daily, Brig. Gen. A.T. Smith, the new Assistant Chief of Staff G-2[29], decided to reopen once more the sensitive question of MID shortcomings in not being able to maintain an effective surveillance over radical activities in the United states. On 19 February 1931, he submitted a relevant study to the Chief of Staff, which strongly recommended the lifting of all restrictions in regard to corps area and other field intelligence officers investigating such matters. Even though this recommendation had been formally concurred in by the G-1, G-3, G-4, and the Chief of the War Plans Division, it was disapproved by the Chief of Staff, Gen. Douglas MacArthur, who declared "it is not believed advisable at this time to initiate this procedure."[30] Unfortunately for the departmental military effort, this adverse decision was made just when the first bonus marches were being organized throughout the country for the avowed purpose of converging upon the District of Columbia and intimidating the United States Government. Six months later, though, permission was finally obtained on a

temporary basis to have the Corps Area Commanders forward to the War Department a monthly report covering subversive activities detected within their own areas.

After the initial bonus marcher groups had actually started to undertake a mass descent upon Washington, the Assistant Chief of Staff G-2, was belatedly instructed by higher authority to follow their detailed progress. Accordingly, on 25 May 1932, a secret War Department memorandum was sent out to all Corp Area Intelligence Officers directing them to investigate and report regularly concerning "bonus demonstrations by veterans." At the same time, MID commenced to forward a daily memorandum to the Chief of Staff describing the current status of the bonus marcher situation within the Nation's capital.[31] Because of this intensified intelligence effort, the anti-subversive files of the departmental intelligence agency soon grew to be richly productive in valuable information and personnel data covering the large number of Communist agitators who were operating with the Bonus Expeditionary Force (BEF).[32]

The principal sources utilized by MID in collecting information on subversive individuals within the ranks of the bonus marchers were through direct observation by departmental military intelligence personnel, civil police[33] and press reports, and interviews held with cooperative BEF members. Alerted United States Army troop units stationed in or near the District of Columbia also executed a number of special reconnaissance missions and notified MID of the results obtained. The departmental agency thus soon found itself actually acting as an operational intelligence center, with Sergeant Mauer in direct charge. Oddly enough, in this same connection, when the Assistant Chief of Staff G-2, Second Corps Area, queried a local representative of the Division of Investigation of the Department of Justice on the subject of bonus marcher activities, he was told that "the Bureau has no
jurisdiction over communistic or radical activities and cannot engage in any inquiry concerning same."[34]

Even after the remarkably successful eviction, on 28-29 July 1932, of the original bonus marcher expedition from the District of Columbia by United States Army elements without firing a single shot, the threat of further domestic disturbances along similar lines continued to remain dangerously acute.[35] As a mater of fact, radical elements had recently launched a concerted subversive drive among the ranks of the Civilian Conservation Corps, which was then in the process of being organized as an anti-depression measure by the national administration. Communist-inspired efforts to stir up discontent of major proportions not only continued throughout the life of that particular corps but also were later coupled with a companion effort aimed at personnel of the National Guard.[36]

The United States Army now stood in obvious need of an active and efficient counterintelligence organization centered about MID but it was not long before the powerful influences which were constantly trying to limit activities along such lines again became controlling. Effective 19 March 1934, for example, "in order to relieve the Corps Area G-2's of the burden of preparing monthly subversive reports, that profitable requirement was abruptly terminated.[37] Nevertheless, to overcome the effects of this unfavorable development, an informal practice shortly grew up wherein the Corps Area Assistant Chief of Staff G-2's continued to forward to MID a series of unofficial monthly "Notes on the Subversive Situation."[38] They were severely handicapped in this irregular enterprise, however, since they did not dare to engage

in any open investigative activity to support it.

During early 1934, with Japanese-American relations rapidly worsening, both the President and the War Department began to receive a large number of letters claiming information to the effect that the Panama Canal was in immediate danger of sabotage. As might well be expected, these warnings proceeded to set off a complicated train of events involving the departmental military intelligence agency. After a high-level conference on the subject, attended by representatives of the War, Navy and State Departments, the Secretary of War addressed a letter to the Commanding General, Panama Canal department, with information copy to the Governor of the Canal Zone, directing that "no effort be spared to maintain the safety of the Canal from any type of sabotage."[39] A corresponding conference was then held within the Panama area, which mainly resulted in a request to Washington for additional counterespionage funds and the assignment of a qualified specialist to coordinate and advise the Governor relative to military security matters. The Secretary of War duly approved these two requests on 11 April 1934.

In searching for a counterintelligence expert to assist the Governor of the Canal Zone as requested, Brig. Gen. A.T. Smith first consulted with J. Edgar Hoover and W.H. Moran, Chief of the United States Secret Service, hoping that one of these key internal security officials might be able to recommend an acceptable civilian for the position. When neither of them seemed willing to do so, he was then forced to turn to the Officer Reserve Corps list in order to find a qualified person with suitable military intelligence background. After careful reviewing the considerable number of applications he had received, General Smith finally selected Maj. Harry A. Taylor, Infantry Reserve, for the assignment. Major Taylor was directed to report to Panama without delay, to become the "Intelligence Specialist for the Governor of the Canal Zone."[40]

Under the existing "Joint Cooperative Plan for the Defense of the Panama Canal," the G-2 Office, Panama Canal Department, was designated as the "coordinating agency for protective information gathered by the Canal Administration, Army and Navy." Although the American Legation in Panama had not formed a part of this early collection arrangement, the MID officials felt that it should now be brought into the regional intelligence picture just as soon as possible. Hence, the Secretary of War was prevailed upon to direct the Governor of the Canal Zone to reach an agreement with the American Administer in Panama City, which would serve to link the Legation in security matters with the three other parties concerned and thereby insure a maximum coordination of effort for collecting information on Canal Zone protection. The eventual result was the creation of a four-member Interdepartmental Intelligence Liaison Board to accomplish that particular purpose, composed of appropriate local intelligence representatives from the Canal Zone Administration, American Legation in Panama, Naval District and Army Department.

The pressures caused by that particular sabotage scare not only served to improve the conduct of counterintelligence operations throughout the Panama Canal area measurably but also helped the Assistant Chief of Staff G-2, War Department General Staff, gain requisite authority to reopen the American military Attaché Office in Columbia, which had been closed in 1932 as an economy measure. On the other hand, similar requests for reopening inactive military posts in Peru and Venezuela failed to obtain like approval until 1939 and 1940, respectively.

During the same general period, MID received numerous reports from a wide variety of more or less reliable sources claiming to describe the operations of Japanese intelligence agents both in the United States and its overseas territories. Additionally, the Army Signal Corps succeeded in intercepting and translating a significant volume of Japanese governmental and commercial coded messages. There was, therefore, a gradual but notable resurgence of counterintelligence activity within the War Department that finally culminated on 17 April 1939, in the establishment of a separate MID Counterintelligence Branch.

This new Counterintelligence Branch was purposely designed to achieve a better functional concentration for military security activities than had been obtainable under the earlier catchall Operations Branch. For that reason, it was given the more aptly descriptive name of "counterintelligence" in denoting its activities, instead of the less adequate terms of "negative intelligence" or "counterespionage." Initially allocated an officer complement of only one colonel, one lieutenant colonel and one major, the branch was called upon to accomplish the following specific tasks:

> *1. Plans and regulations for both national and military censorship.*
>
> *2. Plans and regulations for counterespionage and passport control.*
>
> *3. Domestic intelligence information.*
>
> *4. Safeguarding of military information.*
>
> *5. Plans and regulations for espionage.*[41]

One of the immediate effects of the improved counterintelligence situation in MID was to place a greatly increased emphasis upon issuing proper security instructions for use by the United States Army. This was a most important matter because the current instructions were not only in obvious need of re-codification but also often in actual conflict with each other. The first AR 380-5 "Safeguarding Military Information," dated 19 June 1939, therefore, sought to combine all of the existing rules and regulations on that complicated subject into one concise document. A new counterintelligence field manual was then promptly prepared, which later formed an integral part of the BFM 30 (Military Intelligence) series that was issued to the Army commencing in 1940.

Because the War Department Mobilization Instructions for 1938 had stressed that all subordinate mobilization plans must provide for the immediate institution of military censorship in case of an emergency, the new counterintelligence manual included detailed instructions covering the establishment of such censorship in the field.[42] Censorship planning at the departmental and national level was also expedited in order to complete a joint (Army-Navy) censorship plan by early 1941, which was then approved by the President. While most of the activity within the censorship field continued to remain only in the planning stage prior to the end of the peacetime period, several selected officer-specialists were sent to Bermuda for the purpose of observing British censorship methods and an informal lecture course in military censorship for "certain key officers" was opened at Clarendon, Virginia. Finally, effective 1 September 1941, a separate Censorship Branch was created in MID.

Along with the rest of MID, the Counterintelligence Branch was being sorely handicapped at this time by a constant lack of insufficient and

qualified personnel. During June 1940, though, after the assignment of three recent graduates from the Army War College, it was reorganized on a much sounder basis and placed in a better position to conduct an orderly expansion if and when more funds might become available. Early in 1941, the branch also managed to establish a school for the express purpose of training counterintelligence agents. Instructors for this school were selected from among former FBI agents and civilian detectives holding ORC commissions. Its initial graduates all had to be utilized directly by MID in attempting to uncover subversives working at Army arsenals or plants executing government contracts but it was later possible to assign some of them to tactical units in the field.[43]

There were several other important counter-intelligence developments just before Pearl Harbor, as follows:

1. Shortly after the Counterintelligence Branch was formed, the problem of satisfying the basic requirements for establishing suitable security measures in industrial plants working on manufacturing projects for the Army became acute. Since the FBI had already started to make lengthy surveys along such lines[44], there was also a compelling need for devising more effective coordination procedures among the many different government agencies involved. Any new system adopted would have to be extended without delay in order to cover the numerous plants and arsenals still operating directly under military control. In October 1939, therefore, Maj. (later Brig. Gen.) W.E. Crist, received instructions from the Assistant Chief of Staff G-2, War Department General Staff, to form a "Plant Protection Section." His new section then promptly commenced to compile pertinent security data with reference to civilian manufacturing facilities engaged in classified or sensitive government contracts, as well as for all military installations handling critical items.

2. In June 1940, MID issued a revised confidential pamphlet entitled "Countersubversive Instructions" to all Army, Corps Area, Department and GHQ Air Force Intelligence Officers. The Chief purpose of this security pamphlet was to clarify earlier instructions regarding the formation of a cellular countersubversive control organization within their respective commands starting at the company level. The new instructions were optimistically intended to achieve a high degree of lateral coordination between this undercover security system and the normal chain of command, a most desirable goal but one which had never before been satisfactorily attained.

3. In view of the impressive combat successes that had recently been gained throughout Western Europe by the German Army, the Assistant Chief of Staff G-2 became gravely concerned early in 1940 with the problem of providing appropriate security in the rear areas of American military forces operating in the field. He felt that under currently accepted defense doctrines a serious "fifth column" threat could easily develop within these areas, occasioned either by a major domestic disturbance or a full-scale attack from without. For this reason, he had already directed the preparation in MID of a "War Department Counter Fifth Column Plan." This plan, which was submitted to the Chief of Staff on 6 October 1940,[45] not only described the effective organization of a rear area defense without any important commitment of combat troops but also contemplated the timely accumulation of sufficient counterintelligence information in the United States and possessions to cover all areas where such a defense might become necessary. It was given prompt official approval and forwarded to the Corps Area and Department Commanders on 22 October 1940.[46]

4. Early in January 1941, Brig. Gen. (later Maj. Gen.) C.H. Bonesteel, Commanding General, Sixth Corps Area, addressed a letter to the War Department calling attention to certain military steps which should be taken without further delay to insure the security and continued operation of the canal and locks situated near Sault Ste. Marie, Michigan. Both the Director, FBI, and the Transportation Commissioner of the Advisory Commission for the Council of National Defense had previously written personnel letters on this same subject to the Secretary of War.[47] The

matter was far from simple, though, because one of the locks was located on Canadian territory and there were two international bridges crossing the canal area. Brig. Gen. (later Maj. Gen.) Sherman Miles, the Acting Assistant Chief of Staff G-2, had displayed an active interest in the problem and MID was already preparing a detailed intelligence study pertaining to it. When finished, this study recommended the immediate institution of more than twenty new security procedures at critical defense plants and the transfer of an infantry battalion from Camp Custer to Fort Brady, Michigan, so as to give such points more substantial military protection. It also recommended stationing a Coast Artillery unit with the general area. Eventually, the War Department created, effective 15 March 1941, a special "District of Sault Sainte Marie" defense sector in the Sixth Corps Area for the announced purpose of "safeguarding and protecting the St. Mary's Falls Canal and Great Lakes Waterway from Whitefish Bay to Lake Huron."[48]

5. On 10 June 1941, in view of the national emergency,[49] the Assistant Chief of Staff G-2 was finally granted permission to instruct the Corps Area and Department Commanders to "maintain a digest of subversive situation which will be kept in such form that a brief estimate of the situation, with conclusions, may be submitted promptly by telephone, radiogram, or otherwise, upon request of the War Department." These same commanders were again cautioned, however not to allow any unauthorized investigative activities by their intelligence personnel in accomplishing this newly assigned mission.

6. The President, on 14 November 1941, directed the Secretary of State, to set up a "comprehensive system for the control of all persons, citizens and aliens alike, entering or leaving the United States and its possessions." In compliance, the Secretary of State soon requested the War Department to provide proper representation on several visa committees and one seaman's passport committee, which were being established. MID was naturally called upon to furnish this representation, so the departmental military intelligence agency once more commenced to take part in handling passport and visa control matters for the United States Government.

Hence, after undergoing an abrupt shrinkage immediately following the conclusion of World War I, domestic intelligence operations for the United States Army were soon committed to a lengthy period of enforced inactivity. This unfavorable situation was dictated principally by a public opinion that remained consistently hostile to any form of military intelligence activities along such lines. The handicaps stemming from such outside pressure were somewhat overcome in 1932, though, when the Government was confronted with a series of threatening domestic disturbance caused to a large extent by economic unrest but also conveniently exploited throughout by Communist and other radical elements. These same events likewise served to focus the attention of the national authorities upon the prompt necessity for uncovering Communist attempts to subvert members of the Civilian Conservation Corps and the National Guard. A rapid succession of espionage and sabotage scares pointing toward an alarming increase in foreign agent activities, especially Japanese, against the United States, further contributed to this delayed recognition of the seriousness of the domestic intelligence problem.

Even though the creation of a separate Counterintelligence Branch, within the MID in April 1939, resulted in a more effective domestic intelligence program, this branch, along with the rest of the departmental agency, continued to suffer from a persistent lack of personnel and funds. As a matter of fact, it was not until after the President had issued his limited emergency proclamation in September 1939 that these crippling conditions were permitted slightly to ease. They gradually did improve, however, to the extent that during the last year before Pearl Harbor, there was a marked increase in all phases of Army counterintelligence operations. By 7 December 1941, the Counterintelligence Branch of MID had progressed to the point where it was relatively well-prepared to perform most of its major functional

responsibilities and to participate actively in the crucial military security problems which were about to face the Nation.

ONI Message

From: Director of Naval Intelligence
To: Pacific Coast Communication Superintendent
Subject: Japanese Government Radio Traffic
Reference: (a) Letter 1651-24 of 25 January 1924

1. Reference (a) addressed to the Chief of Naval Operations was referred to this office. The letter itself has been referred to the Director of Naval Communications so far as the traffic problem is concerned.

2. The enclosures have been examined in this office and they are all from Japanese officials in this country to Japanese Government offices, principally to the Ministry of Foreign Affairs.

3. The copies enclosed have been sent to the Cryptographic Section of the Code & Signal Section, where they are accumulating a file of all Japanese code messages and it is noted that code and English and code and Japanese have been mixed which us a valuable aid in cryptography.

4. This office also picked up one or two names from Buenos Aires that are interesting from the espionage standpoint and the message regarding Loomis shows his standing as a propagandist in the Japanese Government.

5. It is believed highly desirable that copies of all Japanese messages in code and all Japanese messages in plain Japanese addressed to government offices in Japan or in the United States be sent to this office for examination and later to be sent to the Code & Signal Section for cryptographic work. It is requested if practicable that this be done. It is impossible to get from the telephone companies or cable companies any Japanese messages, government of otherwise.

/s/ Henry H. Hough

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National Counterintelligence Center

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COUNTER INTELLIGENCE IN WORLD WAR II

Counterintelligence In World War II

Introduction

President Franklin Roosevelt's confidential directive, issued on 26 June 1939, established lines of responsibility for domestic counterintelligence, but failed to clearly define areas of accountability for overseas counterintelligence operations. The pressing need for a decision in this field grew more evident in the early months of 1940. This resulted in consultations between the President, FBI Director J. Edgar Hoover, Director of Army Intelligence Sherman Miles, Director of Naval Intelligence Rear Admiral W.S. Anderson, and Assistant Secretary of State Adolf A. Berle.

Following these discussions, Berle issued a report, which expressed the President's wish that the FBI assume the responsibility for foreign intelligence matters in the Western Hemisphere, with the existing military and naval intelligence branches covering the rest of the world as the necessity arose. With this decision of authority, the three agencies worked out the details of an agreement, which, roughly, charged the Navy with the responsibility for intelligence coverage in the Pacific. The Army was entrusted with the coverage in Europe, Africa, and the Canal Zone. The FBI was given the responsibility for the Western Hemisphere, including Canada and Central and South America, except Panama.

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The meetings in this formative period led to a proposal for the organization within the FBI of a Special Intelligence Service (SIS) for overseas operations. Agreement was reached that the SIS would act as a service agency, furnishing the State Department, the military, the FBI, and other governmental agencies with economic and political intelligence and also information on subversive activities detrimental to the security of the United States. It was also during this period that the President asked William Donovan to undertake several missions abroad. Donovan's work for the White House eventually led to the creation of the Office of Strategic Services (OSS) (see separate chapter on OSS in this volume).

With the creation of the Office of Coordinator of Information, the United States was technically provided with a central intelligence organization, coordinating and exchanging intelligence data with the older services. In practice, however, the well_intentioned plans did not prove adequate. The story of Pearl Harbor has often been told as an illustration of the shortcomings in the intelligence system. Although Washington had ample information indicating that Japan would make an attack on Pearl Harbor, the utilization of this information may best be described as casual. (See the separate chapter on Magic, the decoding of the Japanese codes in this volume).

The end of World War II saw the new President, Harry S. Truman, abolish the OSS because he felt that there was no place for a wartime intelligence agency in a peacetime situation. Shortly thereafter he realized that he indeed needed a central intelligence organization to keep the president informed on world events. This ultimately led to the creation of the Central Intelligence Agency (CIA), the National Security Council (NSC) and the Air Force Office of Special Investigations (AFOSI).

In the midst of all this activity, the Army Security Agency, later renamed the National Security Agency (NSA), made a major breakthrough in decoding Soviet intelligence messages. This program became known as the VENONA project (see the separate chapter on VENONA in this volume). The VENONA decrypts and information supplied by two American operatives of Soviet intelligence, Elizabeth Bentley and Whittaker Chambers, opened American political and intelligence eyes to the massive Soviet effort to infiltrate the US Government. This massive espionage effort and Soviet domination of several governments in Eastern Europe led to the Cold War.

The Office of Naval Intelligence (ONI)[1]

Storm on the Horizon

It is estimated that by 1940, there were no more than 1,000 people employed by organizations composing the US intelligence community. Of those, most were working as radio intercept operators, and, although national efforts were generally limited in scope and capability, a good deal of raw information was being collected nevertheless.

One particularly serious problem during this time resulted from the sad fact that there was no coordin-ation between these agencies as each

routinely worked totally independent of the others. There was no sharing of the intelligence product by agencies that established their own objectives and methods for collection, nor was there any effort to ensure essential coverage was afforded all matters bearing on US national security.

During this time, the president routinely received deficient information from several agencies, notably the Departments of State, Army, and Navy, because it was never produced by an integrated intelligence network that was capable of in-depth introspective analysis. It was precisely this disorganized system that failed to recognize the impending danger or protect our country from the devastating attack at Pearl Harbor.[2]

As had historically been the case, ONI suffered a rapid and continual rotation of naval officers through its ranks during the years immediately preceding the conflict as sea duty continued to remain more career-enhancing than service ashore. Management was not to be spared for between 1940 and 1945, there would be no fewer than seven different directors heading ONI. During 1940 and 1941, ONI relied heavily on 130 naval officers posted abroad as attaches or occupying certain other positions from which they could collect information. Unfortunately, this entire effort emphasized gathering obvious data about foreign ports, navies, and capabilities instead of the more sublime art of determining the intentions and plans of those particular nations. ONI not only failed to collect the vital information that would signal turbulent times ahead for our nation, but it was also precluded from thoroughly analyzing the material it did develop.

That particular responsibility was solely conferred upon the more prestigious War Plans Division, which would invariably rate the worth of information solely on its potential use of fleet units if hostilities ever broke out.

If there was one bright spot among these woeful efforts prior to our declaration of war, it was assuredly in the field of military cryptoanalysis. By 1939 and 1940, the Navy had made gains in breaking Japanese codes and ciphers although it was the Army's Signal Intelligence Service, which cracked that country's top diplomatic code enabling both services to decipher massive quantities of their communication. Assigned the code name "Magic," these collective message translations allowed the President, Army Chief of Staff George Marshall, and a small number of military officers access to high-quality information con-cerning Japanese military activities, diplomatic positions/policies, and, indirectly, certain items of information regarding their German ally.

This particular breakthrough served as a vital source of information throughout the war but was never exploited to maximum advantage because the final intelligence product was not shared with precisely those planners and policymakers at lower levels who could have used it to greater national advantage.

Perhaps the most serious shortfall was due to the fact this information was not analyzed in any depth or synthesized with material collected by independent sources and means. Undoubtedly there were countless hints of Japanese intentions, including their plan to attack Pearl Harbor, but the US intelligence effort proved itself incapable of separating meaning-ful clues from that which was irrelevant in the captured and deciphered traffic.

Contributing to Victory

Once the United States was finally forced into war, it was hard work and

an indomitable spirit that could best explain how the Japanese Fleet Code was broken and the US Navy achieved a resounding victory at the crucial Battle of Midway fought on 4 June 1942.

Adm. Yamamoto devised a plan that employed a feigned attack against American forces guarding the Aleutian Island chain. It was his intention to drive American forces from the Pacific by drawing them northward toward the Aleutians while he captured the strategic island of Midway with a vastly overwhelming contingent.

Owing to the fact ONI had deciphered the Japanese Fleet Code, US Naval commanders knew and effectively countered every Japanese move, dealing them a resounding defeat with the loss of four Imperial aircraft carriers and a forced withdrawal from the area.

The Second World War precipitated the expansion of ONI with manpower and resources made available as never before. On the home front, ONI was directed to conduct personnel security inquiries, sabotage, espionage, and countersubversion cases, examine Japanese activities in the United States, and investi-gate war fraud matters. Even with an end to conflict and the general demobilization of US military forces, the Department of the Army, Navy, and later the Air Force, maintained sizable intelligence components, which would quickly gain respected positions in the intelligence community as their respective roles developed in the postwar environment.

A New Kind of Conflict

The coming of the Cold War brought an unprecedented reliance on our nation's intelligence community to keep the country aware of threats and fully prepared to meet all manner of conflict. It was during these years that ONI developed as an intelligence organization fully capable of supporting the US Navy in the accomplishment of its tactical and strategic responsibilities.

With the founding of the Central Intelligence Agency in 1947, the Navy did not relinquish what it considered a right to an intelligence organization and stood firm in the belief it would continue to "…collect, evaluate and disseminate that intelligence it considered important to its own need."[3]

At the center of today's Naval Intelligence community is the Office of Naval Intelligence which is within the Office of the Chief of Naval Operations. The Director of Naval Intelligence is an Assistant Chief of Naval Operations who reports directly to the Vice Chief of Naval Operations and is also indirectly responsible to the Secretary of the Navy. With the primary purpose of meeting the intelligence and counterintelligence needs of the US Navy, ONI frequently employs a variety of sources and methods to gather information regarding the intentions and capabilities of many foreign nations.

Routinely such information is shared by ONI with policymakers and contingency planners or within the military community to support the formulation of naval or interservice plans and operations. It detects and warns of threats to the security of our naval establishment and is responsible for coordinating all intelligence activities within the Department of the Navy. ONI continually makes meaningful contri-butions to the US intelligence community and is tasked with advising the Secretary of the Navy and Chief of Naval Operations on all matters relating to naval intelligence and the security of classified naval matters.[4]

During the postwar years three components were established to carry out ONI field work. The first of these, Naval District Intelligence Offices,

under the management of ONI, employed personnel assigned to duties in the United States or certain outlying areas and concerned themselves primarily with work in the internal security fields. These offices, directly responsible to the Naval District commanders, were primarily staffed with civilian agents and augmented by Naval Intelligence officers who conducted security and major criminal investigations involving naval personnel and property.

This particular system of District Intelligence Offices was superseded by the United States Naval Investigative Service which was founded in 1966.

The second ONI field component consists of those intelligence personnel on the staffs of flag officers who are assigned to duties in the United States or overseas. The fundamental responsibility of those assigned to staff intelligence duties is to support area, task force and fleet commanders by developing and furnishing operational or tactical intelligence needed to fulfill mission requirements. Intelligence officers working on such staffs not only support unit commanders, but also perform collection activities that further ONI objectives.

The last component consists of the contemporary naval attaché system employing personnel trained to collect intelligence for ONI while assigned to US missions, embassies, or other diplomatic posts around the world. Customarily, the naval attaches concern themselves with gathering information on foreign naval developments, capabilities, and trends.

These individuals are also responsible for compiling and continually updating data on foreign ports, beaches, and harbors since this information would be used in time of conflict to support all manner of naval air, surface, and subsurface operations.

A Continuing Need
With the advent and deployment of weapons that are literally capable of obliterating millions of people in a matter of minutes, ONI had no choice but to maintain a credible military deterrence. The modern day ONI is staffed by highly trained, capable, and devoted personnel who work hard to ensure their organization makes a meaningful contribution to the US intelligence community and national security interests. As potential adversaries continue to deploy technologically advanced weapons systems, the demand for increased quantities of quality intelligence will grow in the coming years. A sizable portion of this information will be gathered and developed by the Naval Intelligence community. Considering the potential consequences, the Department of the Navy and the United States of America have the need for a permanent, active, and professional naval intelligence organization more than ever before.

Colepaugh And Gimpel

In June 1940, the Special Agent in charge of the FBI's Boston Office was in his office reading a letter from the supervising US Customs Agent. The letter indicated that information had come to the attention of the Customs officers that, on several occasions from 2 to 27 May 1940, William Curtis Colepaugh had visited the German tanker, *Pauline Friederich*, which was tied up at Battery Wharf in Boston.

The Customs official advised that Colepaugh claimed he was engaged as a painter aboard the vessel. He reportedly indicated his intention, while visiting on the German tanker, of going to Germany to study engineering. It was also reported that he expressed dissatisfaction with

conditions in the United States and claimed that he desired to leave this country.

It occurred to the Customs official that because of Colepaugh's dissatisfaction with conditions in the United States, the FBI might wish to conduct inquiries concerning him. A case was opened on William Colepaugh and instructions were issued to make the necessary checks to determine whether or not Colepaugh was engaged in subversive activities.

FBI investigation reflected that Colepaugh had been a student at a university in Massachusetts where he studied naval architecture and engineering. The records of this school showed that Colepaugh entered the school in September 1938 and that he had previously attended a secondary school in Toms River, New Jersey. His home address was listed as Old Black Point, Niantic, Connecticut. He was born on 25 March 1918.

Colepaugh was forced to leave the university on 6 February 1941 because of scholastic difficulties. From one of his former roommates, the FBI learned that Colepaugh received considerable mail containing propaganda publications from the German Consul in Boston and from German news agencies in New York. He claimed that Colepaugh showed considerable interest in these publications.

Colepaugh was a member of the US Naval Reserve. From Customs guards stationed at the wharf where the *Pauline Friederich* had been docked, the FBI learned that Colepaugh, on one occasion, claimed he was living aboard the vessel because he liked the crewmembers. On another occasion, he said he had permission from the chief officer to spend a few days on the ship. He stated that he liked the people aboard the ship better than the people in the United States.

The whereabouts of Colepaugh was unknown. One individual advised that he might be in South America as a crewman aboard a merchant vessel.

On 23 July 1942, the *Scania*, a Swedish vessel, arrived at Philadelphia from Buenos Aires. The crew list of that vessel indicated that William Colepaugh was a seaman on board the ship. Colepaugh was questioned by local naval officers, at which time he presented a Selective Service card indicating that he had registered under the provisions of the Selective Training and Service Act on 16 October 1940. During this interview, he admitted his failure to communicate with his local draft board and said that he had never received communications from that board. This information was immediately turned over to the FBI, and FBI agents interviewed Colepaugh.

The Philadelphia Office sent a teletype to the Boston Office, and a check was made of the records of the local draft board in Boston where Colepaugh had registered. It was found that he had failed to return a completed questionnaire to that draft board and had also failed to keep the draft board advised of his address. These were violations of a Federal law under the investigative jurisdiction of the FBI. Accordingly, FBI agents in Boston contacted the local US Attorney, and, on 25 July 1942, a complaint was filed against Colepaugh, charging him with violating the Selective Training and Service Act. A warrant was issued for his arrest.

Colepaugh was returned to Boston and was further interviewed by the FBI. He claimed that his father was a native-born American but that his mother was born aboard the German ship, The *Havel*, while en route to the United States. He indicated that while he was a university student, he

met the Capt. of the German tanker, *Pauline Friederich*. Through this meeting, he was invited to visit the ship and did so on several occasions. During these visits, he became acquainted with a man whom he knew to be a Nazi Party leader on board the vessel. This man was a guest at the Colepaugh home on two occasions.

Colepaugh said that he had purchased a radio set. Subsequently, he received a telephone call from the secretary to the German Consul at Boston who was interested in his radio set. He denied building the set but admitted selling it to the German official for $60. He admitted that he had visited the German consulate on numerous occasions in early 1941. He said that from January to April 1940, he was employed at Lawley's shipyard in Boston as a laborer on board yachts.

On 7 May 1941, Colepaugh went to Canada and shipped out as a seaman on the *Reynolds*. The ship went to Scotland and returned to Boston in late July 1941. Colepaugh subsequently went to New York City, and on 5 September 1941 he obtained a job as a deck hand on board the *Anita*, which left New York City for Rio de Janeiro. He was at Buenos Aires in October 1941 and on 8 December 1941, secured a position as deck hand on the tanker, *William G. Warden*. He made a few trips on this ship in South American waters, and on 25 March 1942, he was again in Buenos Aires. On 5 April 1942, he secured work as a deck hand on board the *Scania*.

Colepaugh stated that he had written to the German Library of Information in New York City for publications, and he added that he had attended a birthday celebration in honor of Hitler at the German consulate in Boston. The secretary to the German Consul, according to Colepaugh, had discussed with him the possibility of his going to Germany to study at various marine-engineering schools.

The US Attorney in Boston advised that he would not authorize prosecution against Colepaugh if the latter would enlist for military service. Colepaugh promised to do so. Colepaugh enlisted as an apprentice seaman in the US Naval Reserve on 2 October 1942. Since he became a member of the Armed Forces, under the jurisdiction of the Navy, the FBI's case on Colepaugh was closed administratively. Copies of FBI reports in this case were furnished to Navy officials for their assistance.

On 28 June 1943, the FBI was advised that Colepaugh had been discharged from the Navy "for the good of the service." Colepaugh was again back in civilian life, and again the FBI began to interest itself in his activities. On 26 March 1943, it was determined that Colepaugh was working for a watch manufacturing company in Massachusetts. On 7 July 1943, he was known to be working for a poultry farmer in Concord, Massachusetts.

A check with the local draft board indicated that Colepaugh had telephoned his draft board on 10 January 1944 that he was going to enter the Merchant Marine and would send a letter to his local draft board advising them of his exact employment. Five days later, the draft board received a letter from him postmarked New York. Enclosed with this letter was a note on the stationary of the Swedish American Steamship line certifying that Colepaugh was employed on board the *Gripsholm* as a messboy.

The FBI had been informed that the *Gripsholm* was carrying individuals who were to be repatriated to Germany. It was not known whether or not Colepaugh would return to the United States as a crewmember aboard the same ship. The FBI therefore placed stop notices with appropriate

Government agencies in order that these agencies would advise the FBI in the event Colepaugh returned to the United States.

On 15, February 1944, the *Gripsholm* sailed. Within a few days of its arrival in Portugal, Colepaugh looked up the telephone number of the German Consulate at Lisbon. It was Sunday, and he was advised that the Consul was not in. At noon, the following day, Colepaugh went to the Consulate in person and told the doorman that he was from the *Gripsholm* and wanted to see the Consul. Colepaugh explained that he was a friend of the former German Consul at Boston.

Colepaugh was admitted to the consulate and met with the German Consul. This individual brought to his office a woman who acted as an interpreter. After the Consul spoke to her, she turned to Colepaugh and her first words were, "Have you come with the information?"

Colepaugh replied that he did not come with information but that he wanted to find out if he could go to Germany. He explained that he knew the former German Consul in Boston and that he had advised him that it would be all right for him to go to Germany.

Colepaugh told the Consul in Lisbon that he desired to join the German Army and explained that he had taken a trip aboard a British ship to Scotland in the spring of 1941 at the request of the German Consul in Boston to gather information regarding convoys.

At the conclusion of the conversation, the Consul told Colepaugh to return on Thursday, and in the meantime he would get in touch with Berlin.

At noon on Thursday, Colepaugh returned to the German Consulate in Lisbon. He was told that no reply had been received from Berlin, and he was requested to return the following day. At 4:00 P.M. on Friday, Colepaugh returned to the consulate. This time there was another man with the Consul whose identity was not made known. This man informed Colepaugh that it would be all right for him to go to Germany. He asked Colepaugh whether or not he had enough money to fly to Germany.

When Colepaugh replied that he did not, this unknown person said he would place Colepaugh in the last exchange repatriation group leaving on the following Monday or Wednesday.

When this was agreed upon, the Consul called another individual into the room for the purpose of adding Colepaugh's name to the repatriation list under the alias "Gretchner." Colepaugh was advised to go to a certain hotel and await further word from the German Consulate.

Within a few days an individual whom Colepaugh had met at the Consulate called at the hotel and gave Colepaugh a slip of paper bearing the name "Carl Curt Gretchner." This was the name Colepaugh was to use while traveling on the repatriation train in Germany. At the train, Colepaugh was turned over to a Gestapo (German Secret Police of the Third Reich) representative.

Colepaugh, as "Gretchner," traveled by train from Lisbon through to Biarritz. While waiting there for a train connection, he met a Dr. Miller, connected with the Schutzstaffel (SS). Miller wanted to know why Colepaugh desired to join the German Army. Colepaugh replied that he liked not only the setup of the German Army but also the way it was handled. Miller asked Colepaugh if he later wanted to return to the United States. Colepaugh replied that he did not. Miller left Colepaugh in care of an unknown individual and they traveled to Saarbrucken, arriving early in March 1944.

On 20 March 1944, Colepaugh left for Berlin, where Dr. Miller met him and then introduced him to a member of the SS. This man asked Colepaugh questions about the United States. He was interested in the election, rationing, and the attitude of the American people toward the war. He questioned Colepaugh very closely relative to the latter's attitude toward the United States and asked why Colepaugh wanted to join the German Army. He also questioned him about his intentions after the war. Colepaugh replied that he had no interest in returning to the United States but intended to take up his shipbuilding trade in Germany after the war.

This man questioned Colepaugh about his attitude with reference to Hitler and the German Government. Colepaugh replied that the German Government and Hitler "look good to me." He opined that the war moves were for the best interest of the German people.

Near the end of June 1944, Colepaugh was interviewed by a high official attached to the S.S. He told Colepaugh that he was going to be placed in the Security Service that handled the training of Nazi spies and saboteurs. Thereupon, Colepaugh was sent to a school operated by the Security Service at The Hague.

His courses included training in radio work and the use of firearms and explosives. He also received a great deal of athletic training to build up his body and was taught to drive a motorcycle. He was taught how to handle explosives and was shown the most effective way to cause a train to be derailed. He was shown how to use thermite to the best advantage and was told that this substance would burn through steel and could be used to wreck a bridge or other steel structures.

Colepaugh was shown by practical problems how explosives would react. He was not only taught the basic principles of handling explosives but was also taught not to be afraid of them.

It was at this school that Colepaugh first met Erich Gimpel who had just returned from Spain where he had been acting as a German agent. Gimpel knew how to handle explosives and during the school course explained to Colepaugh their properties and the procedure to be used in handling them. Gimpel was an expert radio operator. He and Colepaugh were taught how to handle pistols, rifles, and submachine guns. They learned to fire these weapons with either hand.

Nazi Spy Erich Gimpel used this Abwehr forged draft card to backstop his alias name.

PHOTO

While Colepaugh attended the school at The Hague, he was given the name Wilhelm Coller. He was furnished an identification card bearing his picture and that name. The rules of the school were explained to him, and the principal rule was that there was to be no talking to any person on the outside at any time regarding the activities of the school or its personnel. Colepaugh was left with the impression that a violation of this rule meant death.

Colepaugh soon learned that Gimpel was a person of importance in the Security Service in Germany. He had a private office at the Security Headquarters in Berlin and his own private secretary. He was treated with respect. Gimpel told Colepaugh that while he was acting as a German agent in Madrid in 1943-44, he was an instructor in a Fascist academy for young Spanish boys.

In August 1844, Colepaugh was sent to Berlin with Gimpel. They were given a photographic course in one of the branches of the Security

Service. They learned to take pictures with a Leica camera and to develop and print these photographs. From there they were sent to Dresden, Germany, where they studied microphotography and worked with micro-photo-graphy negatives on special sixteen-millimeter film and then developed and examined them to make sure they could read them through the appropriate microscope on the apparatus. After this course, Gimpel and Colepaugh returned to Berlin.

At the time Colepaugh went to Dresden for his microphotography training, he did not know what his assignment would be. While he was there, however, Colepaugh was advised in the presence of Gimpel that they were both being sent to the United States but they were not told what their specific assignments would be.

Two days before Colepaugh and Gimpel left Berlin for Kiel, they went to the home of a Military Officer. There, they met three members of the S.S. Colepaugh was told that these colonels were Doctors of Engineering. They advised that the mission of both men in the United States was to obtain information from periodicals, newspapers, the radio, and all available sources regarding shipbuilding, airplanes, and rockets; in short, any war information that would be of value to Germany. These officers wanted Colepaugh and Gimpel to stress information pertaining to the engineering field. The information gathered by them was to be sent primarily by a radio that Gimpel was instructed to build. In the event of an emergency, either were to use American prisoners of war interned in Germany as "mail drops," or they were to use designated intermediaries in Lisbon and Madrid. Letters sent to these mail drops were to be written in secret ink.

Gimpel was instructed to build, in addition to a radio for his own use, additional radios capable of receiving and sending short-wave messages for use of other German agents who probably would be sent to the United States in the future. Gimpel was to receive instructions from Berlin after they had established a radio contact with Berlin from the United States as to precisely how these radios should be built.

Gimpel was enthusiastic over his mission to the United States and advised Colepaugh that it was not necessary for the latter to learn telegraphy inasmuch as Gimpel would handle the sending and receiving of messages and that Colepaugh could act as the "mouthpiece."

Gimpel told Colepaugh that after their radio had been set up in the United States, he would like to bring German saboteurs to America.

In sending information they would gather, they were instructed to use specific code wavelengths at specified times. They were also furnished with code signatures and other data to assist them in proper transmission. They were advised that their mission to the United States would last for two years. They would leave the United States either by submarine or some other means to be decided upon at a later date. In receiving instructions concerning their assignment, they were advised that Berlin would begin sending out messages in an attempt to contact them twenty days after they landed in the United States and that Berlin would continue to send out messages for a period of several months until contact was established.

Just before they left for Kiel and while they were still in Berlin, they were furnished with film bearing the names and addresses of about twenty American prisoners of war in Germany. These names were to be used by both men in the event they wished to correspond with Berlin. They were told that they were to write an innocuous message or letter but that the actual data they desired to transmit should be placed on the

letter in secret ink. They were reminded that the Security Service in Berlin would examine all letters going to the American prisoners of war.

They received microphotographs with instructions for building the radio and also for receiving and transmitting messages when they reached the United States. Colepaugh was to use the code name "Walter," and Gimpel was to use the codename "Edgar" in transmitting messages to Berlin. In reply, Berlin was to use the codename "David." They were also given a microphotography apparatus, which was to be used to make microphotographs. They were also given one bottle of what appeared to be regular blue-black ink. In realty this was secret ink to be used for transmitting secret messages. At the same time, they were given a supply of developing power to develop any secret messages sent to them while they were in the United States.

Gimpel obtained from one of his friends in Berlin two .32 caliber automatic pistols and the necessary clips and cartridges for these pistols.

The code for sending messages on the radio to Germany, which was given to them was based on the words "Lucky Strike cigarettes, It's Toasted." They were also furnished wristwatches and two small compasses. They were given two kits of concentrated food that had been taken from captured American pilots.

Gimpel received a blue onion-skin paper packet containing about one-hundred small diamonds, which were to be used to provide funds in the event the money given to them was found to be worthless or dangerous to use.

The day before they left for Berlin for Kiel they signed various identification papers, which were later turned over to them in Kiel. The papers made out for Colepaugh carried the name William C. Caldwell. These papers consisted of a birth certificate showing Colepaugh was born in New Haven, Connecticut; a Selected Service registration card showing him to be registered at Local Board 18, Boston; a Selective Service classification card from the same draft board; a certificate of discharge from the United States Naval Reserve; a motor vehicle operator's license for the State of Massachusetts; and several duplicate papers, completely signed and filled out except that the names and addresses were omitted to permit Colepaugh and Gimpel to assume other names if such was found necessary.

About 22 September 1944, Gimpel and Colepaugh went to Kiel where they spent two days waiting aboard the Hamburg-American liner *Milwaukee*. Subsequently, they went aboard German U-boat Number 1230, which left the harbor immediately but laid off Kiel for about two days while waiting for a German convoy going up the coast of Denmark. They proceeded with this convoy to Horton, Norway, where the U-boat was given tests for about six days. Then they went to Kristianson, Norway, where they remained for two days taking on food and fuel.

Colepaugh and Gimpel had received $60,000 for their expenses. This sum had been determined when

Colepaugh had pointed out that the cost of living in the United States had taken a sharp turn upward. He estimated that it would be necessary to have $15,000 a year for the living expenses of one man. Based on this estimate, the $60,000 represented expenses for two men for two years.

On 6 October 1944, the U-boat left Kristianson and proceeded out into the broad Atlantic, bound for the United States. The U-boat commander was cautious. At the first sign of a suspicious sound, he would submerge the U-boat and wait.

On 10 November 1944, the U-boat approached the Grand Banks of Newfoundland. At that point the U-boat crew took radio bearings on Boston; and Portland and Bangor, Maine, and later they established a position off Mount Desert Rock, Maine. They laid off that point until about 4:00 P.M. on the afternoon of 29 November 1944.

During the day the U-boat rested on the ocean bottom. During the night it charged its batteries by using its diesel engines. Through listening devices the crew of the U-boat was able to hear fishing boats on the surface nearby, and on one day they listened to a fishing board which was anchored above them. It was during this period that word was received by radio from Berlin that a U-boat had been sunk in Frenchman's Bay, and the Capt. was instructed to land Colepaugh and Gimpel somewhere else.

Colepaugh, Gimpel, and the captain discussed landing places in Rhode Island, New Hampshire, and Maine. In the end, the captain disobeyed his orders and on the night of 29 November 1944, the U-boat completely submerged, started for Frenchman's Bay.

About one-half mile off Crab Tree Point, the Capt. ordered the U-boat to be raised until the conning tower was just above the water. In this fashion the U-boat proceeded to a point just about 300 yards from the shore at Crab Tree Point, which is just across the peninsula from Hancock Point.

During the trip across the Atlantic, Colepaugh and Gimpel wore regulation German naval uniforms but about half an hour before the U-boat came to its shore position, they removed their uniforms. The U-boat turned to face the south, and the crew made ready a rubber boat with oars. Attached to this boat was a light line to be used to pull the rubber boat back to the U-boat after Colepaugh and Gimpel had rowed ashore.

When the rubber boat was launched, the line broke, and it was necessary for two crewmembers to row Colepaugh and Gimpel to shore. At the landing point, there was a narrow beach of approximately six feet and then a bank. In the stillness of that cold November night on the Maine coast, Nazi agents Colepaugh and Gimpel stepped onto the shores of the United States. The German sailors also stepped ashore in order that they could return to Germany and brag that they had set foot in the United States. When the sailors departed they saluted, "Heil Hitler."

With their equipment, Colepaugh and Gimpel climbed the bank and walked through the woods adjacent to the shoreline until they reached a dirt road. They did not bring any explosives ashore and did not bury anything on the beach. They left their microphotography apparatus on the U-boat because it was heavy and they were in a weakened condition from their long stay aboard the U-boat.

The Nazi agents walked up the dirt road in a northerly direction until they came to the end of the road, at which point there was a house. Then they took a path in an easterly direction and followed it until they came to a macadam road. At that point the handle of the airplane luggage carried by Colepaugh broke and he had to fix it. They started again in a northerly direction.

The snow, which had been falling lightly during the early hours of the evening, was now falling rather heavily. They finally reached US Route 1 and turned left to walk in a westerly direction. It was about 12:30 A.M. when an automobile passed them. The car stopped, whereupon Colepaugh ran up to it and told the driver that he and his friend needed a ride to Ellsworth. Colepaugh was told that the car was a taxi, and after

he talked with the driver, the latter agreed to take both men to Bangor for six dollars.

Arriving at Bangor about 1:30 A.M. 30 November 1944, the taxicab driver took them to a small restaurant to change a ten dollar bill to pay the driver. After doing so, both men walked to the railroad station and boarded a 2:00 A.M. train to Portland, arriving there at 6:00 A.M.

They caught a train for Boston shortly after 7:00 A.M. and arrived there about 10:00 A.M. They registered at a hotel shortly after noon. They spent the night in Boston and left the hotel early the next morning, taking a train to New York City. They arrived at Grand Central Station at 1:30 P.M. on 1 December 1944. They checked their luggage at the station and went to Pennsylvania Station where they checked a briefcase in one of the lockers. That afternoon they registered at a hotel as William C. Caldwell and Edward George Green. They remained at this hotel from 1 to 9 December 1944.

The primary concern for both Nazi agents after coming to New York was to locate an appropriate apartment or house from which the radio could be operated. They made numerous telephone calls to real estate agencies and answered classified ads in the newspapers in an effort to locate such a place. Gimpel usually accompanied Colepaugh in searching for apartments. Gimpel rejected several places, which would have otherwise been satisfactory, because of steel construction in the buildings making them unsuitable for sending and receiving radio messages.

Finally, on 8 December 1944, they were successful in renting an apartment on Beekman Place in New York City for $150 a month. They paid two months rent in advance. Colepaugh took the bags to the apartment while Gimpel waited on the street. Gimpel said he did not want to go into the apartment at first because he did not want it to appear that two men were renting the apartment.

They left the apartment promptly each morning and did not return until late at night to give the impression that they were businessmen going to work every day. Gimpel was with Colepaugh a great deal of the time, and it appeared that Gimpel was reluctant to let Colepaugh get out of his sight. On several occasions Colepaugh did go out in the evening for a good time but Gimpel refused to drink in bars. On 13 December 1944 the two men took the briefcase, which had been checked into the Pennsylvania Station locker, to the apartment.

On 21 December 1944 Gimpel and Colepaugh were at Rockefeller Center where Gimpel had purchased some clothing and was having alterations made on a suit. At about 5:30 in the evening, Colepaugh advised Gimpel that he did not desire to go into the store with Gimpel and would wait outside and listen to the Christmas carols sung where people were ice-skating.

While Gimpel went into the store, Colepaugh walked through the crowd, caught a taxi, and proceeded to the apartment on Beekman Place. He told the cab driver to wait. He went upstairs and took the bags, one of which contained the briefcase, and started to return to the taxi. On his way out, the sister of the man from whom the apartment had been subleased met him.

He told her he was going to visit his relatives in Connecticut for Christmas. Colepaugh got into the taxi and told the driver to take him to Grand Central Station. At the terminal he checked the bag containing the briefcase. He also checked his luggage in the baggage checkroom, placing the claim checks for the two bags in his wallet. He took the Lexington Avenue subway to 59th Street and registered at a hotel.

While they were living at Beekman Place, Gimpel had suggested on one occasion that they should separate. Colepaugh had not agreed to the plan, however, but on the night of 21 December, he actually separated himself from Gimpel.

During this time the FBI was also active. On 3 December 1944, the Boston Field Division received information that a British freighter, the *Cornwallis*, sailing from the British West Indies to St. John, New Brunswick, was torpedoed and sunk at about 6:00 A.M. on that date somewhere between Mount Desert Island and Mount Desert Rock off Bar Harbor, Maine. The ship sank in less than ten minutes as a result of an explosion in the starboard bow, and it was subsequently determined that the sinking actually occurred about eight miles northwest of Mount Desert Rock, Maine.

The FBI felt that the sinking of this ship was significant. It meant that an enemy U-boat was close to the coast of Maine, and the FBI could not discount the possibility that this U-boat also might have landed enemy agents.

The Boston FBI Office immediately dispatched agents to Rockland, Maine, and South West Harbor, Maine. The agents were assigned to a coastal patrol that at first was concentrated in the area of Frenchman's Bay. The FBI was able to determine from the US Navy that this area might be a logical place for enemy agents to land, inasmuch as the coastal waters around the area were deep enough for a U-boat to come close to the shore.

A deputy sheriff was interviewed who advised that his 18-year-old son had observed two strange individuals in the vicinity of Frenchman's Bay on the night of 29 November 1944. He related that the boy noticed the two men walking away from the beach area with their heads down against the snowstorm that was raging that night. The boy became suspicious of these men because they did not appear to be dressed like local residents. The boy told his father who proceeded to the area the next morning, in an attempt to discover traces of the two men. The snowstorm had evidently wiped out all traces.

The agents interviewed the deputy sheriff's son who told them that about 11:30 P.M. near Hancock Point he observed two unknown individuals. He said that they were walking as he met them in his automobile and that he noticed their tracks continued down the road for about a hundred yards and stopped at a point where a path from the beach meets the road. The boy said that both of these men wore light-colored clothing and no hats. It was his impression that the taller of the two was carrying a small bundle or suitcase under his arm.

FBI agents continued their inquiry in the area of Hancock Point and learned that a neighbor of the deputy sheriff had apparently seen the same two men. She advised that about 11:50 P.M., she observed two men walking away from the ocean and toward US Highway Number 1. She saw these two men about one mile from the point where the deputy sheriff's son saw them.

Agents closely examined the beach and all cottages and trails were closely scrutinized for any evidence that a landing had been made. No evidence was found during this search. All residents of Hancock Point, which embraces an area about five miles long and three miles wide, were interviewed by FBI agents without obtaining any information of value.

Additional investigation reflected that no passen-gers had boarded the only bus operating along US Highway Number 1 between Machias and

Bangor on the night in question. Ticket agents of the Maine Central Railroad as well as representatives of trucking lines operating long-distance trucks passing through the area were interviewed. A check was made to determine whether any long-distance telephone calls had been made from the exchange covering Hancock Point.

No information of value was obtained. All available coastal residents, coastal sources of information, law enforcement officers, fishermen, and members of the Armed Forces, were interviewed by FBI agents. No information was developed as to the identity of the two men. The investigation continued.

In the meantime, Colepaugh knew that Richard Fairfax (Comment: fictitious name to protect the identity of the person), a former schoolmate, lived in Richmond Hill, New York. He knew the location of the Fairfax residence since he had visited Fairfax several years ago while they were students. He considered Fairfax an old friend.

At about noon on 23 December 1944, Colepaugh went to Fairfax's home in Richmond Hill where he talked with Fairfax's mother. She told Colepaugh that her son was working at a shoe store in Jamaica. About 2:30, Colepaugh met Richard Fairfax for lunch, at which time Colepaugh talked over old times. Colepaugh made arrangements to see Fairfax at his home about 11:00 P.M. Fairfax's mother had left for a visit in Philadelphia and was not to return for several days.

Colepaugh and Fairfax decided they would go out that night. Fairfax said that he wanted to shave first. While he was in the bathroom shaving, he and Colepaugh entered into a conversation about the war.

Colepaugh said to Fairfax, "Richard, remember you said that I could never get into any real trouble? Well, I am in a lot of trouble now."

Fairfax asked, "What sort of trouble, Bill"?

After a pause, Colepaugh said, "I just came back from Germany."

Fairfax said, "You mean you were in Germany"? Colepaugh replied in the affirmative and then told the entire story.

Fairfax thought Colepaugh was joking and asked him if he was sincere about the whole situation. Colepaugh replied that he was. Upon further questioning, Colepaugh indicated that his mission to the United States was to get information. Fairfax asked him how he intended to get this information back to Germany, and Colepaugh replied that it would be sent by wireless. Fairfax asked Colepaugh where this information would be sent from and Colepaugh said that it might be sent from anywhere.

Fairfax asked if he had a radio, and Colepaugh said no but indicated that Green was an engineer and could build a radio set. He pointed out that Green could make all of the parts of the radio and was even proficient enough to make a radio tube. Fairfax asked Colepaugh where Green was at that time. Colepaugh replied, "I don't know. I ditched him." Colepaugh told him Green's true name was Erich Gimpel.

After discussing more details of the bizarre story, Colepaugh asked Fairfax how to get in touch with proper authorities and subsequently Fairfax called the New York office of the FBI. Fairfax advised the agent who took the call that he had in his possession important information, which he could not discuss over the telephone and wanted an FBI agent to call at his home. A Special Agent was instructed to proceed to Fairfax's home.

On the evening on 26 December, the Special Agent introduced himself to Fairfax. Proceeding into the living room, Fairfax turned to the agent and said, "I want you to meet Mr. Colepaugh. He has a story to tell, and I'll let him tell it himself."

Colepaugh said that his name was William Curtis Colepaugh and that he had lived in Niantic, Connecticut. He appeared to be very nervous as he related to the agent that he and another man under the name of Edward George Green had been landed on the coast of Maine by a German U-boat. He said that they both were in the U.S. for the purpose of obtaining military, political and economic information to be subsequently transmitted to Germany by radio and letter. Colepaugh related in detail the events of his past life, his contact with crew members of the *Pauline Friedrich*, the fact that he had shipped to Scotland on a freighter for the purpose of obtaining information concerning convoys for the former German Consul in Boston.

In detail, Colepaugh explained his trip on the *Gripsholm*, his contact with the German officials in Lisbon, his entry into Germany, his course in the school at The Hague and his meeting with Gimpel, who was in the U.S. under the name of Green. He described his trip on the U-boat, the landing on the Maine coast, the subsequent trip to Boston and the final trip to New York City. Colepaugh told the agent that since their arrival in the U.S. they had not engaged in any espionage activities.

He said they had purchased some parts for a radio at various retail radio shops in New York City. Colepaugh advised that Gimpel was not satisfied with the setup at Beekman Place and told Colepaugh to watch the newspapers for an opportunity to rent a place on the outskirts of the city, which would be suitable for radio activities.

Colepaugh said that he had put off looking for a place on the outskirts of the city when he had made up his mind to get away from Gimpel. He claimed that after he left Gimpel at Radio City on 21 December, he took from the apartment the two bags belonging to Gimpel and that these bags contained between forty to sixty thousand dollars in American money. At this point, Colepaugh turned over to the Special Agent two baggage checks issued by a parcel room at Grand Central Station for these bags. The baggage checks indicated that they were stamped at 6:28 P.M. on 21 December.

Colepaugh said that Gimpel liked to drink but was careful not to drink too much. The agent, in seeking a description of Gimpel, asked Colepaugh if Gimpel had any peculiarities. Colepaugh said that Gimpel did not carry a wallet but kept bills of large denominations in a roll in his trouser pocket and had the habit of stuffing dollar bills into the breast pocket of his suit coat. He said that Gimpel carried a Latvian coin, dated 1942, that was considered by Gimpel to be a good luck token.

He said that Gimpel liked to eat steaks and quite often frequented the better steak houses in New York City. Colepaugh said that Gimpel also liked to frequent Spanish restaurants where he could meet and talk to people in Spanish. He said that while he was with Gimpel in New York the latter had made a number of trips to a newspaper stand located at the foot of the subway stairs at Times Square, where he bought Peruvian newspapers.

In describing Gimpel, Colepaugh said that among other things he wore a silver Inca Indian ring with a square gold top and an Inca design. Gimpel wore this ring on the little finger of one hand.

Colepaugh was asked if he knew where Gimpel might be and he claimed that outside of the apartment at Beekman Place, he did not know of any

other locality where Gimpel would go. He said, however, that Gimpel did not like the cold climate and that he possibly might go to the South. He said that Gimpel had mentioned to him at one time that he had passed through New Orleans.

Concerning the possibility that Gimpel might return to the old Times Building on 42nd Street and 7th Avenue to purchase Peruvian newspapers, Colepaugh said that during one of their last few days together he and Gimpel had attended a short-subject movie based on a "Crime Does Not Pay" type of film. He said the police apprehended the criminals in this particular story when they approached a newsstand to purchase a hometown paper. Colepaugh was not able to state whether this had made any particular impression on Gimpel, and he did not know whether Gimpel would continue to purchase Peruvian newspapers at the old Times Building.

Colepaugh related that with reference to radio material, they had purchased two millimeters, a magnifying glass, a 1944 edition of a radio amateur book, one ohm-test meter, and a small screwdriver.

At the Beekman Place apartment, agents contacted the sister of the person who sublet the top floor apartment to Colepaugh and Gimpel. She confirmed Colepaugh's story of his leaving the apartment with the two suitcases. She said that an hour after Colepaugh had departed, the door buzzer rang, and she went to answer the door. It was Green (Gimpel). He went up to his apartment and a few moments later came down to her apartment. He asked her if his friend was gone, and she replied that he had left to visit his family in Connecticut. He returned to his apartment and about ten minutes later asked her if he could have a key. She gave him a key, and he told her that he would return it to her later. He thereupon left the house.

About 1:30 P.M. the next day, Green returned the key to her and, as he was leaving the house, she noticed he was carrying two cardboard boxes. He indicated at that time he was on his way to join Caldwell.

Agents also interviewed the manager of the clothing store, who was able to produce a sales ticket, which was filed alphabetically under the name of Edward Green. The sales ticket indicated that one suit and one overcoat were sold to an Edward Green of a certain hotel on West 23rd Street.

Surveillance was placed on the newsstand at Times Square to see if Gimpel showed. All railroad and bus stations and airline terminals were examined in an effort to locate the bags known to be in the possession of Gimpel.

Colepaugh had turned over to a Special Agent two baggage checks for bags he had taken from the Beekman Place apartment and deposited at Grand Central Station. FBI agents went to the baggage claim area and interviewed the employees.

One of the employees stated that shortly after midnight on 22 December, an individual by the name of Green came to the south window of the parcel room. He stated that he had two bags that were checked but that he had lost the duplicate coupons. Green was admitted to the inside of the parcel room and told to search among the racks until he located his bags. Green finally located the two bags, which he claimed were his. The employee took Green and the two bags to another checker and asked him to take care of the matter because there was a large crowd waiting in front of the parcel room.

This checker related that one of the bags was a large tan leather case of the "two-suiter" type with two locks and that the other bag was a suitcase of gray airline cloth. He claimed that Green produced a key to the tan leather bag and opened it. When it was opened, it was found to contain dirty clothes and a Leica camera. Gimpel gave the checker two receipts for the bags and left the parcel room with them.

FBI agents had been conducting a continuous daily surveillance at a Times Square newsstand located halfway down the subway entrance stairway at the corner of 42nd Street and 7th Avenue. The newsstand consisted of a three-room store. The first room was open to the public and contained newspapers and magazines from foreign sources, together with some American publications. The second and third rooms of the stand were small in size and were used for storage and office purposes.

At 8:55 P.M. on Saturday, 30 December 1944, while Special Agents were watching this stand, they saw an individual enter the store. One of the agents, noting the resemblance of this person to Gimpel, called the other agent's attention to the customer. This individual was wearing a blue double-breasted overcoat, a brown hat, and a gray suit. His overcoat and suit answered the general description of the clothing reportedly worn by Gimpel. The agents were not able to see that he wore a ring with an Inca design.

The man did not ask for, nor did he go near, the South American newspapers, which were on display at the stand. Instead, he perused the newspapers and magazines published in English and generally moved around the area where these periodicals were on display. The agents were able to observe that he finally selected a copy of a pocket edition of the book entitled, Russia. After making his selection, this individual went to one of the clerks at the newsstand, who was beside the cash register, and paid for his purchase. At this particular time he was generally facing one of the Special Agents, and his back was toward the other agent who moved closer in order that he might overhear the voice of this individual. In paying for his purchase, the man spoke a few words in English with an apparent European accent.

One of the Special Agents noticed that in paying for his purchase, the individual took a bill from the inside of his coat and apparently from the breast pocket of his suit coat. The Special Agent remembered that this was a mannerism that Colepaugh said was peculiar to Gimpel. The agents exchanged nods. One agent preceded this individual from the store to the subway stairs, and the other agent followed.

On the stairway, immediately outside the store entrance, the first Special Agent turned to Gimpel and identified himself as well as the other agent as Federal officers. Both agents displayed their badges and requested the man's name.

He hesitated, saying, "What's this all about?" He was told by one of the agents that they were agents of the FBI, that it was a routine investigation, and that they desired to know his name, whereupon the unknown individual replied, "Green."

He was asked his full name and home address, and, in reply, this individual said that his full name was Edward Green and that his address was Massachusetts.

The agents then escorted him into the rear storage room of the newsstand and away from the presence of other persons. The agents knew that this person, who said that his name was Edward Green, was in reality Erich Gimpel. One of the Special Agents asked Gimpel whether he possessed any identification papers. A group of papers were produced

from inside the suit-coat pocket. A Selective Service registration and a Selected Service classification card made out to Edward George Green, 582 Massachusetts Avenue, Boston, were among the identification papers, which also included a US Naval Reserve discharge made out in the same name and address.

He was searched and approximately $10,000 was removed from his person, as well as 99 small diamonds wrapped in tissue paper.

Gimpel advised that his bags and the briefcase containing the money were located in his room at his hotel. He gave permission to have his room searched and accompanied the agents to the hotel for that purpose. The search of Gimpel's room revealed currency totaling $44,100 as well as blank Selective Service registration and classification certificates. The agents also found blank certificates of discharge from the Navy, as well as blank birth certificates. Leica camera film, two Colt automatics, and a package containing two small bottles filled with a writing fluid were found. Gimpel identified articles and claimed that the two small bottles of writing fluid were secret writing ink to be used specifically for the purpose of writing secret messages.

Gimpel was taken to the New York FBI office where he was interviewed. He said he was born on 25 March 1910, at Merseberg, Germany. He claimed that he was in South America from 1935 to 1942, working for Telefunken, a German radio corporation with headquarters in Berlin. He said that he worked mostly in Lima, Peru. It was in Peru that he was interned by the police in June 1942 and was subsequently brought to Camp Kennedy, Texas, and was later taken to Jersey City, New Jersey, where he was repatriated to Germany on the *Drottningholm*. He arrived in Germany on 1 August 1942.

After returning to Germany, Gimpel said he was employed by the German Foreign Office as a courier between Berlin and Madrid. He was also employed in Hamburg and Berlin designing shortwave radio transmitters. He said he could not go into the German Army because under the agreement between the US Government and the German Government he would not be allowed to enter military service in Germany. He spent one year in Hamburg, until it was bombed out in August 1943. There he helped produce radio and electrical equipment for various German Government agencies. He continued his employment as a courier between Berlin and Madrid until February 1944 and was subsequently engaged to check newspapers for technical information. He continued on this job until July 1944 when he was asked if he desired to work in foreign countries.

Agreeing to do this, he was sent to The Hague, where he first met Colepaugh. He became friendly with Colepaugh in order to practice English. He said that Colepaugh was enthusiastic in his praise of Germany, and Gimpel thereupon decided that Colepaugh would be a good companion for a foreign trip. When Gimpel agreed to come to the United States, he requested that Colepaugh be allowed to accompany him.

He said that in the spring of 1944 he had to sign the following documents:

> *"I obligate myself to exert my entire strength on behalf of Germany; otherwise I am aware that I can expect the sharpest reprisals."*

While at The Hague in July 1944, Gimpel said he signed the following paper:

"That in no event will I, after entrance, give information as to what I have seen here."

He said that this paper was a kind of oath, which he had to take for the purpose of pledging himself against revealing any of the activities that took place in The Hague school.

In explaining his proposed work in the United States, Gimpel said he was to build an 80-watt radio transmitter and that Germany was to start sending messages to him about one or two months after he and Colepaugh had landed in the United States. In the event radio contact with Germany could not be made, he was to send letters to the "mail drops" given to him. He said that when he found out that Colepaugh had left him, he went to a hotel, thinking that perhaps the police might have picked up Colepaugh. He said he subsequently checked out of this hotel and went to another hotel, where he expected to remain until 1 January 1945. He wanted to go to South America but knew it would be hard to get there.

In explaining the use of secret ink, Gimpel said that letters containing innocuous messages were to be written to prisoners of war whose names were furnished by the Germans or to mail drops in Madrid or Lisbon. Gimpel explained that in order to write a secret message, the message was written with specially prepared ink on a piece of paper. The piece of paper was pressed firmly, preferably by weights, against the paper bearing the message and was left in this position for several hours. When the blank piece of paper was removed, it would bear a secret message that could not be seen unless appropriately developed. This paper would appear blank, and an innocuous message could be written on the reverse side. A special type of development could subsequently make the secret message readable.

On instructions from the Attorney General, the FBI turned over Colepaugh and Gimpel to the military authorities in New York City. On 6 February 1945, they faced a Military Commission at Governor's Island, charged with violation of the 82nd Article of War and conspiracy. On 14 February this Military Commission found them guilty and sentenced them to be hanged. Later, the President of the United States commuted their sentences to life imprisonment.

The Custodial Detention Program

The epitome of preventive intelligence was the Custodial Detention Program established by the FBI and the Justice Department during 1940-1941. It should not be confused with the internment of Japanese-Americans in 1942. Both the FBI and military intelligence opposed the massive infringement of human rights that occurred in 1942 when 112,000 Japanese and Japanese-Americans were placed in detention camps__a decision made by President Roosevelt and ratified by the Congress. The authoritative histories stress the crucial influence of the Army's Provost Marshall General and his "empire-building" machinations, especially in reaction to a prewar decision transferring responsibility for alien enemy interment to the Justice Department.[5]

The mass detention of American citizens solely on the basis of race was exactly what the Custodial Detention Program was designed to prevent. Its purpose was to enable the government to make individual decisions as to the dangerousness of enemy aliens and citizens who might be arrested in the event of war. Moreover, when the program was implemented after Pearl Harbor, it was limited to dangerous enemy aliens, and the plans for internment of potentially dangerous American citizens were never carried out.

The most significant aspects of the Custodial Detention Program bear upon the relationship between the FBI and the Attorney General. Director Hoover opposed Attorney General Robert Jackson's attempt in 1940 to require departmental supervision; and, when Attorney General Francis Biddle abolished the Custodial Detention List in 1943, the FBI Director did not comply with his order.

Director Hoover asked Attorney General Jackson in June 1940 for policy guidance "concerning a suspect list of individuals whose arrest might be considered necessary in the event the United States becomes involved in war."[6] Secretary of War Henry L. Stimson advised the Attorney General in August that the War Department had emergency plans providing "for the custody of such alien enemies as may be ordered interned" and suggested that they be discussed between military and Justice Department officials.[7] To deal with these matters, Attorney General Jackson assigned responsibility to the head of a newly created Neutrality Laws Unit in the Justice Department. This Unit was later renamed the Special War Policies Unit and undertook Departmental planning for the war, as well as analysis and evaluation of FBI intelligence reports and the review of names placed on the Custodial Detention List.

The FBI Director initially resisted the plan for Justice Department supervision. He told the head of the Special Unit that the Department's program created "the very definite possibility of disclosure of certain counterespionage activities."[8] Hoover added, "The personnel who would handle this work upon the behalf of the Department…should be selected with a great deal of care. We in the FBI have endeavored to assure the utmost secrecy and confidential character of our reports and records. To turn over to the Department this great collection of material in total… means that the Department must assume the same responsibly for any leaks or disclosure, which might be prejudicial to the continued internal security of our country. Obviously, such personnel will know the identity of many of our confidential informants… The life and safety of these informants are at stake if their identities should become known to any outside persons."

Hoover also feared that if the Department took over any administrative action or prosecution, the identity of confidential informants now used by this would "cut off that source of information insofar as continued counterespionage might be concerned in that case." He claimed that if the Attorney General approved the plan, it would mean the Justice Department was "ready to abandon its facilities for obtaining information in the subversive field."[9]

Attorney General Jackson refused to give into the FBI Director. After five months of negotiation, the FBI was ordered to transmit its "dossiers" to the Justice Department Unit.[10] To satisfy the FBI's concerns, the Department agreed that any formal proceeding would be postponed or suspended if the FBI indicated that it "might interfere with sound investigative techniques." The FBI was assured that the plan "does not involve any abandonment by the Department of its present facilities for obtaining information in connection with subversive activities by surveillance of counterespionage," and there would be "no public disclosure of any confidential informants…without the prior approval of the Bureau."[11] Thus, from 1941 to 1943, the Justice Department had the machinery to oversee at least this aspect of FBI domestic intelligence.

The wartime detention plans envisioned entirely civilian proceedings for arrest of alien enemies following a presidential proclamation pursuant to statutory provisions, and all warrants should be authorized and issued by the Attorney General.[12] Separate instructions stated that, with respect to

American citizens on the list and "not subject to internment," a Departmental committee would consider whether specific persons should be prosecuted under the Smith Act of 1940 "or some other appropriate statute" in the event of war.[13]

FBI instructions to the field reiterated the types of organizations whose members should be investigated under the Custodial Detention Program. In addition to the groups listed in 1940, the order included the Socialist Workers Party (Trotskyite), the Proletarian Party, Lovestoneites, "or any of the other Communist organizations or…their numerous `front' organizations," as well as persons reported as "pronouncedly pro-Japanese."[14]

FBI officials were concerned that the Department plan did not provide sufficiently for action against citizens. In addition to the Smith Act of 1940, FBI officials pointed out to the Department "the possibility of utilizing denaturalization proceedings." At the FBI's request, the Special Departmental Unit prepared "a study of the control of citizens suspected of subversive activities." As later summarized by the FBI, the study stressed:

> *"...the great need for a federal overall plan of legislation to control suspected citizens, rather than isolated statutes which would care for particular citizens…." It was pointed out that the British system of defense legislation had been to enact a general enabling statute under which the executive authority is permitted to promulgate rules and regulations having the effect of law, and it was suggested that, if this country entered the war, a similar type of statute should be enacted which would enable the President to set up a system of regulations subject to immediate change and addition as the need arose.* [15]

Attorney General Francis Biddle did not endorse this position. Instead, the Department's Special Unit relied upon recently enacted specific statutes as the basis for its planning. These included the Foreign Agents Registration Act of 1938, the Smith Act of 1940 making it a federal crime to urge military insubordination or advocate the violent overthrow of the government, and the Voorhis Act of 1941 requiring the registration of organizations having foreign ties and advocating the violent overthrow of the government.

Acting at "the postinvestigative level," the Special War Policies Unit considered these and other statutes as the basis for coordinating "affirmative action on the internal security front." Its annual report in 1942 stated:

> *The Unit deals with new forms of political warfare. As part of its equipment, it has engaged analysts with special experience and schooling in the field of political organization and ideologies. The Unit has not only sought to collate information regarding dangerous individuals and organizations; it has sought to bring together a trained staff equipped to understand the methods, beliefs, relationships and subversive techniques of such individuals and organizations for the purposes of initiating appropriate action.*[16]

During the period 1941-43 the Special Unit included a Foreign Agents Registration Section, a Sedition Section, an Organizations and Propaganda Analysis Section, and a Subversives Administration composed of a Nazi and Fascists Section and a Communist Section. The Special Unit initiated such wartime measures as the internment of several thousand enemy aliens, the denaturalization of members of the

German-American Bund who had become American citizens, sedition prosecutions, exclusion of publications from the mail, and prosecution of foreign propaganda agents. The Unit received and analyzed reports from the FBI, the State Department, the Office of War Information, and the Office of Strategic Services. Attorney General Biddle abolished the Special Unit in July 1943 and transferred its prosecutive functions to the Criminal Division.[17]

In 1943, Attorney General Biddle also decided that the Custodial Detention List had outlived its usefulness and that it was based on faulty assumptions. His directive to the FBI and the Departmental Unit stated:

> *There is no statutory authorization or other present justification for keeping a "custodial detention" list of citizens. The Department fulfills its proper function by investigating the activities of persons who may have violated the law. It is not aided in this work by classifying persons as to dangerousness.*
>
> *Apart from these general considerations, it is now clear to me that this classification system is inherently unreliable. The evidence used for the purpose of making the classifications was inadequate; the standards applied to the evidence for the purpose of making the classifications were defective; and finally, the notion that it is possible to make a valid determination as to how dangerous a person is in the abstract and without reference to time, environment, and other relevant circumstances, is impractical, unwise, and dangerous.*[18]

Upon receipt of this order, the FBI Director did not abolish the FBI's list. Instead, he changed its name from Custodial Detention List to Security Index.[19] The new index continued to be composed of individuals "who may be dangerous or potentially dangerous to the public safety or internal security of the United States." Instructions to the field stated:

> *"The fact that the Security Index and Security Index cards are prepared and maintained should be considered strictly confidential, and should at no time be mentioned or alluded to in investigative reports, or discussed with agencies or individuals outside the Bureau other than duly qualified representatives of the Office of Naval Intelligence and the Military Intelligence Division, and then only on a strictly confidential basis."*[20]

The Attorney General and the Justice Department were apparently not informed of the FBI's decision to continue the program to classify dangerous individuals but under a different name.

Moreover, FBI investigations did not conform to Attorney General Biddle's statement that the Justice Department's proper function was investigation of "the activities of persons who may have violated the law." The FBI Director's instructions at the end of the war emphasized that the Bureau investigated activities "of prosecutive or intelligence significance."[21] However, toward the end of the war, the FBI did limit substantially its investigation of individual Communists. Orders to the field requiring investigation of every member of the Communist Political Association (CPA) (as the Party was named during 1943-1945) were modified in 1944, when field offices were instructed to confine their investigations to "key figures in the national or regional units of the CPA." This directive received "widely varying interpretations" in the field, and many offices "continued to open cases on the basis of membership alone." Further instructions in April 1945 stated that

investigations were restricted to "key figures" or "potential key figures" rather than to all members as had been the policy before 1944. Security Index cards were "prepared only on those individuals of the greatest importance to the Communist movement."[22]

At the end of the war, the head of the FBI Intelligence Division, D. M. Ladd, recommended to Director Hoover another cutback in operations. This proposal was approved by the FBI Executive Conference, and the State Department and the Justice Department's Criminal Division were advised of the changes.[23] FBI field offices were:

> *"...instructed to immediately discontinue all general individual security matter investigations in all nationalistic categories with the specific exceptions of cases involving communists, Russians, individuals who nationalistic tendencies result from ideological or organization affiliation with Marxist groups such as the socialist Workers Party, the Workers Party, the Revolutionary Workers League or other groups of similar character and members of the Nationalist Party of Puerto Rico."*

The FBI would open "no new general individuals security matter investigations…unless they fall within the above specific exceptions." However, the instructions permitted the field to continue investi-gating "individuals whose activities were of paramount intelligence importance such as individuals closely allied with political or other groups abroad, individuals prominent in organi-zational activity of significance, or individuals falling within similar categories." The instructions added:

> *It is realized, of course, that in connection with the intelligence jurisdiction of the Bureau it will be necessary to investigate the activities and affiliations of certain individuals considered key figures in nationalistic and related activities or considered leaders of importance in various foreign nationality groups…. If in such an instance you have any question as the advisability or desirability of instituting such an investigation in view of the above instructions, you should, of course, refer the matter to the Bureau for appropriate decision.*

This flexibility specifically allowed for the investigation of "fascist individuals of prosecutive or intelligence significance."[24]

President Roosevelt's Directive of December 1941 on the FBI's SIS reads as follows:

In accordance with previous instructions the Federal Bureau of Investigation has set up a Special Intelligence Service covering the Western Hemi-sphere, with Agents in Mexico, Central America, South America, the Caribbean, and Canada. Close contact and liaison have been established with the Intelligence officials of these countries.

In order to have all responsibility centered in the Federal Bureau of Investigation in this field, I hereby approve this arrangement and request the heads of all Government Departments and Agencies concerned to clear directly with the Federal Bureau of Investigation in connection with any intelligence work within the sphere indicated.

The Director of the Federal Bureau of Investigation is authorized and instructed to convene meetings of the chiefs of the various Intelligence Services operating in the Western Hemisphere and to maintain liaison

with Intelligence Agencies operating in the Western Hemisphere: (Confidential Directive to the Heads concerned, 12/41.)

An agreement between the FBI and military intelligence dealing with Special Intelligence operations in the Western Hemisphere: cited Presidential "instructions" of June 24, 1940 and January 16, 1942. It described FBI responsibilities as follows:

"The Special Intelligence Service will obtain, primarily through undercover operations supple-mented when necessary by open operations, economic, political, industrial, financial and subversive information. The Special Intelligence Service will obtain information concerning movements, organizations, and individuals whose activities are prejudicial to the interests of the United States." (Agreement between MID, ONI and FBI for Coordinating Special Intelligence Operations in the Western Hemisphere, 2/25/42.)

The following sections from a Joint Chiefs of Staff Directive on the functions of the Office of Strategic Services indicate overlap between FBI and OSS operations in 2943:

3. *Secret Intelligence*

a. The Office of Strategic Services is authorized to: (1) Collect secret intelligence in all areas other than the Western Hemisphere by means of espionage and counter-espionage. In the Western Hemisphere, bases already established by the Office of Strategic Services in Santiago, Chile, and Buenos Aires, Argentina, may be used as ports of exit and of entry for the purpose of facilitating operations in Europe and Asia, but not for the purpose of conducting operations in South America. The Office of Strategic Services is authorized to have its transient agents from Europe or Asia touching points in the Western Hemisphere transmit information through facilities of the Military Intelligence Service and of the Office of Naval Intelligence.

4. *Research and Analysis*

The Office of Strategic Services will (1) furnish essential intelligence for the planning and execution of approved strategic services' operations; and (2) furnish such intelligence as is requested by agencies of the Joint Chiefs of Staff, the armed services, and other authorized Government agencies. To accomplish the foregoing *no geographical restriction is placed* on the research and analysis functions of the Office of Strategic Services.… (Emphasis supplied).

(JCS Directive: Functions of the Office of Strategic Services, JCS 155/11/D, 10/27/43.)

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Magic

Introduction

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Introduction

Herbert O. Yardley was the director of Military Intelligence's cryptanalytic service MI_8 during World War I. When the war ended, Yardley and his staff transferred their code-breaking operation to New York where they continued to operate under commercial cover. This activity became known as "The American Black Chamber" and was funded by the Departments of State and Navy. The Black Chamber's most notable success was breaking the Japanese diplomatic code; the information obtained was used by the US Government during the Washington Naval Arms Limitation Conference in 1921.

In 1929, the new Secretary of State Henry Stimson terminated State's funding for the Black Chamber, which essentially ended the operation. However, the US Army took the Black Chamber files and created its own code-breaking entity, the Signals Intelligence Service under William Friedman. The US Navy also established a Code and Signal Section within the Office of Naval Intelligence in 1924. Both services devoted their efforts to breaking codes in Japanese diplomatic traffic.

The publication of Yardley's book, *The American Black Chamber,* caused the Japanese to change their code and cipher system. They developed their own "enigma-type" machine called "Red," which was used by their Foreign Ministry. In 1937 they began to use a more sophisticated machine, called "Purple" by the Americans. The Japanese entrusted their most sensitive diplomatic traffic to "Purple."

"America First" Committee

Arrest of Japanese in Possession of Illegal Passports

Freezing Order Curtails Japanese Intelligence Activities in America

Maj. Yano Arranges Anti-American Espionage

Minister Akiyama Estimates his Espionage and Propaganda Expenditures

Japanese Military Attaché Requests Expansion of Intelligence Facilities in the United States

Secretary Terasaki Established Net in South America

Japanese Espionage Network Begins Operations

Japanese Naval Officials in Mexico Disapprove of Furnishing General Intelligence

Ambassador Nomura Sends Representatives to "America First" Meeting

Frequency of Ship Movement is Left to Discretion of Consul

Japanese Continue To Watch Navy Maneuvers

Mr. Fuji Changes American Ship Maneuver Signals

U.S.S. Lexington Departs Hawaii

Consul Kita Notifies Tokyo of Balloon Barrage Defenses

Last Intercepted Intelligence Report Before Pearl Harbor Attack Lists Ships in Port

Inaccuracy of Japanese Intelligence Reports

Japanese Official Analyzes Roosevelt's Domestic and Foreign Strategy

Magic Bibliography

William Friedman and his staff were given the task of breaking the Japanese "Purple" code system. It was not until 1940 that they solved the puzzle. The strain of the endeavor, however, led to a nervous breakdown and Friedman's retirement as a Lt. Col. in the Signal Corps reserve.

With the solution of the Japanese Foreign Office's highest grade cryptographic system, the interception, decryption, and translation on a current basis of secret Japanese worldwide diplomatic messages began. These messages also contained Japanese intelligence activities and collection targets. The information the United States derived from this source, designated "Magic," was highly classified and closely guarded. It went only to a few of the highest-level US officials.

The items selected for this chapter pertain to Japanese intelligence activities during 1941.

Japan Discovers the United States is Reading Its Codes

A series of dashes in the translations indicate that a portion of the original encrypted text was not intercepted, was garbled, or could not be decrypted.

On 5 May 1941, Japanese Ambassador Nomura was informed by his superiors in Tokyo that it appeared the US Government was reading his coded messages. This information was obtained from the Germans by Japanese Ambassador to Germany, Osima, who then informed Tokyo. Although Ambassador Nomura requested additional details, the Germans refused to divulge the source of its information.

Ambassador Nomura conducted an investigation and, on 20 May 1941, informed Tokyo that he confirmed that the United States was reading some of the Japanese codes. He did not reveal his source in the message but indicated he would send the details by courier.

From: Tokyo (Japanese Foreign Minister)
5 May 1941
To: Washington (Koshi) #192

According to a fairly reliable source of information it appears almost certain that the United States government is reading your code messages. Please let me know whether you have any suspicion of the above.

From: Berlin (Oshima)
3 May 1941
To: Tokyo (Matsuoka) #482

STAAMAA called me this day (evening?) and stating that this request was to be kept strictly secret, he said that Germany maintains a fairly reliable intelligence organization abroad (or_ _"in the U.S."?), and accordingly to information obtained from the above-mentioned organization it is quite (or_ _"fairly"?) reliably established that the U.S. government is reading Ambassador Nomura's code messages, and then asked that drastic steps should be taken regarding this matter.

There are at least two circumstances substantiating the above (suspicion). One circumstance is that Germany is reading our code messages _ _ _. Regarding this, during my previous residence here, they were known to have a large scale cryptanalytic organization _ _

(unfinished _ _ last two-thirds not available)

From: Tokyo (Matsuoka)
5 May 1941
To: Berlin (Oshima) #370

Please express our appreciation to STAAMAA for the information in question and ask him if it is not possible to give us the authority for the statement that it has been fairly reliably established that the U.S. government is reading our code messages, so that we might take appropriate action. Reply requested.

From: Washington (Nomura)
5 May 1941
To: Tokyo (Gaimudaijin) #267

Most Guarded Secrecy.
Foreign Office Secret.
Re your #192.

For our part, the most stringent precautions are taken by all custodians of codes and ciphers, as well as of other documents. On this particular matter I have nothing in mind, but pending investigation please wire back any concrete instances or details which may turn up.

From: Tokyo (Matsuoka)
7 May 1941
To: Washington (Nomura) #198

Regarding your #267.

This matter was told very confidentially to Ambassador Oshima by the Germans as having been reported to them by a fairly ("rather" or "pretty") reliable intelligence medium; but to our inquiry they are said to have refused to divulge the basis on which they deemed it to be practically certain.

From: Washington (Nomura)
20 May 1941
To: Tokyo #327

INTELLIGENCE:

Though I do not know which ones, I have discovered that the United States is reading some of our codes. As for how I got the intelligence, I will inform you by courier or another safe way.

Expansion of Japanese Espionage in North and South America

American authorities knew that a widespread Japanese espionage organization was operating in the United States for at least a year before the war. The Japanese decided at the end of 1940 that they had neglected political propaganda in the United States by concentrating their attention to cultural enlightenment. They decided to refocus their efforts to political interests with the hope that this new approach would be favorably received. Special attention was to be paid to American Communist Party operations and the economic and social activities of the Soviet Union, not only in the United States but also in Central and South America.

In addition, Japanese espionage agents were directed to ascertain the relations between the United States and Latin American countries. In the past, the Japanese ignored these countries but, with the changing political climate, they believed it was advantageous to change their policy.

The Japanese desired closer contacts with German and Italian agents, as well as with Japanese residents, who were to be cautioned not to create any suspicion in the minds of US authorities regarding their espionage activities. The day after Ambassador Nomura made his official entrance into the diplomatic

scene at Washington, Tokyo issued new instructions concerning the gathering of intelligence in Canada and the United States. Details of this plan demonstrate that the Japanese were preparing for the worst.

From: New York (Iguchi)
17 December 1940
To: Tokyo (Gaimudaijin) #763

Re your msg. to Wash. #591.

As propaganda and enlightenment organs here, we have the Japan Institute, the Tourist Bureau, and the silk office of the Ministry of Commerce and Communication. Other groups whose importance we cannot ignore for collecting information are the financial adviser, the Army and Navy Inspection Offices, Representatives of Domei, ASAHI, NITINITI, AND YOMIURI, the Bank of Japan, the Specie Bank, Mitsui, Mitsubishi, N.Y.K., O.S.K., the Manchurian R.R. and the OKURA Co. In order to obtain the fullest cooperation from the above it is well to establish an information committee centering around the press attaché.

From: Tokyo (Matsuoka)
5 February 1941
To: Washington (Koshi) #056

Re my #591.

In connection with New York to Tokyo message #763, the business men (including Sumitomo's representatives) and representatives of newspapers were invited to call here. One of my men discussed the following points with them:

(l) To have the various representatives of business firms engaged in collecting intelligence material.

(2) To have all such representatives abroad (in the United States) cable their opinions and manipulations in so far as they are related to politics, through diplomatic channels so as to maintain secrecy.

We were able to obtain their agreement to cooperate with us in this respect, so please proceed with this program. We have the perfect understanding and agreement of the Army and Navy in this connection. They promise to give us whatever aid they can.

From: New York (Iguchi)
11 December 1940
To: Tokyo (Gaimudaijin) #762

1. In view of the fact that our Embassy's propaganda effort in the U.S. has been chiefly confined to cultural enlightenment in the past, which

by the very nature of the thing evoked little or no objection, we have been considering a plan since last year to strengthen our political propaganda methods. However, due to the increased vigilance and control exercised over foreign propaganda in general and over the 5th column activities in particular, since the outbreak of the European war, we cannot hope for too great a success in this field of propaganda. Nevertheless, the effect of the recently-signed tri-partite agreement will impose a greater necessity for just such propaganda efforts if the present Japanese-American relations are to be maintained. It is imperative, therefore, that we reconsider our efforts with a view to seeking more effective propaganda methods. While I realize that your office has been giving much thought to this question, I wish to submit herewith my views on the matters.

While cultural propaganda and enlightenment, no doubt, contribute much toward the promotion of amicable relations between Japan and America, the cost is prohibitive. Therefore, I suggest that, wherever possible, this type of propaganda be discontinued.

Political propaganda will meet with a great deal of obstacles which will cast some doubts on its successful outcome. However, we should strive to deal with fundamental problems in order to thwart the counter-propaganda in this country, which is based on the assumption that all foreign propaganda seek to divide the American people.

The set-up of the press attaché should be concentrated on the task of assembling information and of widening the intelligence net and its personnel. Especial effort should be made to establish personal contacts with the members of the press and persons influential in American politics and business. The intelligence net should be so organized as to be able to function even if there should be a severance of diplomatic and commercial relations between Japan and the U.S.

2. In addition to the present work of investigating the activities of the American Communist party and the Chinese by our Embassy, we should constantly keep watch over American politics and the economic and social activities of Soviet Russia in the United States, particularly as they affect Central and South Americas. For this task it is necessary not only to hire Americans, but also to have competent researchers sent from Japan.

3. Although the Tourist Bureau and the Trade Promotion Bureau have been carrying our propaganda in the past, we should consider the inconsistency of having the Tourist Bureau giving out travel information when, today, no American tourists are permitted to travel to Japan.

Capt. Herbert O. Yardley
PHOTO

From: Tokyo (Matsuoka)
20 January 1941
To: Washington (Koshi) #043

Foreign Office secret.

Heretofore, we have placed emphasis on publicity and propaganda work in the United States. In view of the critical situation in the recent relations between the two countries, and for the purpose of being prepared for the worst, we have decided to alter this policy. Taking into consideration the small amount of funds we have at our disposal, we have decided to de-emphasize propaganda for the time being, and instead, to strength our intelligence work.

Though we must give the matter of intelligence work our further study__in this connection we are at present conferring with the intelligence bureau__we have mapped out a fundamental program, the outline of which is contained in my supplementary cable No. 44.

Please, therefore, reorganize your intelligence set-up and put this new program into effect as soon as possible.

Cable copies of this message, as "Minister's orders" to Canada, Mexico, (a copy to be relayed from Mexico to Mexicali), San Francisco, (copies from San Francisco to Honolulu, Los Angeles, Portland, Seattle, and Vancouver), New York, New Orleans, and Chicago.

From: Tokyo (Matsuoka)
30 January 1941
To: Washington (Koshi) #44

(Foreign Office secret).

(1) Establish an intelligence organ in the Embassy which will maintain liaison with private and semi-official intelligence organs (see my message to Washington #591 and #732 from New York to Tokyo, both of last year's series). With regard to this, we are holding discussions with the various circles involved at the present time.

(2) The focal point of our investigations shall be the determination of the total strength of the U.S. Our investigations shall be divided into three general classifications: political, economic, and military, and definite course of action shall be mapped out.

(3) Make a survey of all persons or organizations which either openly or secretly oppose participation in the war.

(4) Make investigations of all anti-Semitism, communism, movement of Negroes, and labor movements.

(5) Utilization of U.S. citizens of foreign extraction (other than Japanese), aliens (other than Japanese), communist, Negroes, labor union members, and anti-Semites, in carrying out the investigations described in the preceding paragraph would undoubtedly bear the best results.

These men, moreover, should have access to governmental establishments, (laboratories?) governmental organizations of various characters, factories, and transportation facilities.

(6) Utilization of our "Second Generation" and our resident nationals. (In view of the fact that if there is any slip in this phase, our people in the U.S. will be subjected to considerable persecution, and the utmost caution must be exercised.)

(7) In the event of U.S. participation in the war, our intelligence set-up will be moved to Mexico, making that country the nerve center of our intelligence net. Therefore, will you bear this in mind and in anticipation of such an eventuality, set up facilities for a U.S._Mexico international intelligence net. This net which will cover Brazil, Argentina, Chile, and Peru will also be centered in Mexico.

(8) We shall cooperate with the Germans and Italian intelligence organs in the U.S. This phase has been discussed with the Germans and the Italians in Tokyo, and it has been approved. Please get the details from Secretary Terasaki upon his assuming his duties there. Please send copies to those offices which were on the distribution list of No. 43.

From: Tokyo (Mausuoka)
5 February 1941
To: Mexico City (Koshi) #239

In view of the critical times we wish to revise our information policy of our offices in South and Central America, along the following lines:

(1) Investigate the general national strength of the United States.

(2) Investigate the United States policy towards South and Central America.

(3) Investigate the extent of south and Central America's participation in the policy of the United States.

(4) Investigate the extent of competition between Germany, Italy and the United States in Central America.

1. Appoint persons to direct these investigations and report their names.

2. Consider plans to use South and Central America for obtaining information regarding the United States in the event that that country is drawn into war, and have an information gathering machinery ready for operation when that situation occurs.

3. Keep a close contact with the German and Italian organs (of information).

4. To organize Japanese residents, including newspaper men and business firms for the purpose of gathering information. Care should be taken not to give cause for suspicion of espionage activities.

5. To formulate a suitable plan for dispatching information obtained under any condition.

Relay to Chile, Peru, Panama, Argentina(?), Venezuela(?), and Brazil and retransmit by code to Santos and Ribeiro Preto.

William Frederick Freidman
PHOTO

From: Tokyo (Matsuoka)
15 February 1941
To: Washington (Koshi) #073

Re my #43.

The information we particularly desire with regard to intelligence involving U.S. and Canada, are the following:

1. Strengthening or supplementing of military preparations on the Pacific Coast and the Hawaii area; amount and type of stores and supplies; alterations to air ports (also carefully note the clipper traffic).

2. Ship and plane movements (particularly of the large bombers and sea planes).

3. Whether or not merchant vessels are being requisitioned by the government (also note any deviations from regular schedules), and whether any remodeling is being done to them.

4. Calling up of army and navy personnel, their training, (outlook on maneuvers) and movements.

5. Words and acts of minor army and navy personnel.

6. Outlook of drafting men from the view-point of race.

Particularly, whether Negroes are being drafted, and if so, under what conditions.

7. Personnel be graduated and enrolled in the army and navy and aviation service schools.

8. Whether or not any troops are being dispatched to the south Pacific by transports; if there are such instances, give description.

9. Outlook of the developments in the expansion of arms and the production set-up; the capacity of airplane production; increase in the ranks of labor.

10. General outlooks on Alaska and the Aleutian Islands, with particular stress on items involving plane movements and shipment of military supplies to those localities.

11. Outlook on U.S. defense set-ups.

12. Contacts (including plane connections) with Central and South America and the South Pacific area. Also outlook on shipment of military supplies to those areas.

Please forward copies of this message as a "Minister's Instruction" to New York, San Francisco, Los Angeles, Seattle, Portland, (Chicago or New Orleans?), Vancouver, Ottawa, and Honolulu. Also to Mexico City and Panama as reference material.

Japanese Concern About Allied Counterespionage

Not only were the Japanese expanding the activities of their espionage agents in North and South America, but they were also extremely concerned over the success of Allied military counterespionage. Simultaneously with the increase of Japanese military and naval observers in the United States, American military observers in the Pacific were undergoing closer supervision. Furthermore, severe measures were taken to restrict foreign visitors from entering Japan. No visitor, except those traveling under diplomatic passports, could reach Japan without first informing the Japanese authorities of his complete personal history and political leanings.

From: Tokyo (Matsuoka)
15 February 1941
To: Rome (Koshi) #300

Under present world conditions, we must redouble our counter espionage activities. To conform with this policy we have decided to further restrict foreign visitors to our shores.

Hereafter, therefore, will you make a thorough investigation of all applicants for visas? Those persons who come under the classifications noted below (including persons who have no nationality) should not be given visas until their names, occupations, object of visit, and other reference material is reported by official communications or by request cables. A detailed description of the personal history and political leanings should accompany the applications of those who come under the category of (2) below. (There will be no change in the procedure which has been in effect in the past, where citizens of the U.S.S.R. and refugees are concerned.)

(1) Officials, military men, and others who are traveling on official business. Possessors of diplomatic passports are excepted.

(2) Newspaper correspondents, magazine writers, and persons connected with propaganda organs.

(3) All others about whose purpose of visit, political leanings, and/or connections you have some doubts.

Japanese Interest in American Labor Unions

Ambassador Nomura received a request from Tokyo on 1 April 1941 to investigate the labor union situation in the United States as a possible obstacle to American unity in the event of war. Inquiry was to be made concerning the attitude of the CIO, the AF of L, the Communist Party, the Socialistic parties, and last but not least, into German and Italian fifth column activities. All this was in conformity with the recent expansion of the Japanese intelligence gathering organization in North and South America.

From: Tokyo
1 April 1941
To: Washington #154

Secret.

It has been reported that recently strikes have broken out in (Chicago?) After you have made a very thorough investigation, please wire me your findings along the following lines:

1. The political motivating forces behind these strikes and their expected development.

2. The extent to which these strikes interfere with national defense organization.

3. The relation between C.I.O's anti-ROOSEVELT policies since the elections last year and the current strikes.

4. To what extent is the LEWIS-MURRAY faction using their criticism of the (Cabinet?) and President ROOSEVELT's foreign policy?

5. Recent A.F. of L. attitude.

6. The attitude of the Communist Party to these strikes.

7. In the event of a breakdown of strike mediation, what are the anticipated government measures and what is the C.I.O.'s attitude toward this? In the event of war we think that the Labor Unions will become a major political factor in hindering unity in the United States. In the future arrange to get in touch with the leaders of labor unions, the Communist Party, the Socialist Party, and other anti-ROOSEVELT movements. At the same time, I would like to have you study the possibility of using such a person as (IKU?) O OYAMA.

Furthermore, with regard to German and Italian Fifth Column activities, I gave you instructions in my #546 of mid-November last year, but at this time particularly I would like to have you give the subject your careful attention.

On the authorization of the Foreign Minister, please transmit this message to all of our officials in the United States with the exception of _ _ _ _. Please communicate the foregoing to Canada, _ _ _ _and

Mexico for their information.

Reports of Japanese Intelligence Agents in America

On 17 April 1941, Ambassador Nomura requested a secret fund of $50,000, which prompted the Foreign Ministry to ask about the intelligence organization recently established in North America. Japanese agents were attempting to establish contacts in many fields of American industry and commerce. Great attention was paid to labor disputes and racial conflicts since the Japanese thought that all forces disrupting American unity would be productive sources of intelligence.

From: Vancouver (Kawasaki)
28 April 1941
To: Tokyo #45

Re #180 addressed by the Minister to the Ambassador in Washington.

This office is at present employing a spy (an Irishman with Communist Party affiliations) and is having him collect information of this nature. We intend to send this man in the near future to Prince Rupert and Yukon, inasmuch as progress of the United States-Canada joint defense plans and the question of air connection with Alaska deserve our attention.

From: Los Angeles (Nakauchi
9 May 1941
To: Tokyo (Gaimudaijin) #067

Strictly Secret.

Re your message #180 to Washington.

We are doing everything in our power to establish outside contacts in connection with our efforts to gather intelligence material. In this regard, we have decided to make use of white persons and Negroes, through Japanese persons whom we can't trust completely. (It not only would be very difficult to hire U.S. (military?) experts for this work at the present time, but the expenses would be exceedingly high.) We shall, furthermore, maintain close connections with Japanese Association, the Chamber of Commerce, and the newspapers.

With regard to airplane manufacturing plants and other military establishments in other parts, we plan to establish very close relations with various organizations and in strict secrecy have them keep these military establishments under close surveillance. Through such means, we hope to be able to obtain accurate and detailed intelligence reports. We have already established contact with absolutely reliable Japanese in the San Pedro and San Diego area, who keep a close watch on all shipments of airplanes and other war materials, and report the amounts and destinations of such shipments. The same steps have been taken with regard to traffic across the U.S.-Mexico border.

We shall maintain connection with our second generations who are at present in the (U.S.) Army, to keep us informed of various developments in the Army. We also have connections with our second generations working in airplane plants for intelligence purposes.

With regard to the Navy, we are cooperating with our Naval Attaché's office, and are submitting reports as accurately and as speedily as possible.

We are having Nakazawa investigate and summarize information gathered through first hand and newspaper reports, with regard to military movements, labor disputes, communistic activities and other similar matters. With regard to anti-Jewish movements, we are having investigations made by both prominent Americans and Japanese who are connected with the movie industry which is centered in this area. We have already established connections with very influential Negroes to keep us informed with regard to the Negro movement.

Japanese encoder
PHOTO

From: Seattle (Sato)
11 May 1941
To: Tokyo #45

Re your #180 to Washington.

1. Political Contacts.

We are collecting intelligence revolving around political questions, and also the question of American participation in the war which has to do with the whole country and this local area.

2. Economic Contacts.

We are using foreign company employees, as well as employees in our own companies here, for the collection of intelligence having to do with economics along the lines of the construction of ships, the number of airplanes produced and their various types, the production of copper, zinc and aluminum, the yield of tin for cans, and lumber. We are now exerting our best efforts toward the acquisition of such intelligence through competent Americans. From an American, whom we contacted recently, we have received a private report on machinists of German origin who are Communists and members of the labor organizations in the Bremerton Naval Yard and Boeing airplane factory. Second generation Japanese_ _ _ _ _ _ _ _ _ _ _ _ .

3. Military Contacts

We are securing intelligence concerning the concentration of warships within the Bremerton Naval Yard, information with regard to mercantile shipping and airplane manufacturer, movements of military forces, as well as that which concerns troop maneuvers.

With this as a basis, men are sent out into the field who will contact Lt. Comdr. OKADA, and such intelligence will be wired to you in accordance with past practice. KANEKO is in charge of this. Recently we have on two occasions made investigations on the spot of various military establishments and concentration points in various areas. For the future we have made arrangements to collect intelligence from second generation Japanese draftees on matters dealing with troops, as well as troop speech and behavior._ _ _ _ _ _ _ _ _ _ _ _ _.

4. Contacts with Labor Unions.

The local labor unions A.F.of L. and C.I.O. have considerable influence. The (Socialist?) Party maintains an office here (its political sphere of influence extends over twelve zones.) The C.I.O., especially, has been very active here. We have had a first generation Japanese, who is a member of the labor movement and a committee chairman, contact the organizer, and we have received a report, though it is but a resume, on the use of American members of the (Socialist?) Party. _ _ _ _OKAMARU is in charge of this.

5. In order to contact Americans of foreign extraction and foreigners, in addition to third parties, for the collection of intelligence with regard to anti-participation organizations and the anti-Jewish movement, we are making use of a second generation Japanese lawyer.

This intelligence_ _ _ _ _ _ _ _ _ _ _ _ _.

Japanese Reports From the United States

During the period from 12 May to 6 August 1941, the Japanese showed enormous attention to the movement of American warships. While the question of convoying American ships to England was still pending in Congress, Japan was expanding its intelligence network, especially in America. Fearing that a crisis might be reached before this organization could become well organized, Japan hurried to secure intelligence from its agents in the United States, Germany, and Spain. Mr. Taro Terasaki, recently assigned as Chief of Japanese Intelligence and propaganda work in the United States, warned Tokyo that the US Government was tending toward entrance into the war. For this reason, he emphasized, in a report to Tokyo on 19 May 1941 the importance of securing funds, establishing contacts with influential persons, and acquiring personnel for intelligence work. The Dies Committee and restrictive regulations regarding foreigners and Americans in foreign employ made the task difficult for the Japanese.

Information that the US Navy was interested in requisitioning until September, half of the American Consulate office space at Manila for espionage work, led Mr. Matsuoka, on 1 July 1941 to fear that this was the first step in establishing a special service for British-American-Chinese military liaison. Besides keeping close watch on naval personnel to verify this report, the Japanese kept under surveillance a number of persons who had entered the country as temporary tourists.

From: Washington
19 May 1941
To: Tokyo #319

Re your #45 and #180.

I have had Terazaki of Intelligence make an official trip to New York for the purpose of keeping in touch with the Consul-General there, and we have come to the following conclusions.

1. We are of the opinion that Roosevelt's dictatorial attitude is becoming more pronounced and government is learning toward all-out war. Therefore, we desire that you remit immediately as large an amount as possible so that we may have funds with which to carry on intelligence work in the emergency created by America's entry into the war. For this purpose we assume that Japanese-American relations will continue as at the present.

2. The duties of an intelligence office are becoming increasingly difficult. Because of the existence of the Dies Committee and of the application of the regulations regarding Americans in foreign employ and regarding foreigners resident in America the gathering of accurate secret information is far from easy. This is only one example and there are many other "delicate" problems, so please understand the delay in my answering telegraphic (requests for information).

3. We wish to make Washington and New York one unit and have a unified policy for it. Therefore we wish to get your approval before Terazaki starts for his post. We wish to have Consul Inagaki come here

to serve. We feel that we should have here at least one-third of the personnel that they have in Shanghai for intelligence. Therefore, we are looking for temporary employees, (non-career clerks). Furthermore, we wish to have the officer in charge of intelligence visit New York about the 10th of every month.

4. The title of the officer in charge of intelligence will be that of "press attaché." His duties will be as decided in the business conference on March 4th, Article 61(1), as follows:

A. Ordinary investigations and,

B. The development of intelligence.

"A" will of course include the investigation and gathering of secret information on the division in American public opinion regarding the rapprochement in Japanese-American relations based on the peace movement. But we wish to preclude such policies as the strategy being employed in the present negotiations.

5. A summary of the present state of the policy is as follows:

We are making personal contacts on every hand. However, at this place and in New York we are continuing the existing formal contacts and gathering secret information. In addition, to this, the officer in charge of intelligence has contacts with:

(A) J, and W, who are in close touch with the President and his wife.

The President is cultivating power through the "relief workers" and the "W.P.A." and other agencies. In addition to this, since his third term anyone who opposed him becomes the target of his attacks and his dictatorial tendencies are becoming more marked, therefore it is natural that we should pay special attention to those in close touch with him.

One or two items regarding Roosevelt's position: Evidence was brought out in the Senate to the effect that the former Ambassador to England, Kennedy, had not paid his 1932 income tax, but the President maintained silence. According to other secret information, Willkie had a secret understanding with Roosevelt and attacked him in his public speeches more than was necessary as a Presidential candidate and enjoyed scandalizing public opinion, however, had he by any chance become President he would have become a mere puppet of Roosevelt.

Again, _ _ _ _told Terazaki that originally he was an isolationist, but that now in view of the opposition he was keeping silent. Six months from now if he said he were an isolationist he would not be able to go about in safety.

(B) W of the State Department.

When Terazaki was a student at Brown University he became well acquainted with W.

(C) G of the Senate.

When Terazaki was in Brown University he was greatly helped by this G.

(D) The relationship of the "America First Committee" to Lindbergh and W.

Every time Lindberg makes a speech the German newspapers approve and American newspaper reporters in Germany write it up and

American newspapers make a big thing of it so that the impression is conveyed that Lindberg is an agent of Germany. Because of this, Lindberg and the Committee are very perplexed and according to W, Lindberg has been cautioned by the German Embassy. Since then he has been in touch with W.

(E) D, an Irish American.

D told our intelligence officer that a Jewish American Justice of the Supreme Court, Frankfurter, was packing the key posts of the government with Jewish Americans. But that American antipathy toward Jews is increasing to such an extent that eventually anti-Jewish influence would prevail.

(F) Persons with religious affiliations.

(1) Catholic. (2) Protestant.(3) Undecided.

The Catholics are the ones who are concerned in the present negotiations.

(G) The Brown University Club.

This meets regularly once a month and at other times at which times he (Terazaki) is present.

6. Concerning the salary for employing nationals and foreigners. The future is another matter: however, judging from the past unless our general funds are increased it will be impossible to move. We wish to have you cognizant of the actual situation and when the opportune time comes we wish to take decisive action.

7. Looking at the funds for general intelligence, of the $30,000 income, only about $3,900 a year is available for actual development of intelligence and about $1,800 a year for entertainment and receptions. However, in the decision of the committee held on March 4th of this year regarding intelligence business, and the stipulations of the policy regarding propagation of intelligence, it was variously affirmed that of course the utmost effort would be put forth and that we would need no small sum for expenses. According to the present allotment we will need for the present year the sum of $500,000 for the development of intelligence. We respectfully request this.

From: Tokyo (Matsuoka)
1 July 1941
To: Manila (Riyoji) #191

According to a reliable source of information the United States Navy in your territory is desirous of requisitioning half of the American Consulate office space in the Tourist Bureau Building until September 1st, for vigilance and anti-espionage work.

The above may be part of the plan to establish a special service organ for the British-American-Chinese military liaison chain, therefore, please verify the above report and watch the conduct of the Navy personnel and reply information.

As the source of this information is strictly secret, please exercise caution in making investigations.

Japanese Attempts to Expand Its Naval Intelligence Activities

On September 2, 1941, it became apparent to Tokyo that the expansion of Japanese naval intelligence activities in both North and South America was necessary. Based on a request from naval authorities in Japan, Ambassador Nomura was to insist that a member of his staff go to Hawaii in the capacity of a courier, though in the light of Japanese-American relations, the selection of an opportune moment for the presentation of this request to the American Government was left to his discretion.

Ambassador Nomura replied that inasmuch as Courier Kuga was returning to Japan by way of the United States, having booked passage on the *President Taylor* sailing from San Francisco on September 6, 1941, the dispatching of a courier to Hawaii was no longer necessary.

No. 295
From: Tokyo (Japanese Foreign Minister)
2 September 1941
To: Washington #520

The Naval authorities have made the following request of us. They would like to have you insist at this time upon a member of your staff going to Hawaii in the capacity of a courier. Now, as to the most opportune moment, in the light of Japan-American relations, they would like to have this matter left up to your Excellency's discretion.

According to what the Naval authorities have to say on the matter, your Embassy staff is well aware of this situation. If this is indeed the case, direct application should be made from Washington rather than from the Home Office. Based on a similar request by the Naval authorities, a courier is being sent to South America. This is for your information.

No. 296
From: Washington (Nomura)
2 September 1941
To: Tokyo #762

Re your #520.

Naval authorities here have filed still another request. Inasmuch as courier KUGA is returning to Japan by way of the United States and has booked passage on the President Taylor sailing from San Francisco on the 6th, the matter to which you refer is no longer necessary.

Japanese Foreign Minister Requests Special Intelligence Reports Concerning Pearl Harbor

Japanese naval intelligence reports from Honolulu, though few in number, were in the light of the later attack on Pearl Harbor to grow increasingly significant as December 7, 1941 drew nearer. The significance becomes apparent however, only when reading history backwards.

Concerning Pearl Harbor, Foreign Minister Toyoda on September 24, 1941 directed that in future intelligence reports from Hawaii, Pearl Harbor waters were to be divided roughly into five subareas:

Area A: Waters between Ford Island and the Arsenal

Area B: Waters adjacent to the island south and west of Ford Island. (This area is on the opposite side of the island from Area A.

Area C: East Loch

Area D: Middle Loch

Area E: West Loch and the communicating water routes.

Furthermore, reports were to be made on warships and aircraft carriers at anchor and, although not so important, those tied up at wharves, buoys, and in docks. The type and classes of vessels were to be designated briefly, and special mention was to be made when two or more vessels were alongside the same wharf.

On September 29, 1941, the details of a special code to be used in referring to the location of American warships in Pearl Harbor was sent to Tokyo through diplomatic channels. "KS" meant the repair dock in the Navy yard; "FV" was the mooring in the vicinity of Ford Island; "FG" designated the location alongside Ford Island; and "A" and "B" indicated east and west sides of "FG" respectively.

No. 356
From: Tokyo (Toyoda)
24 September 1941
To: Honolulu #83

Strictly Secret.

Henceforth, we would like to have you make reports concerning vessels along the following lines insofar as possible:

1. The waters (of Pearl Harbor) are to be divided roughly into five sub-areas. (We have no objections to your abbreviating as much as you like.)

Area A. Waters between Ford Island and the Arsenal.

Area B. Waters adjacent to the Island south and west of Ford Island. (This area is on the opposite side of the Island from Area A.)

Area C. East Loch.

Area D. Middle Loch.

Area E. West Loch and the communicating water routes.

2. With regard to warships and aircraft carriers, we would like to have you report on those at anchor. (these are not so important) tied up at wharves, buoys and in docks. (Designate types and classes briefly. If possible we would like to have you make mention of the fact when there are two or more vessels alongside the same wharf.)

No. 357
From: Honolulu (Kita)
29 September 1941
To: Washington Circular #041.

Honolulu to Tokyo #178.

Re your Tokyo's #083.

(Strictly secret)

The following codes will be used hereafter to designate the locations of vessels:

1. Repair dock in Navy Yard (the repair basin referred to in my message to Washington #48): KS.

2. Navy dock in the Navy Yard (the Ten Ten Pier); KT.

3. Moorings in the vicinity of ford Island: FV.

4. Alongside in Ford Island: FG (East and west sides will be differentiated by A and B respectively)

Relayed to Washington. San Francisco.

American Officials Search Japanese Business Offices in Los Angeles

An inspection of the NYK, Yokohama Specie Bank, the Sumitomo, the Mitsui, and the Mitsubishi branch offices in Los Angeles by four to seven Treasury Department and FBI officials was reported to Tokyo on August 18, 1941. A thorough and detailed inspection had been made in each office. Not only had the inspectors checked letters of private individuals, but photostatic copies had been made of several thousand documents, although the Sumitomo office had forbidden the photostatting of its codes.

Consul Kenji Nakauchi believed that the investigation had been conducted to determine the existence of "subversive acts" in spite of the fact that it was theoretically conducted in conjunction with the freezing order. Official employees of the Yokohama Specie office had been forbidden to enter their offices, or to leave, between 6:00 P.M. and 8:30 A.M. in order to prevent the burning of documents. It had been necessary, Consul Nakauchi disclosed, to secure the approval of the inspectors on all telegraphic communications received or dispatched.

No. 380
From: Los Angeles (Nakauchi)
18 August 1941
To: Tokyo #157

(Part 1 of 2.)

Re my #142.

Each of the local NYK, Yokohama Specie Bank, Sumitomo, Mitsui, Mitsubishi branch offices were visited by four to seven Treasury Department inspectors on the afternoon of the 16th. Their inspection lasted until late at night. (The inspection of the NYK and the Mitsui offices lasted for _ _ _ days.) The permanent staff of each of the branch offices involved cooperated with the inspectors. Thorough and detailed inspection was made in each branch office, even to the extent of inspecting the drawers of all desks. Explanations were requested with regard to various account books. (Japanese and English encodement books?), circular letters from the Bureau of Communications, and relationships with customers. They went even so far as to "check" letters of private individuals. Photostatic copies were made of several thousand documents. The Sumitomo office forbid the photostatting of codes.)

No. 381
From: Los Angeles (Nakauchi)
18 August 1941
To: Tokyo #157.

(Part 2 of 2.)

Though this inspection was under the pretext that it had to do with the investigation conducted in conjunction with the freezing legislation, it seemed as though it was an investigation to determine the existence of "subversive acts." They were particularly cautious regarding any relationships with military persons. Included among the personnel making the above mentioned inspections were F.B.I. men.

Furthermore, no so long ago Treasury officials had wax seals placed on the Yokohama Specie office from 6 in the evening until 8:30 in the morning and official employees have been forbidden to enter or leave the office during that time in order to prevent the burning

of documents. The bank was opened in the morning and closed at night by the inspectors themselves. It was necessary to secure the approval of the inspectors on all telegraphic communications received or dispatched.

Relayed to San Francisco, Washington, New York and _ _ _ _.

Japanese Authorities Express Concern Over United States' Official Inspection

On August 23, 1941 Financial Attaché Tsutumu Nishiyama in Tokyo wired his opinion regarding the bank inspection conducted by the Treasury Department officials and FBI men. He believed that the American inspection came closer to being a search for "subversive acts" rather than an inspection connected with the freezing order.

Influential persons in the Specie Bank, greatly concerned, asked that an investigation be conducted to ascertain the real purpose of the inspection of American officials.

No. 394
From: Tokyo
23 August 1941
To: Washington #497.

From Financial Attaché Nishiyama (#70).

1. American inspection of Japanese firms and banks comes close to being a search for "subversive acts" rather than an inspection connected with the freezing order. There was a marked difference in the Japanese inspection of American banks. Influential persons in the Specie Bank are much concerned and desire an investigation to ascertain just what the real purpose of the American officials is. Furthermore, the National City Bank is arranging for the Kobe and Yokohama branches to unite with the Tokyo office and is closing out the Dairen office. According to Curtis's explanation the above move is dictated by economic policy as was the case in the Osaka amalgamation and that there is no other reason for the move. Two or three young Americans will be left in the Tokyo office and the others will be returned home.

2. A proposal has been received from the British-Dutch Bank to exchange commodities for commodities in order to liquidate the ban's accounts and this matter is being pressed by the head of the London branch of the Yokohama Specie Bank. However officials in the foreign office do not look with favor upon pushing negotiations to the solution of this one problem when there are so many other questions pending between Japan and Britain. Also the immediate conclusion of such an agreement would exert an unfortunate influence upon the leadership of

public opinion hence orders have been issued not to ratify such an agreement.

(This item is for your information only.)

Consul Morishima Suggests Further Precautions To Ensure Secrecy of Dispatches

Asking that the Japanese Ambassador in Washington investigate the telegraphic situation, Consul Morito Morishima in New York protested that the Western Union Telegraph Company had returned one of his dispatches which had been sent to

Vancouver. Furthermore, since code messages from the Consulate apparently had been prohibited, requests for transmissions must have been received from Japanese Consulates in Canada.

No. 386
From: New York (Morishima)
20 August 1941
To: Tokyo #415.

To Ottawa as Circular #67.

Re #161 from San Francisco to Tokyo.

It happened here, too, that when I transmitted my #411 to Vancouver, apparently because code messages from the Consulate have been prohibited, the Western Union Telegraph Company returned the message. Since it must be that requests for transmittals have been received from our Consulates in Canada, please find out exactly what the situation is.

The break in US-Japanese relations was reported in this deciphered message.
PHOTO

Mr. Terasaki Plans To Confer With "America First" Committee

For the purpose of making secret contacts with members of the "American First" Committee, Ambassador Nomura asked Tokyo on September 6, 1941 to authorize Secretary Hidenari Terasaki to make an official visit to Chicago. Since Mr. Terasaki had been unable to make an official tour to Los Angeles and San Francisco, it was requested also that he be permitted at this time to stop off at San Francisco, Seattle and Los Angeles.

No. 410
From: Washington (Nomura)
6 September 1941
To: Tokyo #789.

Strictly secret.

I would like to have TERASAKI go on an official mission to Chicago in order to make secret contacts with members of the "America First" committee residing in that city. Please send authorization. At that time, I would like to have him make a study on the spot of the matter concerning OYAMA mentioned in your #154.

Furthermore, TERASAKI was not able to make an official tour to Los Angeles and San Francisco in line with your #349 because he went

south to Mexico. At this time should you permit him to stop off at San Francisco, Seattle, and Los Angeles, it would be exceedingly convenient from the standpoint of the work at hand.

Message 154 discussed a plan for Terasaki's visit to Mexico to confer with Japanese Minister there for the development of plans pertaining to the establishment of an espionage net; the focal point of this net to be Mexico City carrying out activities in the United States as well as South America.

No. 410A
From: Tokyo
10 July 1941
To: Washington #349.

Secret outside the Department.
(To be handled in Government Code.)

Re #18 from New Orleans and #244 from Mexico to this Foreign Minister.

We wish Consul ITO to go to Mexico City. Lately the offices housing the German and Italian Consulates were closed and their intelligence net broken. Intelligence activities in the Americas and suitable liaison are now essential, so we wish Secretary TERAZAKI also to go to Mexico to confer with our Minister there, in order to realize our plans in a concrete fashion based on the policy described in previous messages. We want Secretary TERAZAKI, and him only, to stop off at Quito, Los Angeles, San Francisco, etc. In this connection the points which we would like to bring to your attention are as follows:

1. We will have three routes to Mexico from the United States, consisting of Laredo, Ciudad Juares and Mexicali. Mexicali in particular is a convenient point for us on the west coast. In case we need more personnel, we can get them from our Ministry in Mexico.

2. We will establish a Chile route from Mexico by way of Manszanillo and a Brazil route by way of Vera Cruz.

3. Various officials in the United States and Mexico will work out all the details of their own espionage nets, correlate them, and develop a concrete plan for making contacts and exchange on the border.

4. In order to succeed in this objective, ways and means for keeping in contact through telegraphy, telephones, memoranda, and word of mouth will be decided upon and put into effect.

5. These routes are to be established against the day of evil and, while all is calm, nothing must be done which would jeopardize their security; therefore, at present investigate only the feasibility of circulating over them.

6. The expenses are to be paid by the several offices.

Because of its geographical position, Mexico is the main point for intelligence work in Brazil, Argentina and Chile, as well as in the United States. Therefore, before we think of relying too much upon Brazil, Argentina and Chile, let us concentrate on Mexico. However, the other three bases are different. In case the United States joins the war, they would inevitably come under her control, but so long as Mexico does not officially join the war, we can continue our intelligence schemes there. Paralleling these plans of course, if you can also work out a plan for establishing a net with Brazil, Argentina and Chile, it would be excellent groundwork for the establishment presently of an

intelligence net. Please transmit this to Mexico City and take with you to New Orleans.

Arrest of Japanese in Possession of Illegal Passports

Tokyo learned on September 6, 1941 from Consul Nakauchi in Hollywood that local immigration officers had arrested Japanese who were in possession of illegal passports. Approximately 100 persons had been taken into custody in California. Since it appeared that "this sort of round-up" would be carried on in the future as well, Mr. Nakauchi declared that when boats became available approximately half of these persons would be given the opportunity to return home.

No. 412
From: Hollywood (Nakauchi)
6 September 1941
To: Tokyo #169.

The local immigration office has gradually undertaken the arrest of Japanese who are in possession of illegal passports. In Los Angeles approximately 50 and in the entire state of California, rough 100 persons are understood to have been taken into custody. All of them have borrowed money to cover bond.

When boats become available approximately half of them will be given the opportunity to return him should they so desire. It seems that this sort of round-up will be carried on in the future as well.

Relayed to Washington and San Francisco.

US Navy-produced Purple Machine
PHOTO

Freezing Order Curtails Japanese Intelligence Activities in America

Readjustments in the Japanese civilian intelligence organizations continued to be the subject of dispatches from Consul Morishima in New York to Tokyo. On September 22, 1941, he said that the following of a more aggressive policy in connection with the Cultural Institute had been impossible because of the freezing of funds. Activities of the Institute had even been curtailed. The Library on Wheels, which had maintained a route hardly worth mentioning would be transferred to the Cultural Institute, and its driver would be dismissed from employment.

No. 424
From: New York (Morishima)
22 September 1941
To: Tokyo #453.

(Part 1 of 2.)

For some time we have been conferring on and considering, in connection with the questions of adjustments to be effected among civilian intelligence organs, the various pending questions relative to the activities of the Cultural Institute. However, with the coming of a new crisis, following the freezing of funds, the execution of a more aggressive policy became, even from the economic standpoint alone, impossible and we have had to curtail the activities of the Institute. We have therefore planned the following:

1. To carry on future activities of the Institute on the basis of a revised plan which will be within the scope of the funds on hand.

2. With this in mind, to hold a conference with civilians once a month for study and discussion.

3. To continue to _ _ _ _for the purpose of _ _ _ _and collection of intelligence by civilians.

We are now directing its activities along these lines. However, because of the fact that our propaganda work in this country is now placed under great handicap, we do not believe that it would matter very much if a man of _ _ _ _.

_ _ _ _was employed as a secret agent.

No. 425
From: New York (Morishima)
22 September 1941
To: Tokyo #453.

(Part 2 of 2.)

Though matters are as I have outlined above, we in this office are complying with your instructions but in my opinion in view of the fact that the employees are evidencing a critical attitude, I think that the question of a complete shake-up within the office should be postponed for a while.

Accompanying the worsening of the attitude toward Japan, the "library on wheels," since the latter half of last year, has maintained a route hardly worth mentioning. I believe, however, that the distribution of pamphlets for enlightenment purposes will supplement this activity. Though the "library on wheels" will be taken over by the Cultural Institute as long as there are no great changes in the situation I do not believe that much effectiveness can be expected of its work. Therefore, in line with the effects of the freezing legislation we do not plan upon the continued engagement of _ _ _ _, who drives the "library on wheels" and who had been showing a none too pleasant attitude in the Cultural Institute. We have arranged to cancel all his unfinished business arrangements. (Please refer to my #446). This truck and the books which go with it as well as other things, we plan to place in the custody and under the name of Cultural Institute.

Maj. Yano Arranges Anti-American Espionage

The Japanese officials stationed in the United States were planning an increase in anti-American espionage activities. After receiving instructions from the General Staff Headquarters in Tokyo, Maj. Yano, on October 10, 1941 was preparing to leave Washington with Japanese codes books for an official trip to Mexico.

No. 471
From: Washington (UAWRK)
10 October 1941
To: Tokyo #201.

In line with instructions from General Staff Headquarters, Major YANO is making an official trip to your place, in order to make preliminary arrangements concerning anti-American espionage. He leaves Washington by plane tomorrow, the 11th, at 9:00 p.m. and is scheduled

to arrive at your place at 12:30 p.m. (Mexico time) on the 12th. He is bringing code books with him. I leave everything to your discretion.

(Note: This appears to be an information copy to Tokyo, since the context apparently refers to the Japanese espionage ring being established in Mexico.)

Minister Akiyama Estimates His Espionage and Propaganda Expenditures

After having made a special study of the attitude of the United States, of the nature of the Panamanian people, and of the topography of Panama, Mr. Akiyama, in a dispatch to Tokyo on September 20, 1941 made an estimate of the money needed for enlightenment, propaganda, and intelligence purposes. With a forewarning that the expenditure summary would be "hard to take," he begged that these per month expenses by considered carefully.

The estimate included bonuses for officials or spies assigned to observe the movements of warships or give warning about other matters; running expenses for the Japanese broadcasting office; money for special spies; funds to pay those who tried to obtain information as well as those who achieved results; and a separate fund to maintain contact with newspaper reporters and other agents. In addition, he listed a special fund for spying in the other countries to which he was accredited. The total estimate amounted to an expenditure of $730.00 per month.

No. 499
From: Panama (Akiyama)
30 September 1941
To: Tokyo #169

(Part 1 of 2.)

Since taking office, I have made a special study of the attitude of the United States and also of the nature of the people and topography of this section; and as a result have made the following estimate of the amount of money needed for enlightenment and propaganda purposes. This amount is necessary in making contacts for intelligence purposes, and already some expenditures have been made. I know that this will be "hard to take," but beg of you that you will consider the matter carefully and wire me the result (all per month expenses):

1. (a) Bonuses for officials or spies residing at some distance from the Canal who go at night to observe the movement of warships $70.00

(b) For those who from time to time give warning $150.00

2. Money to supplement the activities of the Kyowa Company in this country $100.00

(Part 2 of 2.)

3. Running expenses of our broadcasting office $50.00

4. Money for special spies $50.00

5. To follow the principle of paying well those who try as well as those who accomplish results $100.00

6. For maintaining contacts with newspaper reporters and other agents $130.00

7. Costs of making arrangements $30.00

8. Money for spying in other countries to which I am accredited $50.00

The above are for the current fiscal year.

Japanese Military Attaché Requests Expansion of Intelligence Facilities in the United States

Since it seemed evident to Japanese representatives in Mexico that war between Japan and the United States would break out at any time, they advised the establishment of additional facilities to acquire military intelligence in the United States. In the future it would probably be extremely difficult for Japanese agents, either in the United States or in South America to carry on espionage as formerly planned. In view of the fact that after and even before the outbreak of war Japanese agents would be unable to get intelligence concerning the details of military operations, the Japanese Military Attaché in Mexico advised that additional advisors, particularly with air and technical backgrounds, be sent immediately to the attaché's office in the United States to increase facilities for gathering intelligence.

(Comment: This message was not translated until May 3, 1945)

No. 626
From: Mexico City (MXMRK)
15 October 1941
To: Tokyo (SUMMER)(Vice-Chief, General Staff) #179.

(2 parts _ _ complete.)

According to the impression I received as the result of the conference of attaches and advisers in America, it is expected that war will break out between Japan and the United States. In order to gather operational intelligence in preparation for that, it is thought necessary that the attaché's office in the United States (because of the withdrawal from New York) be now given at least two more advisers (particularly air and technical specialists).

Part 2

If you consider the limitations to the espionage which can be carried out against the United States by the attaches in South America, you will see that they will be able, after the outbreak of war between Japan and the United States (and before that too, of course), to do no more than learn of general, easily discovered activities. It will be particularly difficult to get intelligence concerning the details of military operations. Also, we in Mexico will be able to get only a small amount of intelligence. Consequently, we must work, before the withdrawal of our attaché in the United States, to increase our facilities for gathering intelligence. Thus, the general situation is like that in the United States, in regard to an insufficiency in attaché's office personnel.

CONTINUE CHAPTER 2

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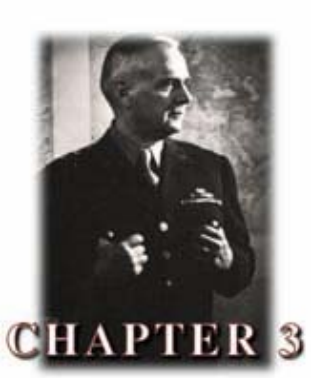
SHAEF (INT) Directive No. 7



Counterintelligence in the Office of Strategic Services

Introduction

The Office of Coordinator of Information (COI) was established on 11 July 1941. It was announced to the public as an agency for the collection and analysis of information and data. Actually, through COI and its successor, the Office of Strategic Services (OSS), the United States was beginning its first organized venture into the fields of espionage, propaganda, subversion and related activities under the aegis of a centralized intelligence agency.

In themselves, these various functions were not new. Every war in American history has produced different examples of the use of spies, saboteurs, and propagandists. Every major power, except the United States, has used espionage, for example, in peace as well as in war, for centuries. The significance of

COI/OSS was in the concept of the relationship between these varied activities and their combined effect as one of the most potent weapons in modern warfare.

The concept evolved from two missions performed for President Roosevelt in 1940 and 1941 by the man who guided COI/OSS throughout its existence—William Joseph Donovan.

(Counterintelligence)

Contents of Gen. Donovan's Memorandum to President Roosevelt, Dated 18 November 1944

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Establishment of Central Intelligence Agency

Executive Order 9621

Recommendations from the Bureau of the Budget, Dated 20 September 1945

Memorandum for the Director of the Strategic Services Unit

Memorandum for the Brig. Gen. John Magruder, USA *27 September 1945*

Contents of Memorandum Signed by Gen. Magruder *26 November 1945*

Gen. Donovan's Letter to the Director of the Bureau of Budget, Harold D. Smith

Executive Directive of 22 January 1946 Addressed to the Secretaries of State, War, and Navy

NIA Directive No. 1, Dated 8 February 1946: Policies and Procedures Governing the Central Intelligence Group

NIA Directive No. 4, Policy on Liquidation of the Strategic Services Unit *2 April 1946*

CIG Directive No. 6, "Liquidation of Strategic Services Unit" (Top Secret) *8 April 1946*

Appraisal of Operations of OSS and SSU

NIA Directive No. 5, Dated 8 July 1946, Functions of the Director of Central Intelligence

House Report No. 2734 of 17 December 1946

Artifice: James Angleton and X-2 Operations in Italy

Counterintelligence in the OSS Bibliography

The establishment of the COI met particularly vigorous opposition from the Army and Navy on the ground that the new agency might usurp some of their functions. Therefore, it was decided to establish COI as a part of the Executive Office of the President. The new order was not designated as either a military or an executive order; it referred to Roosevelt's position as President, as well as commander in chief, and expressly reserved the duties of his military and naval advisors. It deleted the previous reference to the Army in appointing Donovan as Coordinator.

COI was renamed OSS in June 1942 with its directior reporting to the Joint Chiefs of Staff. The British asked FBI Director J. Edgar Hoover to appoint a Bureau officer to run a new counterintelligence (CI) organization to handle foreign CI, which Donovan had agreed to house within OSS. When Hoover rejected this request, the British asked Donovan to set up a CI section. On 1 March 1943, Donovan created the CI section, known as X-2, and placed James R. Murphy in charge. Murphy and X-2 were given access to ULTRA, Magic and ICE. ICE was the OSS cryptonym for the British MI6 cryptonym ISOS, the decoded and translated German Abwehr (Military Intelligence) message traffic.

This chapter provides the written correspondence by Donovan, President Roosevelt, and others on the creation of COI/OSS, its eventual dissolution after the war, and reports on X-2.

The Coordinator of Information

The White House
July 11, 1941

By virtue of the authority vested in me as President of the United States and as Commander in Chief of the Army and Navy of the United States, it is ordered as follows:

1. There is hereby established the position of Coordinator of Information, with authority to collect and analyze all information and data, which may bear upon national security, to correlate such information and data available to the President and to such departments and officials of the Government as the President may determine; and to carry out, when requested by the President, such supplementary activities as may facilitate the securing of information important for national security not now available to the Government.

2. The several departments and agencies of the Government shall make available to the Coordinator of Information all and any such information and data relating to national security as the Coordinator, with the approval of the President, may from time to time request.

3. The Coordinator of Information may appoint such committees consisting of appropriate representatives of the various departments and agencies of the Government, as he may deem necessary to assist him in the performance of his functions.

4. Nothing in the duties and responsibilities of the Coordinator of Information shall in any way interfere with or impair the duties and

responsibilities of the regular military and naval advisers of the President as Commander in Chief of the Army and Navy.

5. Within the limits of such funds as may be allocated to the Coordinator of Information by the President, the Coordinator may employ necessary personnel and make provision for the necessary supplies, facilities, and services.

6. William J. Donovan is hereby designated as Coordinator of Information.

Franklin D. Roosevelt

Memorandum for the Chief of Staff

Subject: Undercover Intelligence Service

1. The military and naval intelligence services have gone into the field of undercover intelligence to a limited extent. In the view of the appointment of the Coordinator of Information and the work which it is understood the President desires him to undertake, it is believed that the undercover intelligence of the two services should be consolidated under the Coordinator of Information. The reasons for this are that an undercover intelligence service is much more effective if under one head rather than three, and that a civilian agency, such as the Coordinator of Information, has distinct advantages over any military or naval agency in the administration of such a service.

2. In the event or the immediate prospect of any military or naval operations by United States forces in any part of the world, however, the armed forces should have full power to organize and operate such undercover intelligence services as they may deem necessary.

3. The Coordinator of Information has indicated in conference that he is prepared to assume the responsibilities indicated in Paragraph 1 above.

4. A memorandum similar to this is being submitted to the Chief of Naval Operations by the Director of Naval Intelligence.

5. Action recommended:

That the Secretary of War approve the recommendations contained in Paragraphs 1 and 2, above, so far as the War Department is concerned.

September 6, 1941

APPROVED

By order of the Secretary of War
G.C. MARSHALL
Chief of Staff

by/S/ W.B. Smith
Col., G.S.C., Sec. W.D.G.S.
Noted-Chief of Staff
W.S.B.

/S/ SHERMAN MILES
Sherman Miles
Brigadier General, U.S. Army
Acting Assistant Chief of Staff
G-2, noted by Sec. War 9/9/41

E.H.B.

Memorandum for the President

From: The Coordinator of Information
October 10, 1941

By joint action of the Military and Naval Intelligence Services there was consolidated under the Coordinator of Information the undercover intelligence of the two services. In their memorandum the reasons stated for the action are:

1. That such a service is much more effective under one head rather than three, and

2. A civilian agency has distinct advantages over any military or naval agency in the administration of such a service.

This consolidation has been approved by the Secretary of War and the Secretary of the Navy.

In making this consolidation effective, it is necessary to do the following:

Send to a given country a man who is essentially an organizer. The function of this man would be to set up agents of information who would be able to supply him with information.

(a) During the period our diplomatic corps is accredited to that country; and

(b) To be in a position to continue sending reports in event diplomatic relations are severed.

Vital considerations in making this plan effective are security and communications. Therefore, it will be necessary for our representatives to have:

(a) Status for his protection;

(b) Use of the diplomatic pouch;

(c) Establishment of a line of communi-cations, both by radio and other means, that will endure after the particular country has been closed to us diplomatically.

Contents of a Letter From Attorney Gen. Francis Biddle to Col. Donovan

9 March 1942

I have been advised that you have appointed General David P. Barrows as Coordinator of Intelligence and Information on the West Coast. I am further advised that the Directors of Military and Naval Intelligence have not been informed of the purpose or reason for General Barrows designation to this post.

The intelligence services have been carrying on a carefully coordinated program built upon a complete exchange of pertinent information and the carrying out of mutual undertakings in carefully defined fields of responsibility. Close personal liaison is constantly maintained.

Therefore, there would be no reason for the designation of a Coordinator.

I would appreciate if you would let me know your purpose in designating General Barrows and your intentions and program with reference to this Coordination. I am somewhat surprised that this appointment was made without prior discussion with the regularly constituted intelligence services.

Donovan's Reply to the Attorney General

16 March 1942

1. No one has been designated as (your quote) Coordinator of Intelligence and Information on the West Coast.

2. Some weeks ago we did designate, as one of our representatives on the West Coast, General David P. Barrows, a distinguished and respected citizen of San Francisco.

3. The whole question of the selection of representatives on the West Coast was discussed with General Miles, Admiral Wilkinson, and Mr. Hoover, by Colonel Buxton and myself at lunch on the 2nd of December 1941. Colonel Buxton went immediately to the West Coast for the purpose of selecting a representative. While there, he told the Army and Navy officials, and also Mr. Pieper, the F.B.I. representative, that Barrows was under consideration.

4. Colonel Buxton, upon his return from the West Coast, discussed the matter with Colonel T.B. Bissell, General Lee's assistant.

5. Admiral Wilkinson sent a message to San Francisco informing his people of the designation.

6. No attempt of any kind has been made to have any representative of ours there invested with authority over other services or to coordinate their activities, interfere with them, or impinge upon their prerogatives. Our written instructions to General Barrows, as to all others, concerning your department relate only to the duty of turning over to your office any information concerning subversive activities which might come to his attention. This is a duty incumbent upon him not only as our representative but as a private citizen.

7. There has never been any misunderstanding regarding General Barrows on the part of either ONI or MID in San Francisco, and there is no reason for any misunderstanding on the part of your Department.

William Donovan, Head of the OSS.
PHOTO

Memorandum (No. 360) for the President From William J. Donovan

March 30, 1942

There has been submitted to you by the Joint Chiefs of Staff a proposed order which would bring more closely together the office at the Joint Chiefs of Staff and our agency. They have told me that this matter has been taken up with Harry Hopkins for submission to you.

I hope you will approve the order. It exactly conforms to your original directive to me, both in name and function—but which was finally modified at the instance of the Army and Navy. The present proposal comes at their instance. The services now seem to have confidence in our organization and feel that we have in motion certain instrumentalities of war useful to them. For these reasons, and in order more closely to integrate with the armed forces the various elements that we have been developing, they recommend the signing of the order.

On March 16 (my memorandum No. 334) I briefly tried to describe to you how our principal units supplement and support one another. I think it essential that both chiefs of Staff, under your direction as Commander-in-Chief, should have these services at their disposal. These would be welded into one fighting force every essential element in modern warfare. You will note that they have even provided for the Commandos.

I am glad to concur in the recommendation at the Joint Chiefs of Staff, because I believe this is a sensible and necessary step toward the more effective use of all modern war weapons.

Donovan Letter to the President

The President
The White House
April 14, 1942

My dear Mr. President:

I talked with Sam Rosenman yesterday and was disturbed as well as surprised by the conversation. Disturbed because it indicates that since you have not signed the order pertaining to our alignment with the Office of the Joint Chiefs of Staff, as a supporting agency, it must be that you have not yet become convinced, as I am, of the necessity for some such alignment. The conversation was further disturbing because of my strong feeling that the preparation of any plan involving political and subversive warfare must heavily involve those entrusted with the protection of subsequent forms of warfare.

If this war has taught us anything, it has taught us the need for unification of all efforts__some new__which play a part in modern warfare. It was for this reason that I wrote you on March 4th outlining fully the reasons for leaving the present efforts of our office coordinated into one effective whole. I would particularly call your attention to this paragraph:

Now that we are at war, foreign propaganda must be employed as a weapons of war. It must march with events. It is primarily an attack weapon. It must be identified with specific strategic movements often having effectively it must be allied with the military services. It must be to a degree informed as to possible movements. The more closely it is knit with the intelligence and the physically subversive activities of the Army and the Navy, the more effective it can be. All of these necessitates security. In point of fact the use of propaganda is the arrow of initial penetration in coordinating and preparing the people and the territory in which invasion is contemplated. It is the first step—then Fifth Column work, then militarized raiders (or "Commandos") and then divisions.

PHOTO

It was for these same reasons that I concurred with the Joint Chiefs of Staff in their request for aligning our office with them Further deliberation, far from causing me to change my mind, has only served to make me more convinced that the successful prosecution of this war demands such unification of all the forces of war.

Let me add on this: at the very outset of our present relationship, it was agreed that I would deal directly with you. Due to your continued support and confidence, we have been able to set up for you an instrument of modern warfare, which, if left unimpaired, will mean for you a weapon of combined operations which will be able to stand against any similar weapon of the Axis. In doing this we have not usurped the function of or encroached upon the domain of the Army, Navy, or State Department. I am sure you believe that I have no such intention. But I feel it is now my duty respectfully to urge that this weapon which has been so carefully prepared over the last eight months, which has already begun to demonstrate its usefulness, and which has won the respect of some who were skeptical at the outset, shall not be disturbed at home before it shall be put to its really crucial work abroad.

Respectfully,

/s/ William J. Dovovan

Presidential Military Order Establishing the Office of Strategic Services (OSS)

12 June, 1942,

By virtue of the authority of the vested in me as President of the United States and as Commander in Chief of the Army and Navy of the United States, it is ordered as follows:

1. The Office of the Coordinator of information, established by order of July 11, 1941, exclusive of the foreign information activities transferred to The Office of War Information by executive order of June

13, 1942, shall hereafter be known as the Office of Strategic Services, and is hereby transferred to the jurisdiction of the United States Joint Chiefs of Staff.

2. The Office of Strategic Services shall perform the following duties:

a. Collect and analyze such strategic information as may be required by the United States Joint Chiefs of Staff

b. Plan and operate such special services as may be directed by the United States Joint Chiefs of Staff.

3. At the head of the Office of Strategic Services shall be a Director of Strategic Services who shall be appointed by the President and who shall perform his duties under the direction and supervision of the United States Joint Chiefs of Staff.

4. William J Donovan is hereby appointed as Director of Strategic Services.

The order of July 11, 1941 is hereby revoked.

Franklin D. Roosevelt
Commander in Chief

Allen Welsh Dulles, Director of CI who served in OSS office in Bern, Switzerland, 1942-1945. DCI, 26 February 1953 - 29 November 1961.
PHOTO

General Order 13 Establishing a Counterintelligence Division in the Secret Intelligence Branch of the OSS

1 March 1943

There is hereby created a Counterintelligence Division in the SI branch of intelligence service of OSS.

James R. Murphy is designated as the head of this division. The functions of the Counterintelligence Division shall be:

1. To collect from every authorized source appropriate intelligence concerning espionage activities of the enemy.

2. To take such action with respect thereto as may be appropriate, and to evaluate and disseminate such intelligence within OSS as may be necessary, and to exchange such information with other agencies as may be appropriate.

The Counterintelligence Section shall be provided with such personnel and facilities as may be required. All geographic functional desks, sections, and branches of OSS are directed to cooperate in all respects with the CI Division and to furnish it with all information or material relating to its field of activity.

William J. Donovan

General Order Establishing the Counter Espionage Branch of the Intelligence Branch of the Intelligence Service of OSS

15 June, 1943

The provisions of General Order number 13, issued 1 March 1943, are hereby rescinded and there is established under the Deputy Director, Intelligence Service a Counter Espionage Branch which should be referred to by members in conversation and in communication of OSS as X-2 branch.

The functions of the Counter Espionage Branch shall be...

1. To collect from every authorized source appropriate intelligence data concerning espionage and subversive activities of the enemy.

2. To analyze and process such intelligence in order to take appropriate action, and to exchange such intelligence with appropriate authorized agencies.

3. To institute such measures as may be necessary to protect the operational security of OSS, and to prevent the penetration of our espionage and other secret activities.

4. To cooperate with the counterintelligence agencies of the United States and our allies, and afford them timely information of enemy attempts at penetration or subversive action from areas in which X-2 is authorized to operate.

5. To prepare secret lists of subversive personalities in foreign areas for the theater commanders and other such government agencies as the director may prescribe. The X-2 branch shall be provided with such personnel and facilities as may be authorized. All geographic and functional desks, sections and branches of OSS are directed to cooperate in all respects with the X-2 branch and to furnish it with all information or material relating to its field of activity.

There should be close coordination between S.I. and X-2 branches. The chiefs of the S.I. and X-2 branches will exchange operational information to the extent necessary to affect coordination of the operation of both branches.

The X-2 branch shall furnish to the S.I. branch any intelligence which is not exclusively of X-2 interest, and the S.I. branch shall refer promptly to the X-2 branch intelligence of interest to the latter branch.

X-2 officers operating in foreign areas shall be under either a SSU officer or an OSS mission chief. The X-2 branch may, with the permission of the chief of S.I. employ S.I. field representatives in connection with its work in the field. In such event X-2 activities so conducted shall be kept separate by such field representatives and communications with respect thereto will be subject to examination of the chief of S.I. and the appropriate desk head.

Practices and procedures with respect to the working arrangements between the S.I. and the X-2 branches shall be adopted in consideration between the chiefs of these branches and approved by the Deputy Director_vice…Intelligence Service.

The X-2 branch shall maintain its own separate liaison and separate channels of communication within existing OSS facilities.

The X-2 branch shall establish and maintain its own files and records and shall locate its registry functions in close proximity to those of the S.I. branch in order that there may be a central area for S.I. and X-2 information.

James Murphy is designated chief of the Counterespionage branch.

William J. Donovan

Extract of Memorandum from Brig. Gen. William J. Donovan to Maj. Gen. W. B. Smith

17 September 1943

1. The National Interest requires such an organization.

(1) National Policy is formulated in the light of information concerning the policies and activities of other nations.

(2) Each nation in defense of its institutions and its people, must have an independent intelligence service to guide its policy in peace as well as in war.

(3) Reliance cannot be placed either on the continuance or the impartiality of intelligence voluntarily furnished to one nation by another, however friendly. Such service may be interrupted and even if not discontinued, it is found to reflect, in its evaluation, as ours would, the bias and color of national interest.

2. All major nations other than ours have such agencies.

With the exception of the United States, all of the major nations have had, prior to the war, intelligence services, including secret, separate in large measure from their military establishment.

Such agencies are a recognized and accepted part of the machinery of government. They have kept their respective Governments informed of current political activities, and long prior to the war, they recruited and trained personnel, provided them with suitable cover, and placed them in political enemy countries; established networks and communications, and laid the groundwork for actual operations in time of war.

William Joseph Casey, Director of CI who served in OSS from 1943; Chief of the Special Intelligence Branch in European Theater of Operations, 1944-1945. DCI, 28 January 1981 - 29 January 1987.

PHOTO

3. Position of the United States in this respect prior to World War II.

(1) The intelligence agencies of the United States were not geared to the demands of a World War. They had been caught unprepared. There was no over-all general intelligence service which collected and analyzed information on which decisions should be made and plans formulated. There was no coordination of our various agencies of information, nor of the information itself. There was no Secret Intelligence nor Counterintelligence Service for working in enemy territory. There were no plans to meet those needs.

(2) Five months prior to the outbreak of war, a Committee of Cabinet members was appointed by the President to inquire into the matter. That committee consulted with the writer of this paper who studied the problem, and prepared a report with certain recommendations which were accepted and put into effect by Presidential order.

These recommendations were based upon certain:

4. Requirements for a long-range Strategic Intelligence Service with Subversive Attributes.

(1) That the intelligence services of one nation should be kept independent from that of any other nation, each with its own agents, communications, and transportation__for the following reasons:

(a) *Security*. The disclosure of one will not necessarily involve damage to another.

(b) *Verification*. If networks are truly separate, it is improvable that information simultaneously received from two chains, springs from a single source.

(c) *Control*. The effectiveness of intelligence work is dependent upon performance_at least insofar as it is not subject to the power of another to terminate it. The danger that its operation may be terminated by the act of another means subordination.

(2) That a long range intelligence service should include an overall collection of political, economic, sociological, and psychological

information.

(3) That a branch of such a service should obtain information by secret means.

(4) A Counterintelligence Service is necessary for the protection of primary services.

(5) That a Research and Analysis Branch should be established, composed of men of technical and professional competence_ research specialists with extensive knowledge of areas in question, and trained to critical appraisal of information.

(6) That it should have access to short-wave radio as a strategic weapon of attack and exploitation, knit into military plans and strategy.

(7) That it should have under its direction morale and physical subversion.

(8) That it should have no concern with combat or operational intelligence, except to furnish information required.

(9) That there should be:

1. Independent communications by pouch and code.

2. A separate budget and unvouchered funds.

3. Passport privileges.

(10) That its Director should be a civilian, and its personnel should be recruited largely from civilian life. They should be men whose professional or business training has given them vision, imagination, alertness, initiative, and experience in organization. The organization which was set up based on these concepts became known as:

5. The Office of Strategic Services

It is useless to relate the difficulties and vicissitudes of this organization in finding acceptance of its services by those who needed it most. For the purposes of this paper it is necessary only to say that it has been able to realize in large part the above named requirements, and today is a living organism which can be adapted to a permanent plan or as a design for a new but similar agency.

Richard McGarrah Helms, Office of Strategic Services and its successors 1943-1947. DCI, 30 June 1966 - 2 February 1973.

PHOTO

SHAEF (INT) Directive No. 7 (Counterintelligence)

Appendix "B"
Special Counterintelligence Units
(With Paragraphs not pertinent to this text omitted)

General

1. Information relating to enemy secret intelligence services in enemy, enemy-occupied and neutral territory is available in LONDON main in Section V or MI 6 X-2 Branch of OSS, but also, in other departments such as MI-5 and MI-14(d), War Office. Owing to the special nature of this information and the great discretion required in its use, it is not suitable for passing to the CI Staffs through normal intelligence

channels. Special CI Units will therefore be supplied by Section V of MI 6 for attachment to British Army Group and Army Headquarters and by X-2 Branch of OSS for attachment of US Army Group and Army Headquarters. These units will act as a channel for passing information to CI Staff, about enemy secret intelligence services and will advise them as to its use.

2. All producer departments of information of this type in LONDON will work in close collaboration and will pass their information to MI6/OSS for transmission, of necessary, to SCI units.

Duties

5. The Duties of SCI units in the planning stage are:

(a) To assist in the preparation of all available information about enemy secret intelligence services in the form required by the CI Staffs.

(b) To advise CI Staffs in the selection of the immediate counterintelligence targets and in the method of dealing with them to ensure the maximum intelligence results.

6. The duties of the SCI units in the field are:

(a) To distribute and interpret to the CI Staffs all counterespionage information received by them from LONDON and from other SCI units, and advise as to its most effective and secure use.

(b) To afford the maximum protection to special sources of secret counterespionage information,.

(c) To advise CI Staffs in the selection of counterespionage targets whose capture is likely to yield material of value.

(d) To assist CI Staffs in the examination of captured enemy documents or material of special counterespionage interest.

(e) To assist CI Staffs in the interrogation of captured enemy agents.

(f) To pass to LONDON all information on enemy secret intelligence services collected in the field, including such captured documents and other material as is no longer required in the field.

(g) To serve as a direct channel between each Army group HQ for information on enemy secret intelligence services collected in the field.

(h) To serve as a channel between the Army Groups and from Army Groups to LONDON for any other counterintelligence information which cannot be passed through normal service channels.

Employment of SCI Units

7. SCI Units are normally attached to the CI Staffs of a Headquarters and are directly responsible to the Chief CI Staff Officers.

8. Although not technically forming part of the CI Staff, the officers of SCI units will work in closest liaison with the component subsections of the staff. The functions of the SCI units are advisory and not executive. Executive action on information supplied by SCI units is the province of the CI Staffs and CI personnel.

9. SCI units will normally pass their information direct to the appropriate sub-section of the CI Staff. However, in furtherance of the

responsibility to safeguard special sources (see para 6 (b) above), they will have the right to withhold any particular item of information derived from such sources from any but the Chief CI Officer, and represent to him the necessity for prohibiting or limiting action upon it, where action or unrestricted action might prejudice the security of these sources. The ultimate decision as to whether action is or is not to be taken in the field will rest with the A C of S (G-2) or the BGS (I) of the Army Group except when an express prohibition to take action is issued by MI6 or OSS in LONDON.

10. Personnel of SCI units should not be employed in any area where there is danger of capture and therefore of interrogation by the enemy. They should normally move with the HQ to which they are attached.

11. It may often be profitable to attach CI personnel to SCI units for short periods of training for special tasks, e.g., seizure and inspection of CI documents. Personnel of SCI units may also accompany CI personnel on such tasks subject to the proviso in the preceding paragraph.

12. Personnel of SCI units are specially qualified and must not be employed on any other counterintelligence duties.

Communications

13. SCI units are furnished with special communi-cations and codes and are not normally dependent on Army Signals.

14. Each SCI unit will be in direct communication with its LONDON Headquarters, and all units within the same Army Group Zone will be in direct communication with each other. In addition, each unit with an Army Group Headquarters will be in direct communication with the unit at the other Army Group Headquarters.

Other paragraphs pertinent to SCI units are cited below:

Section IX: The Handling and Disposal of Known and Suspect Enemy Agents

1. The first responsibility of Counterintelligence staffs in the theater of operation is the detection and apprehension of enemy agents. Detailed planning of measures against the Germany Intelligence Services (GIS) must be undertaken well in advance. Such plans will be based upon information supplied by SCI units and will be formulated in consultation with officers of these units. While SCI units will render advice and furnish information, executive action is the responsibility of CI Staffs and personnel.

3. Whenever GIS personnel are captured, SCI officers must be notified and afforded the earliest opportunity to interrogate them. All documents, records, or equipment of GIS personnel captured will be turned over to SCI units for examination. SCI units will be consulted as to the disposal of each individual case. It is only by making the fullest use in this way of SCI units that the maximum information can be obtained and the detection and arrest of other agents secured.

8. The field interrogation of arrested enemy agents should be carried out immediately. The more important cases should, upon advise of SCI officers, be returned to the U.K. for further and more specialized interrogation at the MI5 Interrogation Centre in LONDON.

Section X: Counter-Sabotage

5. *Enemy Sabotage Agents*. Information from special sources covering the sabotage activities of enemy agents who will be made available to CI Staffs by SCI units, will advise on the action to be taken in respect to such agents.

6. Any captured saboteur known or believed to be an enemy agent will be handled in the same manner as other enemy agents (see Section IX).

7. Liaison With MI5 Counterintelligence Staffs at Headquarters, Army Groups, will maintain direct liaison with the counter-sabotage section of MI5. MI5 will furnish the CI Staffs with all available information of enemy sabotage methods and equipment, and with advice as to measures for the prevention and detection of sabotage and interrogation of saboteurs. CI Staffs will similarly notify MI5 of sabotage developments discovered in the field. Where necessary such information will be passed through MI6 (V), LONDON, and the SCI units in the field.

Section XI: Channels of Counterintelligence Information

2. Procedure for handling information collected in the field.

(c) SCI units at Army and Army Groups will pass back direct through their special communication channels to MI5 (V)/OSS

(X-2) information unsuitable for transmission by Army Signals. MI6 (V)/OSS (X-2) will undertake the collation and the further distribution of this information where necessary, to the other departments in LONDON or WASHINGTON and will pass to the Coordination Section, SHAEF, such detailed routine information as will be necessary for maintaining the personality cards up to date, and any summaries which will be required by SHAEF.

3. Procedure for the distribution of information in the field.

(b) All further information or requests for information addressed from departments in LONDON and WASHINGTON to formations in the field, and which are suitable for transmission by normal Army channels, will be routed through the Coordination Section, SHAEF. Information concerning the operation of SCI units or which is not suitable for transmission by normal means, will be routed through MI6 (V)/OSS (X-2).

7. Channels of Counterintelligence Information.

(a) MI6 (V)/OSS (X-2) pass information relating to hostile secret intelligence services direct to SCI units attached to Army Groups in the field through their own special communi-cations.

Contents of Gen. Donovan's Memorandum to President Roosevelt, Dated 18 November 1944

Pursuant to your note of 31 October 1944, I have given consideration to the organization of an intelligence service for the post-war period.

In the early days of the war when the demands upon intelligence services were mainly in and for military operations, the OSS was placed under the direction of the JCS.

Once our enemies are defeated the demand will be equally pressing for information that will aid us in solving the problems of peace.

This will require two things:

1. That intelligence control authority reporting directly to you, with responsibility to frame intelligence objectives and to collect and coordinate the intelligence material required by Executive Branch in planning and carrying national policy and strategy.

I attach in form of a draft directive the means by which I think this could be realized without difficulty or loss of time. You will note that coordination and centralization are placed at the policy level but operational intelligence (that pertaining primarily to Department action) remains within the existing agencies concerned. The creation of a central authority thus would not conflict with or limit necessary intelligence functions within the Army, Navy, Department of State and other agencies.

In accordance with your wish, this is set up as a permanent long-range plan. But you may want to consider whether this (or part of it) should be done now, by executive or legislative action. There are common sense reasons why you may desire to lay the keel of the ship at once.

2. The immediate revisions and coordination of our present intelligence system would effect substantial economies and aid in the more efficient and speedy termination of the war.

Information important to national defense, being gathered now by certain departments and agencies, is not being used to full advantage in the war. Coordination at the strategy level would prevent waste, and avoid the present confusion that leads to waste and unnecessary duplication.

Though in the midst of war, we are also in a period of transition which, before we are aware, will take us into the tumult of rehabilitation. An adequate and orderly intelligence system will contribute to informed decisions.

We have now in the Government the trained and specialized personnel needed to the task. This talent should not be dispersed.

Counter-Espionage (X-2)

This section was taken from the official history of OSS. The text has been slightly edited.

Counterespionage (CE) is a distinct and inde-pendent intelligence function. It embraces not only the protection of the intelligence interests of the government it serves, but, by control and manipulation of the intelligence operations of other nations, it performs a dynamic function in discerning their plans and intentions, as well as in deceiving them. An effective counterespionage organization is therefore an intelligence instrument of vital importance to national security.

The development of a secret intelligence organi-zation makes protective counterintelligence inevitable. However, to confine such activity to its protective aspects would be to eschew the development of the affirmative phases of counterespionage, which give it its unique and distinct value.

A counterespionage organization usually develops slowly. Basic to it is the vast body of records, which is the key to its operations and which normally takes years to accumulate. A second requirement, however, no less vital, is skilled personnel familiar with the intricate techniques

by which the intelligence efforts of other nations may be controlled and directed.

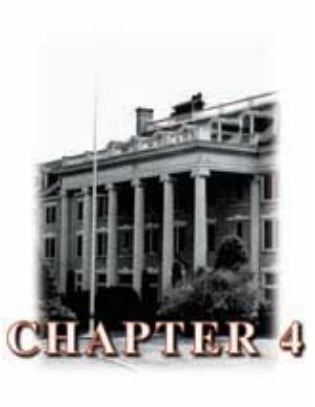
The United States lacked these basic factors. At the outbreak of the war, its counterintelligence activities were performed by several agencies and departments of the government and the armed forces, principally FBI, G-2, and ONI. Fortunately, the domestic security problem, most important at that time, was efficiently handled by the FBI, which kept itself alerted to threats from beyond US borders by liaison with Allied security services, chiefly those of the British. With respect to areas outside the Western Hemisphere, however, the United States had virtually no security protection. Also, the divisions of interest of the various American organizations concerned with counterintelligence and the limitations upon their several missions had resulted in incomplete and duplicative records, which were scattered and uncoordinated. The lack of complete past and current records of enemy espionage organizations, their personnel, and activities made the effective pro-secution of counte-espionage seem impossible.

The development by COI/OSS of a secret intelligence organization to operate outside the Western Hemisphere made it obvious that it would be necessary to establish a security organization for its protection. It is, of course, inevitable that a secret intelligence agent in a foreign area will attempt to acquaint himself with the intelligence activities and undercover personnel of other nations operating in the same area. This, however, provides only localized and uncoordinated knowledge. Furthermore, it does not take advantage of the affirmative possibilities inherent in the possession of such knowledge, if it is coordinated with related data and supported by an efficient centralized organization.

CONTINUE CHAPTER 3

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

COUNTER INTELLIGENCE IN WORLD WAR II



VENONA

Introduction

In 1943 the Army Signal Intelligence Service, the forerunner to the National Security Agency (NSA), started a project codenamed "VENONA," which concentrated on cracking the Soviet Diplomatic code. Ultimately, after a series of cryptographic breakthroughs over a period of several years, a number of KGB espionage messages were broken, read, and discovered to reveal details of widespread KGB-inspired espionage efforts, including those of the atomic bomb spies.

The counterintelligence payoff from VENONA was significant. It was instrumental in providing the FBI with investigative leads that contributed to the identification of the Rosenberg atomic espionage ring and a number of other agents spying on the atomic bomb program.

In a ceremony at CIA headquarters in Langley, Virginia, on 11 July 1995, Director of Central Intelligence John M. Deutch announced the release of the VENONA translations of the encrypted Soviet diplomatic communications. In October 1996 a conference on VENONA, cosponsored by CIA, NSA, and the Center for Democracy was held in Washington, D.C. For the conference, CIA and NSA collaborated on producing a publication, called *VENONA, Soviet Espionage and The American Response, 1939-1957*, as a handbook for scholars interested in VENONA. Anyone interested in this chapter of American counterintelligence should also use the VENONA volume as well as look at the 2,900 Soviet messages on the Internet.

Short History of Venona

On 1 February 1943, the US Army's Signal Intelligence Service, a forerunner of the National Service Agency, began a small, very secret program, later codenamed VENONA. The object of the VENONA program was to examine, and possibly exploit, encrypted Soviet diplomatic communi-cations. These messages had been accumulated by the Signal Intelligence Service (later renamed the US Army Signal Security Agency and commonly called "Arlington Hall" after the Virginia location of its headquarters) since 1939 but had not been studied previously. Miss Gene Grabeel, a young Signal Intelligence Service employee who had been a school teacher only weeks earlier, started the project.

The accumulated message traffic comprised an unsorted collection of thousands of Soviet diplomatic telegrams that had been sent from Moscow to certain of its diplomatic missions and from those missions to Moscow. During the first months of the project, Arlington Hall analysts sorted the traffic by diplomatic missions and by cryptographic system or subscriber.

Initial analysis indicated that five cryptographic systems, later determined to be employed by different subscribers, were in use between Moscow and a number of Soviet overseas missions. It also became apparent that one system involved trade matters, especially Lend-Lease. The other four systems appeared to involve the Soviet Foreign Ministry in Moscow in communication with its missions abroad.

Further analysis showed that each one of the five systems was used exclusively by one of the following subscribers (listed in descending order according to the volume of message traffic, which had been collected):

1. Trade representatives_Lend-Lease, AMTORG, and the Soviet Government Purchasing Commission.

2. Diplomats_That is members of the diplomatic corps in the conduct of legitimate Soviet Embassy and consular business.

3. KGB_the Soviet espionage agency, headquarters in Moscow and Residencies (stations) abroad.

4. GRU_the Soviet Army General Staff Intelligence Directorate and attaches abroad.

5. GRU_Naval-Soviet Naval Intelligence Staff.

The VENONA Breakthroughs
From the very beginning in February 1943, the analysis of the traffic proved slow and difficult. Then in October 1943, Lt. Richard Hallock, a Signal Corps reserve officer who had been a peacetime archaeologist at the University of Chicago, discovered a weakness in the cryptographic system of the Soviet trade traffic. This discovery provided a tool for further analytic progress on the other four cryptographic systems.

During 1944, the skills of other expert cryptanalysts were brought to bear on this Soviet message traffic to see if any of the encryption systems of the messages could be broken. One of these cryptanalysts, Cecil Phillips, made observations, which led to a funda-mental break into the cipher system used by the KGB, although he did not know at the time who used the system. The messages were double-encrypted

and of enormous difficulty. In spite of Arlington Hall's extraordinary cryptanalytic breakthroughs, it was to take almost two more years before parts of any of these KGB messages could be read or even be recognized as KGB rather than standard diplomatic communications.

Three closely spaced counterintelligence events occurred in 1945 that VENONA decrypts were able to amplify. First, the FBI carefully questioned Whittaker Chambers, whose earlier efforts to disclose details about Soviet espionage in the United States in the 1930s had gone unheeded. Second, Igor Gouzenko, a GRU code clerk, defected in Ottawa. Third, in late 1945 Elizabeth Bentley, a veteran KGB courier and auxiliary agent handler, went to the FBI and named names. While Gouzenko's revelations were important to Allied counterintelligence efforts, they had no bearing on the VENONA breakthroughs. Strong cryptographic systems like those in the VENONA family of systems do not fall easily.

The VENONA decrypts were, however, to show the accuracy of Chambers' and Bentley's disclosures.

In the summer of 1946, Meredith Gardener, an Arlington Hall analyst, began to read portions of KGB messages that had been sent between the KGB Residency in New York and Moscow Center. On 31 July 1946, he extracted a phrase from a KGB New York message that had been sent to Moscow on 10 August 1944. This message, on later analysis, proved to be a discussion of clandestine KGB activity in Latin America. On 13 December, Gardner was able to read a KGB message that discussed the US presidential election campaign of 1944. A week later, on 20 December 1946, he broke into another KGB message that had been sent to Moscow Center two years earlier which contained a list of names of the leading scientists working on the Manhattan Project-the atomic bomb!

In late April or early May 1947, Gardner was able to read two KGB messages sent in December 1944 that show that someone inside the War Department General Staff was providing highly classified information to the Soviets.

US Army intelligence, G-2, became alarmed at the information that was coming out of Arlington Hall. An Arlington Hall report on 22 July 1947 showed that the Soviet message traffic contained dozens, probably hundreds, of covernames, many of KGB agents, including ANTENNA and LIBERAL (later identified as Julius Rosenburg). One message mentioned that LIBERAL's wife was named "Ethel."

Gen. Carter W. Clarke, the assistant G-2, called the FBI liaison officer to G-2 and told him that the Army had begun to break into Soviet intelligence service traffic and that the traffic indicated a massive Soviet espionage effort in the United States.

Gen. Carter W. Clarke
PHOTO

In October 1948, FBI special agent Robert Lamphere joined the VENONA Project full-time as the FBI's liaison and case controller for the VENONA espionage material. Also, by 1948 the British joined the VENONA effort, in particular, their signal intelligence service assigned full-time analysts to Arlington Hall. There was excellent cooperation between the two US agencies and the UK over the many years of VENONA, in large measure a result of the early efforts of Robert Lamphere and Meredith Gardner.

Robert Lamphere
PHOTO

Covernames in VENONA
The VENONA messages are filled with hundreds of covernames (designations used in place of the real names to hide identities of Soviet intelligence officers and agents—that is, spies or cooperating sources—as well as organizations, people, or places discussed in the encrypted messages). A number of public figures were also designated by covernames, while others in that category appear in the text of the messages by their names. The following are examples of covernames recovered from the VENONA corpus:

Covername	True Name
KAPITAN	President Roosevelt
ANTENNA (later LIBERAL)	Julius Rosenberg
BABYLON	San Francisco
ARSENAL	U.S. War Department
THE BANK	U.S. Department of State
ENORMOZ	Manhattan Project/A-bomb
ANTON	Leonid Kvasnikov, KGB

Arlington Hall and the FBI studied the covernames for leads to identities, grouping them into families of covernames. Some covernames came from mythology, some were Russian given names, and other were names of fish, etc. KAPITAN was easily identified from the context as a good covername for President Roosevelt, but his covername was, nevertheless, outranked by those of persons of lower station, including KGB operatives covernamed PRINCE, DUKE, and GOD. Other KGB assets were just plain BOB, TOM, and JOHN, while Elizabeth Bentley had the covername GOOD GIRL. Very rarely, the KGB was careless in choosing a covername. For example, the covername FROST was used for KGB agent Boris Moros. The Russian word for "frost" is Moroz."

The VENONA Translations
There were about 2,200 VENONA messages translated. The VENONA translations released to the public often show an unexpectedly recent date of translation because the breaking of strong cryptographic systems is an iterative process requiring trial and error and reapplication of new discoveries leading to additional ones. Consequently, a message may have been reworked many times over the years as new discoveries enabled progress in the decryption and understanding of more and more of the text. Partial information was available from many messages as early as 1947 and later that year was provided to the FBI. Almost all of the KGB messages between Moscow and New York and Moscow and Washington of 1944 and 1945 that could be broken at all were broken, to a greater or lesser degree, between 1947 and 1952.

There are still unreadable gaps in the translated messages. These are indicated as a number of code groups "unrecovered" or "unrecoverable." This means that the cryptanalysts were unable to break those portions of the messages.

Success Rate
The serial number of the VENONA messages indicate that the KGB and GRU sent thousands of messages between Moscow and the overseas recipients. Only a fraction of the total messages sent and received were available to the cryptanalysts. The messages, which have been exploited were never exploited in real time. In 1946, Meredith Gardner was working on KGB messages of 1944.

Arlington Hall's ability to read the VENONA messages was spotty, being a function of the underlying code, key changes, and the lack of volume.
Of the message traffic from the KGB New York office to Moscow, 49 percent of the 1944 messages and 15 percent of the 1943 messages were readable, but this was true of only 1.8 percent of the 1942 messages. For the 1945 KGB Washington office to Moscow messages, only 1.5 percent was readable. About 50 percent of the 1943 GRU-Naval Washington to Moscow messages were read, but none from any other year.

VENONA Myths and Misunderstandings
In spite of what has been written in a number of books and articles, Arlington Hall made the VENONA breakthroughs purely through sweat-of-the-brow analysis. There was no cryptanalytic assistance for Lt. Richard Hallock, Cecil Phillips, or Meredith Gardner and their colleagues from lost, discovered, or battlefield-recovered Soviet codebooks during the years in which the main analytic breakthroughs were made. It was not until 1953 that a photocopy of a partially burned codebook (recovered by US Military Intelligence in 1945) was discovered to be related to the VENONA crypto-graphic systems after another cryptanalytic breakthrough. The successful decryption of the VENONA messages was a triumph of analysis by a small group of intelligent and dedicated women and men working long hours in their cramped offices at Arlington Hall.

Messages from the KGB New York Residency to Moscow Center
Although KGB and GRU communications between New York and Moscow during 1939-1941 were in cryptographic systems that could not be broken, a comparison of the New York_Moscow KGB, and GRU message counts between these years indicates that, at least in the United States, the GRU may have been the more active Soviet intelligence agency up until that time. For example, in 1940, the NY GRU sent an estimated 992 messages to Moscow while the KGB sent only an estimated 335 messages. Furthermore, later translations of 1944 and 1945 messages show that a number of KGB espionage personalities had previously been GRU assets (or possibly COMINTERN agents under GRU control). In 1942 there were nearly 1,300 KGB New York_Moscow messages, but only 23 were successfully decrypted and translated. In 1943, however, there were a little over 1,300 messages with over 200 decrypted and translated.

The COMINTERN and the Soviet Intelligence Services
The COMINTERN (Communist International) was a Soviet-controlled organization that conducted liaison with the national communist parties of various countries, including the United States, in order to further the cause of revolution. Moscow issued guidance, support, and orders to the parties through the apparatus of the COMINTERN. Nevertheless, Stalin publicly disbanded the COMINTERN in 1943. A Moscow message to all stations on 12 September 1943, message number 142, relating to this event is one of the most interesting and historically important messages in the enter corpus of VENONA translations. This message clearly discloses the KGB's connection to the COMINTERN and to the national Communist parties. The message details instructions for handling intelligence sources within the Communist Party after the disestablishment of the COMINTERN. The translation of the Moscow-Canberra message was the only message of those sent to all the Residencies that was successfully decrypted.

KGB Organization in the United States
During the VENONA period, the KGB had US Residencies in New York, Washington, and San Francisco__the latter residency was not

established (or possibly reestablished) until December 1941. There was also a geographic Subresidency in Los Angeles.

The translations show that the KGB New York Residency operated under three official institutional cover arrangements-the Soviet Consulate, the trade
mission (AMTORG/Soviet Government Purchasing Commission), and TASS, the Soviet news agency. Other KGB officers worked at various locations around the United States under Purchasing Commission cover, often as factory inspectors working on Lend-Lease matters.

During 1942, Gen. Vassili M. Zubilin (true name: Zarubin) was the KGB Resident (chief) in New York. Zubilin, known in VENONA by the covername MAXIM, signed many KGB telegrams. His wife, Elizabeth, was a KGB colonel who had the covername VARDO. There are indications that Zubilin/MAXIM was the senior KGB officer in the United States. For example, the KGB Residency in Washington did not send messages until late 1943 after Zubilin arrived there. Before that, New York sent the Washington espionage messages.

All KGB Residencies abroad came under the First Chief Directorate (Foreign Intelligence) of the Moscow Center. Lt. Gen. Pavel Fitin, covername VICTOR, ran the First Chief Directorate, and most VENONA messages from the Residencies are addressed to him.

Although most or all KGB officers in New York worked for the First Chief Directorate, their day-to-day operations were defined by what the KGB called a "Line." A Line worked against a specific target set or carried out some specialized function. A number of Lines are mentioned in the VENONA translations, and their specialization can be either identified or easily inferred. Some, not all, of these may be seen in the 1942-43 messages:

Line Target or Function
KhU Line: High-tech targets, including the Manhattan Project, jet engines, rocket engines, radar (Julius Rosenberg's group worked under this Line).

White Line: Probably worked against the White Russians.

Fifth Line: Security of the Soviet Merchant Fleet (probably connected to the Second Chief Directorate—internal counterintelligence—at Moscow Center.

Second Line: Watching nationalist or minority groups of interest to the Soviet state (for example, the Ukrainians).

Technical Line "A": Special work such as document forgery.

Fellow Countryman Line: Liaison with the American Communist Party.

Line of Cover: The institutional or personal cover of the KGB officer.

Other organizations referenced in the VENONA materials include the Eighth Department at Moscow Center, which evaluated political intelligence; the special cipher office, which encrypted and decrypted the telegrams; the Center-KGB headquarters; and the "House" or "Big House," which probably meant the COMINTERN headquarters in Moscow (although it sometimes appears to be used interchangeably for Moscow Center).

Telegrams sent by the KGB Residency in New York were usually signed by the Resident (MAXIM, LUKA, or MAJ) and were addressed to VIKTOR, head of the First Chief Directorate. Sometimes telegrams were signed with the covername ANTON, head of the KhU Line, since Moscow Center gave him special authority to do so in 1944. In special circumstances, telegrams were addressed to or received from PETROV, believed to have been L.P. Beria, head of the Soviet security apparatus; however, PETROV might also have been V.N. Merkulov, a principal deputy of Beria, who probably headed KGB operations from the latter part of 1943.

At least in the case of the New York Residency, we see what probably was the KGB in transition-trying to organize its espionage activities better while sorting out the impact of the dissolution of the COMINTERN. We also see considerable KGB interest in European and Latin American Communists, which presented opportunities for subversion, a classic COMINTERN methodology, rather than espionage. Nonetheless, the New York Residency had many espionage assets during this period and was aggressive, even reckless, and imaginative in trying to recruit or place people in sensitive positions.

The activities of a Soviet Illegal: MER/ALBERT (covername for KGB officer Iskak Akhmerov, who operated as a clothier) is seen in VENONA, which also provides some insight into Illegals used by Soviet intelligence. Although only the activities of Akhmerov and a GRU-naval operation involving an illegal are presented in some detail, there is a small number of other cases of illegals mentioned. An Illegal was usually a Soviet citizen, a KGB or GRU officer, who operated under an alias with no visible connection to official Soviet establishments. Illegals had no diplomatic immunity, usually entering the country illegally-hence the term.

The Washington KGB Residency

Except for its agents working against high-tech targets such as the atomic bomb project, the most important KGB sources were in Washington, D.C. Nonetheless, VENONA shows that the New York Residency apparently ran these Washington-based espionage nets. In late 1943 the Washington Residency began to run some of its agents but it was not until 1945 that they finally took charge of most of its agents. Vassili Zubilin, who was the KGB Resident in New York, moved to Washington during 1943 and became Resident. After his move, the Washington Residency began sending messages in increasing volume. When Zubilin was recalled to Moscow in 1944, Anatoliy Gromov, covername VADIM, replaced him in Washington. Gromov (actual last name Gorsky) was also a senior officer, in his late thirties, who had served for the preceding four years as the KGB Resident in London. American spymaster and courier for the KGB, Elizabeth Bentley, knew him only as "Al."

New York Espionage Operations—The New KGB

In 1944, covername MAJ, believed to have been Stepan Apresyian, became the KGB Resident in New York. According to a complaint to Moscow Center by his co-Resident or subordinate, covername SERGEJ, MAJ was a young, inexperienced officer who had not previously been posted abroad. Apresyian was about 28 years old; he operated in New York under the cover of vice consul. While we do not know why MAJ was elevated early to senior KGB rank, there were other major changes in KGB espionage operations.

Moscow Center and the New York Residency intended to take a more direct control of some existing espionage nets that had been run for the KGB by American Communists such as Jacob Golos (covername ZVUK) and Greg Silverman (covernames PEL and ROBERT). And, as

MAJ reported to Moscow, the time might come when the KGB would need to have espionage nets not recruited from within the Communist Party.

All of this relates to the dissolution of the COMNINTERN. The transition was resisted by American spies, Greg Silverman and Elizabeth Bentley, as well as by some of their agents. They complained that Moscow did not trust them and that, as a practical matter, the KGB would be less successful in running espionage operations if they put their officers in direct contact with the agents, bypassing the old guard Communist Party controllers. Perhaps mindful of this, the KGB introduced the Illegal Albert into their espionage operations. Silvermaster, Elizabeth Bentley, some of their individual agents, and members of the "new network" were now to fall under Albert's control.

KGB Operations
Information in the VENONA materials reveals KGB tradecraft (that is, the practical means and methods of espionage and counterespionage) of the time in great detail. Most VENONA messages concern operational/tradecraft matters. The sheer volume of data collected by KGB stations abroad was too great to be reported by telegram; instead the VENONA messages indicated that photocopies of classified documents went to Moscow by courier. In one translation, KGB in New York informed Moscow that it had 56 rolls of film from their agent, covernamed ROBERT, and that this trove of classified material was to be sent off by courier to Moscow Center.

Information in VENONA translations describes the KGB's modus operandi in arranging meetings with their agents, with much attention given to the security of these secret meetings. Other messages describe KGB countermeasures against FBI—counter-surveillance, detection of bugging devices, and ensuring the loyalty of Soviet personnel in the United States. A particularly fascinating set of VENONA messages describes the KGB's efforts to locate Soviet sailors who had deserted from merchant ships in San Francisco and other US ports. Some of the most interesting messages detail KGB assessment and recruitment of American Communists for espionage work.

KGB and GRU Spies and Assets in the United States
Over 200 named or covernamed persons found in the VENONA translations, persons then present in the United States, are claimed by the KGB and the GRU in their messages as their clandestine assets or contacts. Many of these persons have been identified, many have not been. These approximately 200 persons are separate from the many KGB and GRU officers who also appear in VENONA. One such asset, ROBERT, is found in VENONA translations several dozen times. Other covernamed persons were found only few times. The majority of unidentified covernames in the New York KGB traffic appear three or less times

KGB Espionage Against the VENONA Program
A number of sources outside of signals intelligence reveal that the KGB learned early on that the United States had begun to study Soviet communications. In late 1945, KGB agent Elizabeth Bentley told the FBI that the KGB had acquired some limited information about the US effort during 1944. Kim Philby, while assigned to Washington, D.C., 1949-1951, occasionally visited Arlington Hall for discussions about VENONA; furthermore, he regularly received copies of summaries of VENONA translations as part of his official duties. Although the Soviets knew what Arlington Hall was accomplishing, they could not, at any rate, get the message back.

The Rosenberg/Atomic Bomb Espionage Messages
All but two of the 49 VENONA translations, that have been identified as associated with atomic bomb espionage messages, are KGB traffic; one is a GRU and one a Soviet diplomatic messages.

These messages disclose some of the clandestine activities of Julius and Ethel Rosenberg, Harry Gold, Klaus Fuchs, David and Ruth Greenglass, and others. The role played by the person covernamed PERS associated with the atomic bomb espionage remains unidentified to this day.

VENONA messages show that KGB officer Leonid Kvasnikov, covername ANTON, headed atomic bomb espionage in the United States, but that he, like the Rosenbergs who came under his control, had many other high-tech espionage targets such as the US jet aircraft program, developments in radar and rockets, etc. As with most VENONA messages, the Rosenberg messages contain much information relating to KGB net control and tradecraft matters.

Elizabeth Bentley
In 1945, Elizabeth Bentley, a KGB agent who also ran a network of spies and served as courier, went to the FBI to describe Soviet espionage in the United States and her part in it. She gave a 100-page statement, in which she provided many names—persons in positions of trust who, she told the FBI, were secretly supplying information to the KGB. However, she brought no documentary proof. No espionage prosecutions resulted directly from her accusations. Over the years she testified before Congress and in court and also published a book about her espionage career. Elizabeth Bentley was a controversial figure, and there were many who discounted her information. Ms. Bentley appears in the VENONA translations (covernames UMNITSA, GOOD GIRL, and MYRNA) as do dozens of KGB agents and officers whom she named to the FBI. VENONA confirms much of the information about Soviet espionage that Ms. Bentley provided the FBI.

Elizabeth Bentley
PHOTO

Boris Morros
Boris Morros was, like Ms. Bentley, another controversial figure of the Cold War. In 1959 he wrote an often criticized book, *My Ten Years as a Counterspy*, in which he described his long association with the KGB and his decision to go to the FBI with the story of KGB operations in the United States. In the book he wrote about various personalities who are referred to in VENONA, including Zubilin and Jack Soble. Morros appears in VENONA as covername FROST. In his book, Morros described how KGB agent Alfred Stern provided his own money to fund a musical company, managed by Morros, as a KGB front and a cover for international intelligence operations. This operation is confirmed in VENONA-Stern (covername LUI) is quoted as saying his "130,000 dollar investment is exhausted" but also that "I want to reaffirm my desire to be helpful. My resources are sufficient for any solid constructive purpose."

Donald Maclean
Longtime KGB agent Donald Maclean, covername HOMER, a senior British diplomat posted to Washington during the 1940s, is found in several VENONA messages all sent during 1944. He was neutralized because of information from VENONA. Because only a small body of the Washington messages from a limited window were read, there is only a glimpse of Maclean's involvement, but ample opportunity to see the type of important information he was providing to the Soviets.

HOMER is the English rendition of the Russian covername spelling GOMER. (The Cyrillic alphabet used in Russian has no letter representing the sound "h" of the Roman alphabet, and foreign words are regularly spelled with the Cyrillic equivalent of "g.")

Meredith Gardner, Arlington Hall's principal VENONA analyst in the early days, began to break HOMER messages as early as 1947/48, but the story did not come together immediately as the covername was variously represented in the messages as GOMMER (a KGB misspelling), GOMER, G., and "Material G." Initially, it was not apparent that these were all references to the same person, particularly as both New York and Washington traffic was involved, and Gardner worked the NYC traffic first.

Perspective

The VENONA program concerned KGB and GRU messages that were available to Arlington Hall codebreakers. Most of the messages which were collected were not successfully decrypted, and, short of a release of the KGB and GRU archives from the period, we may never know more about the KGB and GRU activities represented in the VENONA corpus of messages.

END OF CHAPTER 4

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Enoch Crosby Describes His Career As A Spy

Southeast, Putnam County,

15 October 1832

In the latter part of the month of August in the year 1776, he enlisted into the regiment commanded by Col. Swortwaut[14] in Fredericksburgh now Carmel in the County of Putnam and started to join in the army at KingsBridge. The company had left Fredericksburgh before the declarent started, and he started along after his said enlistment and on his way at a place in Westchester County about two miles from Pines bridge he fell in company with a stranger, who accosted the deponent and asked him if he was going down.

The stranger then asked if declarent was not afraid to venture alone, and said there were many rebels below and he would meet with difficulty in getting down.

The declarent perceived from the observations of the stranger that he supposed the declarent intended to go to the British, and, willing to encourage that misapprehension and turn it to the best advantage, he asked if there was any mode which he the stranger could point out by which the declarent could get through safely. The stranger after being satisfied that declarent was wishing to join the British army, told him that there was a company raising in that vicinity to join the British army, and that it was nearly complete and in a few days would be ready to go down and that declarent had better join that company and go down with them.

The stranger finally gave to the declarent his name, it was Bunker, and told the declarent where and showed the house in which he lived and told him that Fowler[15] was to be the captain of the company then raising and Kipp[16] Lieutenant. After having learned this much from Bunker, the declarent told him that he was unwilling to wait until the company could be ready to march and would try to get through alone and parted from him on his way down and continued until night when he stopped at the house of a man who was called Esquire Young, and put up there for the night.

In the course of conversation with Esquire Young in the evening, the declarent learned that he was a member of the committee for safety for the county of Westchester and then communicated to him the information he had obtained from Mr. Bunker, Esqr. Young requested the declarent to accompany him the next morning to the White plains

in Westchester County as the committee of safety for the County were on that day to meet at the Court house in that place.

The next morning the declarent in company with Esqr. Young went to the White plains and found the Committee there sitting. After Esqr. Young had an interview with the committee, the declarent was sent for, and went before the committee, then sitting in the Court room, and there communicated the information he had obtained from Bunker.

The Committee after learning the situation of declarent, that he was a soldier enlisted in Col. Swrotwaut's regiment and on his way to join it if he would consent to aid in the apprehension of the company then raising. It was by all thought best, that he should not join the regiment, but should act in a different character as he could thus be more useful to his country.

He was accordingly announced to Capt. Townsend who then was at the White plains commanding a company of rangers as a prisoner, and the Captain was directed to keep him until further orders. In the evening after was placed as a prisoner under Capt. Townsend, he made an excuse to go out and was accompanied by a soldier. His excuse led him over a fence into a field of corn then nearly or quite full grown. As soon as he was out of sight of the soldier he made the best of his way from the soldier and when the soldier hailed him to return he was almost beyond hearing. An alarm gun was fired but declarent was far from danger.

In the course of the night the declarent reached the house of said Bunker, who got up and let him in. The declarent then related to Bunker the circumstances of his having been taken prisoner, and his going before the Committee at the Court house, of being put under the charge of Capt. Townsend and of his escape, that he had concluded to avail himself of the protection of the company raising in his neighborhood to get down. The next morning Bunker went with declarent and introduced him as a good loyalist to several of the company. The declarent remained some days with different individuals of the company and until it was about to do down, when declarent went one night to the house of Esqr. Young to give information of the state and progress of the company. The distance was four or five miles from Bunkers.

At the house of Esqr. Young, the declarent found Capt. Townsend with a great part of his company and after giving the information he returned to the neighborhood of the Bunkers. That night the declarent and a great part of the company which was preparing to go down were made prisoners. The next day all of them, about 30, were marched to the White plains, and remained there several days, a part of the time locked up in jail with other prisoners, the residue of the time he was with the Committee. The prisoners were finally ordered to Fishkill in the County of Dutchess where the State Convention was then sitting. The declarent went as a prisoner to Fishkill. Capt. Townsend with his company of rangers took charge of the company.

At Fishkill a Committee for Detecting Conspiracies was sitting composed of John Jay, afterwards Governor of N York, Zerpeniah Platt afterwards first judge of Dutchess County, Colonel Duer of the County of Albany, & a Mr. Sackett. The declarent was called before that committee, who understood the character of declarent and the nature of his services, this the committee must have learned either from Capt. Townsend or from the Committee at White plains. The declarent was examined under oath and his examination reduced to writing. The prisoners with the declarent were kept whilst declarent remained at Fishkill in a building which had been occupied as a Hatters shop and

they were guarded by a company of rangers commanded by Capt. Clark. The declarent remained about a week at Fishkill when he was bailed out by Jonathan Hopkins. This was done to cover the character in which declarent acted.

Before the declarent was bailed, the Fishkill Committee had requested him to continue in this service, and on declarent mentioning the fact of his having enlisted in Col. Swortwaut's company and the necessity there was of his joining it, he was informed that he should be indemnified from that enlistment, that they would write to the Colonel and inform him that declarent was in their service. The Committee then wished declarent to undertake a secret service over the river. He was furnished with a secret pass, which was a writing signed by the Committee which is now lost and directed to go to the house of Nicholas Brawer near the mouth of the Wappingers creek who would take him across the river, and then to proceed to the house of John Russell about 10 miles from the river, and make such inquiries & discoveries as he could.

He proceeded according to the directions to said Brawers, and then to John Russells, and there hired himself to said Russell to work for him but for no definite time. There was a neighborhood of Loyalists and it was expected that a company was there raising for the British army. The declarent remained about 10 days in Russells employment and during that time ascertained that a company was then raising but was not completed. Before the declarent left Fishkill on this service, a time was fixed for him to recross the river and given information to some one of the committee who was to meet him.

This time having arrived and the company not being completed, the declarent recrossed the river and met Zepeniah Platt, one of the Committee, and gave him all the information he had then obtained. The declarent was directed to recross the river to the neighborhood of Russells and on a time then fixed, again to meet the Committee on the east side of the river.

The declarent returned to Russells neighborhood, soon became intimate with the Loyalists, and was introduced to Capt. Robinson, said to be an English officer and who was to command the company then raising. Capt. Robinson occupied a cave in the mountains, and deponents—having agreed to go with the company—were invited and accepted of the invitation to lodge with Robinson in the cave. They slept together nearly a week in the cave and the time for the company to start having been fixed and the rout designated to pass Severns, to Bush Carricks where they were to stop the first night.

The time for starting having arrived before the appointed time to meet the Committee on the east side of the river, the declarent—in order to get an opportunity to convey information to Fishkill—recommended that each man should the night before they started sleep where he chose and that each should be by himself for if they should be discovered that night together all would be taken which would avoided if they were separated.

This proposition was acceded to, and when they separated declarent not having time to go to Fishkill, and as the only and as it appeared to him the best means of giving the information, as to go to a Mr. Purdy who was a stranger to declarent and all he knew of him was that the Tories called him a wicked rebel and said that he ought to die, declarent went and found Purdy, informed him of the situation of affairs, of the time the company was to start and the place at which they were to stop the first night, and requested him to go to Fishkill and give the information to the Committee. Purdy assured the declarent

that the information should be given. Declarent returned to Russells and lodged in his house.

The following evening the company assembled consisting of about thirty men and started from Russell's house which was in the Town of Marlborough and County of Ulster for New York and in the course of the night arrived at Bush Carricks and went into the barn to lodge after taking refreshments.

Before morning the barn was surrounded by American troops and the whole company including Capt. Robinson were made prisoners. The troops who took the company prisoners were commanded by Capt. Melancton Smith, who commanded a company of rangers at Fishkill. His company crossed the river to perform this service.

Col. Duer was with Capt. Smith's Company on this expedition. The prisoners including the declarent were marched to Fishkill and confined in the stone church in which there was near two hundred prisoners, after remaining one night in the church the Committee sent for declarent and told him that it was unsafe for him to remain with the prisoners, as the least suspicion of the course he had pursued would prove fatal to him, and advised him to leave the village of Fishkill but to remain where they could call upon him if his services should be wanted.

Declarent went to the house of a Dutchman a farmer whose name is forgotten about five miles from the Village of Fishkill and there went to work at making shoes. After declarent had made arrangements for working at shoes he informed Mr. Sacket one of the Committee where he could be found if he should be wanted.

In about a week declarent received a letter form the Committee requesting him to meet some one of the Committee at the house of Doct. Osborn about one mile from Fishkill. Declarent according to the request went to the house of Doct. Osborn and soon after John Jay came there, inquired for the Doctor—who was absent, inquired for medicine but found none that he wanted, he came out of the house and went to his horse near which declarent stood and as he passed he said in a low voice it won't do, there are too many around, return to your work. Declarent went back and went to work at shoes but within a day or two was again notified and a horse sent to him, requiring him to go to Bennington in Vermont and from thence westerly to a place called Maloonscack, and there call on one Hazard Wilcox, a Tory of much notoriety and ascertain if anything was going on there injurious to the American cause.

Declarent followed this instructions, found Wilcox but could not learn that any secret measure was then projected against the interest of the county at the place, but learned from Wilcox a list of persons friendly to the British cause who could be safely trusted, from that place quite down to the south part of Dutchess County, declarent followed the directions of said Wilcox and called on the different individuals by him mentioned but could discover nothing of importance until he reached the town of Pawling in Duchess County where he called upon a Doctor, whose name he thinks was Prosser, and informed him that he wished to go below, but was fearful of some trouble.

The Doctor informed him that there was a company raising in that vicinity to go to New York to join the British Army, that the Captains name was Shelden that he had been down and got a commission, that the Prosser was doctoring the Lieutenant, whose name was Chase, that if declarent would wait a few days he could safely go down with that company, that he could stay about the neighborhood, and should be

informed when the company was ready. That declarent remained in that vicinity, became acquainted with several of the persons who were going with that company, was acquainted with the Lieutenant Chase, but never saw the Captain to form any acquaintance with him.

The season had got so far advanced that the company were about to start to join the enemy to be ready for an early commencement of the campaign in 1777. It was about the last of February of that year, when a place was fixed and also a time for meeting. It was at a house situated half a mile from the road and about three miles from a house then occupied by Col. Morehause a militia Colonel. After the time was fixed for the marching of Capt. Sheldens company the deponent went in the night to Col. Morehause and informed him of the situation of the company of the time appointed for meeting of the place and Morehause informed declarent that they should be attended to.

The declarent remained about one month in the neighborhood, and once in the time met Mr. Sackett one of the Committee at Col. Ludingtons, and apprised him of what was then going on, and was to have given the Committee intelligence when the company was to march but the shortness of the time between the final arrangement and the time of starting was that declarent was obliged to give the information to Col. Morehause.

The company consisting of about thirty met at the time and place appointed and after they had been there an hour or two; two young men of the company came in and said there was a gathering under arms at old Morehauses, the inquiry became general, what could it mean, was there any traitors in the company. The captain soon called one or two of the company out the door for the purpose of private conversation about the situation, and very soon declarent heard the cry of stand, stand.

Those out the door ran but were soon met by a company coming from a different direction, they were taken in the house surrounded and the company all made prisoners. The Col. then ordered them to be tied together, two and two, they came to declarent and he begged to be excused from going as he was lame and could not travel, the Col. replied, you shall go dead or alive and if in no other way you shall be carried on the horse with me, the rest were marched off and declarent put onto the horse with Col. Morehause, all went to the house of Col. Morehause and when the prisoners were marched into the house declarent with the permission of Morehause left them and made the best of his way to Col. Ludingtons and there informed him of the operations of the night, he reached Col. Ludingtons about day light in the morning, from thence he went to Fishkill to the house of Doct. Van Wyck where John Jay boarded and there informed him of all the occurrences on that northern expedition.

Said Jay requested the declarent to come before the Committee the next night when they would be ready to receive him he accordingly went before the Committee where he declared under his oath all that had occurred since he had seen them. The Committee then directed him to go to the house of Col. Van Ness in Albany County and there take directions from him. He went to Van Ness house and was directed by him to go to the north but declarent cannot tell the place the duty was performed, but nothing material discovered, further that the confiscation of the personal property of the Tories and leasing of their lands had a great tendency to discourage them from joining the British Army, declarent then returned to Pokeepsie, where Egbert Benson and Melancton Smith acted in the room of the Fishkill Committee.

There was no more business at that time in which they wished to employ declarent, and he being somewhat apprehensive that a longer continuance in that employment would be dangerous, and the time for which he enlisted in Col. Swortwauts regiment having expired he came home with the approbation of the Committee. This was about the last of May 1777, and in the course of the fall after, the declarent saw Col. Swortwaut at his house in Fishkill and there talked over the subject of the employment of the declarent by the Committee and the Col. told declarent that he had drawn his pay the same as if he had been with the regiment, that the Paymaster of the Regiment lived in the town of Hurley in Ulster County. Declarent went to the paymaster and received his pay for nine months service or for the term for which the regiment was raised. The declarent was employed in the secret service for a period of full nine months.

This declarent further says that in the year 1779 in the month of May he enlisted into a company commanded by Capt. Johah Hallett for six months declarent enlisted as a sergint in said Hallets company. The term of enlistment was performed on the lines in the County of Westchester, moving from place to place to guard the country and detect Tories, that the company continued in this service until after Stony Point was taken by Gen. Wayne and abandoned and also reoccupied and abandoned by the English troops.

When this company was ordered over the river and joined the regiment at Stony Point and continued there in making preparations for building a block house until the time of the expiration of the service when the company was ordered to march to Pokeepsie to be discharged by the Governor. When they arrived, the Governor was absent the company was billetted out and the declarent was billetted upon the family of Doct. Tappen.

After remaining a day or two and the Governor not arriving, they were discharged. During this service in Westchester County the following occurrence took place a British vessel of war lay at anchor near Tellers Point and a party of sailors or marines cam eon shore and wandered a short distance from the water when a party of our men got between them and the river and made them prisoners. They were marched to the place when the company then lay, a little east of Tellers point, the number of prisoners declarent thinks was twelve and the captors six. The prisoners were afterwards sent to Pokeepsie.

This declarent further says that in the month of May in the year 1780 he again enlisted for six months in a company commanded by Capt. Livingston in Col. Benschautens Regiment. He enlisted as a sergent in the Town of Fredericksburgh now the town of Kent in Putnam County. The Regiment assembled at Fishkill and marched to Westpoint and remained there a few days some ten or fifteen, a call was made for troops to fill up the Brigade or Brigades under the command of Gen. De La Fayettes, and they were to be raised by drafts or volunteers, a call first was made for volunteers and the declarent with others volunteered and made a company which was put under the care and charge of Capt. Daniel Delavan.

The declarent continued to be a sergent in Delavans company. Col. Phillip Van Cortland commanded the regiment to which Captain Delavans company was attached, soon after the company was formed they crossed the river from West Point and marched to Peekskill where they remained one night. The next day marched to Verplanks point and crossed over to Stony Point and from thence made the best of their way to New Jersey where they remained until late in the fall when the time of enlistment having expired they were discharged, after having fully

and faithfully performed the service of six months for which he enlisted.

During this campaign in New Jersey. Major Andre was arrested, condemned and executed several of the soldiers of Capt. Delavan's company went to see him executed. This declarent was sergent of the guard that day and could not go to see the execution.

The declarent further says that he has no documentary evidence of his service, and that he knows of no person who can testify to his services other than those whose depositions are hereto annexed.

Enoch Crosby
PHOTO

The declarent hereby relinquishes every claim whatever to a pension or annuity except the present and declares that his name is not on the pension roll agency of any state.

The declarent has a record of his age.

The declarent was living in the town of Danbury in the state of Connecticut when he enlisted into the service, that since the revolutionary war the declarent has resided in the State of New York, in what is now the County of Putnam formerly the County of Duchess, and now lives in the same county and on the same farm where he has lived for the last fifty years. The declarent always volunteered in every enlistment and to perform all the services which he performed as detailed in this declaration.

That the declarent was acquainted with the following officers who were with the troops where he served. General Schuyler, Gen. Montgomery, General Wooster, Col. Waterbury, Col. Holmes, Gen. DeLa Fayette, Gen. Poor, Col Van Coretlandt, Col. Benschauten, Col. Ludington.

The declarent never received any written discharge, and if he ever received a sergents warrant it is through time and accident lost or destroyed.

This declarent is known to Samuel Washburn a Judge of the Court of Common Pleas of the County of Putman, Benaiah Y. Morse a clergyman in his neighborhood and who he believes can testify to his character for veracity and good behaviour and thus belief of his services as a soldier of the revolution.

/S/ Enoch Crosby

Benedict Arnold [17]

"bold, crafty, unscrupulous, unrepentant: the Iago of traitors"[18]

The US public prefers to dismiss Benedict Arnold as simply "a despicable traitor." To today's US counterintelligence (CI) specialists, however, he offers a valuable case study—the classic example of a "high performer" and "trusted insider" who (for complex and unpredictable reasons) decided to become an espionage "volunteer." What were Arnold's motivations, and what were the enabling and precipitating causes of his decision to go over to the enemy? More importantly, what changes in Arnold's behavior and activities should have raised "CI flags" in the minds of his friends and fellow officers?

The "Enabling" Causes:

Several personal and historical factors combined to make it possible for Benedict Arnold to eventually make the decision to become a traitor. These factors included:

1). Arnold was a "self-made man" in the truest sense of these words. Born into a poor but respectable New England family (his great-grandfather had been a colonial Governor of Rhode Island) he received the 18th Century equivalent of a high school education and was apprenticed to a pharmacist. Arnold learned the "military arts" by serving with (and—in a premonition of things to come—deserting from) several New York militia units in the late 1750s. During the next two decades he became a successful merchant, sea trader/smuggler (he sailed his own ships between Canada and the West Indies), and family man in Connecticut and Massachusetts.

From the outset, however, Arnold's personality demonstrated certain excesses which made him ill-suited for public service or other cooperative enterprises. These included: extreme personal ambition, ruthlessness in business dealings, opportunism, and a willingness to take risks and manipulate situations to his own advantage. By the time he joined the Continental Army in 1775, Arnold had established a reputation as a cranky and litigious "sharp trader" used to making his own rules and getting his own way. These personality characteristics were to remain constant throughout Arnold's life, and were often noted by those who dealt with him during his cooperation with the British authorities in 1779-1782 and throughout his subsequent career as a businessman in Canada and England.

2). Arnold's military career during the Revolutionary War was meteoric. Physically strong and apparently quite fearless in battle, he took part in a series of spectacular, high risk operations against the British (the capture of Fort Ticonderoga, the St. John's raid, the ill-fated invasion of Canada in the Fall of 1775—during which he was severely wounded—and the Battle of Valcour Island) which boosted his reputation and self-confidence. Arnold's energy and valor ingratiated him to George Washington, who urged his promotion and supported him during a series of politically-motivated misconduct investigations. Although he was promoted to Brigadier in January, 1776, and Major General in May, 1777, Arnold resented the fact that some younger, less able men had been promoted ahead of him.

Arnold tells Andre to hide West Point plans in his boots.
PHOTO

Andre is captured.
PHOTO

Andre on his way to the gallows.
PHOTO

Carl Van Doren has described Arnold's "military persona" as follows:

"As a soldier he was original and audacious, quick in forming plans, quick in putting them into vigorous execution. He led his soldiers, not drove them, and won and held the devotion of the rank and file. He had a gift for command when the objective was clear and his imperious will could be fully bent upon it...But in the conflict of instructions and of other officers of rank equal or nearly equal to his, Arnold was restive and arrogant. He could not turn philosopher and patiently endure small irritations day by day. "

"He was passionate and personal in almost all his judgments...At the same time, Arnold was a whirlwind hero who could not be bothered with keeping track of small expenses. Spend what had to be spent, and

figure the amount up later." (It was these attitudes that got him into trouble with the Continental Congress.)

3). It is also important to remember the historical context within which Arnold acted. After four years of inconclusive combat operations, in the Spring of 1779 the final outcome of the "American War of Independence" remained uncertain. In purely military terms, the war had evolved into a stand-off, with the British unable to trap and destroy the Colonial armed forces, and the Continental Army incapable of driving the British from major ports and garrison cities. In addition, the Treaty of Alliance signed with France the previous year had yet to produce any successful joint military French-American operations (Admiral d'Estaing's fleet operations had failed repeatedly, and General Rochambeau's expeditionary force would not arrive until July, 1780).

Politically, things did not look much better. The British Government was still hanging tough on suppression of the colonial "rebellion," and hundreds of thousands of pro-British "Tories" or "loyalists" remained active in North America. Less than a third of the population of the thirteen colonies had actively supported the American revolutionary cause in the first place, and this base of support had eroded as the war progressed. By 1779, quite a few "Patriots of 1776" had begun to consider changing sides. Arnold was not alone in his growing cynicism and pessimism.

The "Precipitating" Causes

Seriously wounded in the same leg for a second time at the Battle of Saratoga, the partially disabled Arnold was placed in command of the Colonial forces in Philadelphia following the British evacuation of that city in June, 1778. Meanwhile, Congress had approved an adjustment in his date of rank, so that he now technically outranked his younger competitors. So, what was Arnold's motivation for committing treason a year later? What factors made it certain that he would finally choose to betray his country's cause? The following reasons come to mind:

1). He still nursed a long series of accumulated grievances against the Continental Congress, which he believed to be hopelessly incompetent and corrupt.

2). Arnold was a restless man of action—"driven and tremendously energetic," according to one biographer. Now less mobile because of a shortened leg, he saw his chances for a future field command slowly slipping away, and life as a garrison commander did not agree with him.

3). At the age of 38, the rough-cut war hero had just married beautiful and sophisticated 19-year-old Peggy Shippen (his first wife had died in 1775) , the daughter of an old and wealthy Philadelphia family. Pro-British and socially ambitious, Peggy was a willing coconspirator in Arnold's espionage activities. He desperately wanted to live up to her expectations.

4). Arnold was essentially an arrogant, narcissistic opportunist who felt that his contributions to the Revolutionary cause had not been fully appreciated. His duty assignment in Philadelphia had given him a year to reflect upon his future prospects. By coincidence, in May, 1779 he found himself faced with an opportunity which was simply too good to pass up—the chance to make a fortune and (perhaps) end up on the winning side of what increasingly appeared to be a "war of attrition."

The "fortune" Arnold stood to make was not inconsequential. He first demanded 10,000 pounds for his services, but General Clinton demurred. The British became more cooperative after Arnold was put in charge of West Point, however, offering to pay 20,000 pounds, nearly $750,000 in today's money—if Arnold delivered West Point to them with its garrison and artillery intact. 20,000 pounds was a huge sum in

the late 18th century, clearly sufficient to maintain Arnold and his family at a high standard of living anywhere in the world.

Implications for US Counterintelligence Today

What "CI indicators" or changes in Arnold's personality or behavior should his colleagues have noticed? Did any "CI anomalies" occur which should have been noted during the time that Arnold worked for the British? What steps could have been taken to anticipate, pre-empt, or prevent Arnold's treason?

Arnold's defection came as a complete surprise, both to his subordinates and George Washington's intelligence staff. This is remarkable, considering that Arnold remained "an agent in place" for sixteen months (from May, 1779 to September, 1780) after offering his services to the British. Under such circumstances, effective CI awareness and countermeasures should have detected Arnold's protracted negotiations and data sharing with the British Commander-in-Chief, General Henry Clinton. These exchanges made use of both verbal and written messages (some of which were in code). The communications were transmitted via loyalist intermediaries, Peggy Arnold, and Major John Andre, Clinton's aide-de-camp and intelligence coordinator. Much of this correspondence involved protracted bargaining over the terms of his "espionage contract"—a process which revealed Arnold's haggling skills and exaggerated self-esteem.

Arnold also was a valuable "reporting asset" during this period, warning Clinton of the impending arrival of French troops under Rochambeau and passing vital update information about the defenses of West Point and other Colonial strong points along the Hudson River. In addition, Arnold transmitted "bits and pieces of information" (via letters to Peggy Arnold which she passed to Andre) concerning the planning of what was to become the May-October, 1781 Yorktown campaign. Arnold had been asked to command part of the allied forces being prepared for that operation, and he remained "in the loop" until September, 1780—just eight months before US and French forces moved on Yorktown.

Most of the personal characteristics which made Arnold a dangerous spy also made him an effective military leader and a credible "Patriot." Arnold was certainly not the only arrogant and cantankerous field commander in the Continental Army, and probably no one but his new wife knew exactly what was going on in his mind when he decided to turn his coat. However, the fact that he had been embroiled in such a long series of courts-martial and Congressional investigations, should have raised some official eyebrows when Arnold began to lobby aggressively for command of the strategic Colonial garrison at West Point in May, 1780. Another "ignored" CI indicator was the fact that he also refused the offer of an attractive field command (the ring wing of Washington's army), claiming that he was disabled.

Arnold was an extremely resourceful and clever spy. After taking command of West Point, he used "profiteering" as a cover for his expanding contacts with local Tories whose homes provided opportunities for meetings with Major Andre. Even Arnold's closest aides—probably influenced by the General's past reputation as a smuggler— were taken in by this ploy. Arnold and the British used classic espionage tradecraft to cloak their conspiracy. These measures included the use of coded communications, clandestine signals, passwords, pseudonyms, safehouses, clandestine meetings, intermediaries, and—in an effort to distract Arnold's pursuers immediately following his defection—a diversion (a feigned "nervous breakdown") staged by his wife.

Arnold's activities apparently produced no "CI anomalies" that suggested the existence of a spy in the highest ranks of the Continental Army. This fact may be partly explained by the slow pace of communications in the late 1700's , as well as Clinton's understandable reluctance to jeopardize the security of his best-placed agent by acting precipitously on information that could only have been provided by someone at Arnold's level. In addition, the British military intelligence apparatus in North America was aggressive and resourceful, and was known to have intercepted and copied sensitive Continental Army documents in the past. For this reason, the British probably felt they did not have to mount a CI deception operation to "screen" Arnold's activities.

Epilogue for a Spy

Although he had failed to fulfill his "contract" by delivering the plans of West Point's defenses (these were captured with Major Andre), Arnold was awarded 6,315 pounds in compensation for his lost property. He and his entire family were granted pensions by the British Government. Arnold was made a Brigadier General in the British Army and given command of a "Tory legion" which he had offered to help raise. In January, 1781 he led a 1600-man force in a raid against Hampton Roads, Virginia. Continuing up the James River, Arnold's troops attacked Rebel artillery positions near Jamestown and briefly looted and occupied Richmond.

Despised and ultimately rejected by the British, in the long run Arnold paid a heavy price for his ill-gotten "fortune." Ever optimistic and entrepreneurial, for a decade (1782 to 1792) he moved his second family back and forth between Canada and England, seeking social acceptance and commercial opportunities. Arnold's many post-war business ventures achieved limited success, however, and when he died in 1801 he was deeply in debt. Both Arnold and his wife were permanently estranged from their relatives in the newly-independent United States. The three sons from Arnold's first marriage remained in America. Four of his sons by Peggy Shippen (she died in 1804) served in the British Army, one of them becoming a Lieutenant General.

NOTES

14. Col. Jacobus Swartwout (d. 1826), commander of the 2d Dutchess County Regiment of Minute Men.

15. Johnathan Fowler.

16. James Kip.

17. This article was written by Dan Lovelace, National Counterintelligence Center.

18. Carl Van Doren's description of Benedict Arnold in his Secret History of the American Revolution.

CONTINUE CHAPTER 1

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Dr. Edward Bancroft [19]

Among the many spies the British recruited and placed inside the American Commission in Paris under Benjamin Franklin, was one who had access to every secret move, conversation and agreement negotiated between the American delegation and the intermediaries representing the French government. French support and aid was critical to the American revolutionary cause, without it the dream of American independence would have expired. Yet, despite the British intelligence success, the government of Lord North was ineffective in stopping American-French activities. The spy, Dr. Edward Bancroft, was never discovered until seventy years after his death when the British government provided access to its diplomatic archives.

Bancroft was born on 9 January 1744 in Westfield, Massachusetts. When he was two years old his father died of an epileptic seizure leaving his mother to care for the family. Five years later, his mother, Mary, remarried and the family moved with her new husband, David Bull, to Hartford, Connecticut. Bull owned "The Bunch of Grapes" tavern which, on 23 May 1781, hosted a meeting between George Washington and General Jean-Baptiste de Vimeur, Comte de Rochambeau, to plan their siege against British General Lord Charles Cornwallis at Yorktown.

While growing up in Hartford, Bancroft studied under Silas Deane, after the latter's graduation from Yale. Two years later, at age 16, Bancroft was apprenticed to a physician in Killingsworth, Connecticut. Then, on 14 July 1763, Bancroft left the colonies for Surinam where he found employment as a medical chief on one of the plantations. Bancroft expanded his medical practice to several additional plantations and also found time to write a study of Surinam's environment. Bancroft soon grew weary of Surinam and in 1766 began one year of travel between North and South America before sailing for England.

After his arrival in London, Bancroft became a physician's student at St. Bartholomew's Hospital. He also published, in 1769, a book titled, "Natural History of Guiana," which brought him to the attention of Paul Wentworth, the colonial agent for New Hampshire in London. Wentworth hired Bancroft to survey his plantation in Surinam with the hope that Bancroft could uncover ways for Wentworth to increase his profits from the land. Bancroft returned to Surinam for several months and then returned to London.

Also in London at the time was Benjamin Franklin, who was the colonial agent for several colonies. Franklin met Bancroft and they became friends. Franklin used Bancroft as a spy to support several of

Franklin's colonial activities.[20] When Franklin returned to America, it is unknown if Bancroft continued his spying for Franklin but evidence exists that this may have been the case. For example, when the Committee for Secret Correspondence sent Silas Deane to Paris to examine the political climate of France, Franklin provided Deane instructions to contact Bancroft. Deane was told that to arrange the meeting:

> *"...by writing a letter to him, under cover to Mr. Griffiths, at Turnham Green, near London, and desiring him to come over to you in France or Holland, on the score of old acquaintance. From him you may obtain a good deal of information of what is now going forward in England, and settle a mode of continuing correspondence. It may be well to remit a small bill to defray his expenses in coming to see you, and avoid all political matters in your letter to him."*[21]

If Bancroft was not an agent, why is it suggested that the letter be sent to a cover address rather than to Bancroft directly. Deane had been Bancroft's teacher, so it would be natural for a teacher to try to contact a former successful student. Also, Deane's instructions to devise a contact plan to meet with Bancroft adds further proof of some clandestine relationship.

A day after Deane arrived in France, 7 June 1776, he mailed a letter requesting Bancroft come to Paris to discuss some assistance to Deane in procuring goods for Indian trade and enclosing 30 pounds to defray travel expenses. Bancroft agreed and on 8 July both men met in Paris. Deane and Bancroft quickly established a close rapport, so much so that Deane informed Bancroft of his true mission in Paris.

He told Bancroft that he was attempting to devise a clandestine relationship with the French to obtain military aid for the colonies. Bancroft declined an invitation to attend the negotiations between Deane and the French but agreed to serve as Deane's assistant and interpreter during meetings with French agents, Pierre Augustin Caron de Beaumarchais and Monsieur Donatien le Rey de Chaumont. It was at these meetings the details of transferring to the Americans some forty thousand strands of arms, including two hundred cannon with French markings removed, as well as four million lives credit for miscellaneous military supplies. [22]

Pierre Augustin Caron de Beaumarchais
PHOTO

Deane informed Bancroft that the American objective was to motivate a Bourbon-Prussian coalition against England on the continent to force the British to redirect their power to a continental conflict and leave the colonies alone. The Americans expected the French to agree to the alliance. In fact, French Foreign Minister, Charles Gravier, the Comte de Vergennes was leaning towards war with England when he learned that General Sir William Howe evacuated Boston but wanted to enlist Spain's assistance and agreement to go to war with Portugal, England's ally. The situation changed when the French learned that Britain defeated Washington's forces on Long Island on 27 August 1776. [23]

Bancroft, saying business matters obliged him to return to London, left France on 26 July 1776. Before departing, he agreed to provide Deane with intelligence gleaned from his contacts in England. Despite his agreement to cooperate, Bancroft was troubled by his new role. He had always supported the British Empire's interest but also adhered to the

belief that the colonies and the crown had to reconcile their positions through some compromise. He now realized that this was impossible and that French entry into the conflict would destroy the British empire. Bancroft considered informing the British government about Deane's efforts because he was convinced "that the government of France would endeavor to promote an absolute separation of the then United Colonies from Great Britain; unless a speedy termination of the revolt by reconciliation, or conquest, should frustrate this project." [24]

Before Bancroft had an opportunity to contact the British, he was met by Paul Wentworth. Wentworth was recently recruited by William Eden, chief of the British Secret Service,[25] who assigned Wentworth the task of meeting with his old friend to obtain full details of Bancroft's visit to Paris. Wentworth informed Bancroft that the British knew he met and spent several days with Deane. Wentworth asked Bancroft to meet with Eden. Bancroft agreed and shortly thereafter a meeting was held between Bancroft, Eden, and Lords Suffolk and Weymouth to discuss the colonial rebellion. At this meeting, Bancroft was recruited as a double agent for the British. He later wrote of his decision:

> *"I had then resided near ten years, and expected to reside the rest of my life in England; and all my views, interests and inclinations were adverse to the independency of the colonies, though I had advocated some of their claims, from a persuasion of their being founded in justice. I therefore wished, that the government of this country, might be informed, of the danger of French interference, though I could not resolve to become the informant. But Mr. Paul Wentworth, having gained some general knowledge of my journey to France, and of my intercourse with Mr. Deane, and having induced me to believe that the British Ministry were likewise informed on this subject, I at length consented to meet the then Secretaries of State, Lords Weymouth and Suffolk, and give them all the information in my power, which I did with the most disinterested views."* [26]

When Benjamin Franklin arrived in Paris to take over the negotiations with the French, Lord Suffolk told Bancroft to move to Paris and inject himself in Franklin's circle. In return for his service, Bancroft was offered a life pension of 200 pounds per year, increasing to 500 pounds per year. Bancroft left England on 26 March 1977. After his arrival in Paris, it was not difficult for him to find a position with Franklin, his former friend and mentor. Bancroft was made secretary to the American commission. Also arriving in Paris was Paul Wentworth, who was sent to be Bancroft's handler.

To communicate with the British, Bancroft was instructed in the use of a timed deaddrop. He was told to compose a series of cover letters about gallantry which he was to address to a "Mr. Richards," and sign each with "Edward Edward." Between the lines of his letters, he was to write in secret ink the information he acquired on the French-American partnership. When the letter was complete, he was to place it in a bottle with a piece of string around the bottle's neck. Each Tuesday evening after 9:30, Bancroft was instructed to proceed to the south terrace of the Jardin de Tuilleries where he was to place the bottle in a hole in the roots of a certain box tree. The bottle was retrieved by Thomas Jeans, secretary to British diplomat Lord Stormont, who removed the contents and usually replaced it with taskings for Bancroft. Bancroft later that

same evening returned to the drop site to recover the bottle. It is reported that Bancroft provided copies of hundreds of documents to his handlers. For example, it is said that the French-American treaty was in King George's hand 48 hours after its signing, courtesy of Bancroft.

Compliments of Franklin and Deane, who sent Bancroft on frequent secret intelligence missions to London, Bancroft had the luxury of sitting down in a relaxed atmosphere to be debriefed by Lord Suffolk and others. There is some suggestion by historians that Franklin was aware of Bancroft's betrayal, citing Franklin's comment in response to a friend's warning about British spies:

> *"I have long observ'd one Rule which prevents any Inconvenience from such Practices. It is simply this, to be concern'd in no Affairs that I should blush to have made publick, and to do nothing but what Spies may see & welcome. When a Man's actions are just and honourable, the more they are known, the more his Reputation is increas'd and establish'd. If I was sure, therefore that my Valet de Place was a Spy, as probably he is, I think I should not discharge him for that, if in other Respects I lik'd him."*[27]

Whether Franklin knew and used Bancroft to pass false information to the British or never knew Brancroft's true status is subject to interpretations of the facts because Franklin did not write about it and Bancroft's personal papers were later destroyed by a family member. No matter what the truth is, the fact remains that the British had placed an excellent double agent within the American Commission in Paris who provided a wealth of information on the French-American alliance. Even with Bancroft and the other British agents inside the Commission, the British were unable to take more effective action to destroy or diminish the negotiations and support which lead to the American-French Alliance and the final defeat of the British at Yorktown.

Secret Writing

While serving in Paris as an agent of the Committee of Secret Correspondence, Silas Deane is known to have used a heat-developing invisible ink, compounded of cobalt chloride, glycerin and water, for some of his intelligence reports back to America. Even more useful to him later was a "sympathetic stain" created for secret communications by James Jay, a physician and the brother of John Jay. Dr. Jay, who had been knighted by George III, used the "stain" for reporting military information from London to America. Later he supplied quantities of the stain to George Washington at home and to Silas Deane in Paris.

The stain required one chemical for writing the message and a second to develop it, affording greater security than the ink used by Deane earlier. Once, in a letter of John Jay, Robert Morris spoke of an innocuous letter from "Timothy Jones" (Deane) and the "concealed beauties therein," noting "the cursory examinations of a sea captain would never discover them, but transferred from his hand to the penetrating eye of a Jay, the diamonds stand confessed at once."

Washington instructed his agents in the use of the "sympathetic stain," noting in connection with "Culper Junior" that the ink "will not only render his communications less exposed to detection, but relieve the fears of such persons as may be entrusted in its conveyance . . ." Washington suggested that reports could be written in the invisible ink "on the blank leaves of a pamphlet . . .a common pocket book, or on

the blank leaves at each end of registers, almanacs, or any publication or book of small value." Washington especially recommended that agents conceal their reports by using the ink in correspondence: "A much better way is to write a letter in the Tory stile with some mixture of family matters and between the lines and on the remaining part of the sheet communicate with the stain the intended intelligence."

Other Spies

To Joseph Reed or Colonel Cornelius Cox

Head Quarters, Morris Town,
April 7, 1777.

Dear Sir:

I am informed, there is a certain Mr. Smith, who has been lately taken up by Genl. Lincoln as a Spy and sent to Philadelphia under that Character; I believe, for several reasons that he is the man who was employed by you to act for us, in that capacity, and that the apprehending him is a mistake, which may be attended with ill consequences. Lest he should be precipitately tried and punished, I must beg you will interpose in the affair without delay, and if you find him to be the person I suspect he is, take measures to have him released. I should be glad indeed, that some management might be used in the matter, in order to turn the Circumstance of his being apprehended to a good account. It would be well to make him a handsome present in money to secure his fidelity to us; and contrive his releasement, in such a manner, as to give it the appearance of an accidental escape from confinement. After concerting a plan with him, by which he will be enabled to be serviceable to us, in communicating intelligence from time to time, let him make the best of his way to the Enemy. Great care must be taken, so to conduct the scheme, as to make the escape appear natural and real; there must be neither too much facility, nor too much refinement, for doing too little, or over acting the part, would alike beget a suspicion of the true state of the case. I am etc.

To Governor William Livingston

Head Quarters, Valley Forge,
January 20, 1778

Sir:

I last night received a Letter from Colo. Dayton, informing me, that John and Baker Hendricks, and John Meeker had been apprehended upon a supposition of carrying on an illegal Correspondence with the Enemy, as they had been several times upon Staten Island and that they were to be tried for their lives in consequence.

In justice to these Men I am bound to take this earliest opportunity of informing you that they were employed by Colo. Dayton last Summer to procure intelligence of the movements of the Enemy while upon Staten Island, for which purpose I granted them passports, allowing them to carry small quantities of Provision, and to bring back a few Goods the better to cover their real designs. Colo Dayton acquaints me that they executed their trust faithfully; this I very well remember, that what

intelligence he communicated to me and which he says, came principally thro' them, was generally confirmed by the Event. Upon these Considerations I hope you will put a stop to the prosecution, unless other matters appear against them. You must be well convinced, that is indispensibly necessary to make use of these men to procure intelligence. The persons employed must bear the suspicion of being thought inimical, and it is not in their powers to asset their innocence, because that would get abroad and destroy the confidence which the Enemy puts in them. I have the honour, etc.

To Governor William Livingston

Head Quarters, Valley Forge,
March 25, 1778.

Dear Sir:

I have strong reasons to suspect a Mr. Banskon,[28] late a Captain of Marines in our service, of being in the employ of the enemy as a Spy. His family lives at Princeton. We have nothing against him that amounts to proof, and to seize him at present would answer no end; but to put it out of our power to detect and punish him. It were to be wished, your Excellency, without discovering our suspicions could fall upon some method to have him well watched, and, if possible, find out something to ascertain the fact. He is lately from Philadelphia and has offered me his services in that way, as he proposes to return in a few days, taking this Camp in his way. If in the mean time any circumstances should arise within your knowledge you will be pleased to transmit it to me. I am etc.

To Colonel Stephen Moylan

Head Quarters,
April 3, 1778.

Sir:

By command of his Excellency, I am to desire, you will send a corporal and six Dragoons, with a Trumpeter to Head Quarters, without loss of time. They are wanted to escort the Commissioners on our part who are to meet on the subject of a General Cartel. You need not be told they must be picked Men and horses, must make the best possible appearance, must be very trusty and very intelligent. They should also be of the same regiment.

The General reminds you again of the necessity of keeping your Officers close to their quarters and duty; and of letting no attention be wanting to put the cavalry under your command, on the best footing you can, both with respect to condition and discipline.

There is a certain Mr. Bankson late of the Continental marines, who has a family at Princeton. We suspect him to be a spy to Mr. Howe, though he offers himself as one to us. We wish to find out his true history. He left this camp the 24th of March, on pretense of making a visit to his family, and is now returned with renewed offers of service. It is doubted whether he has not, in the mean time, been at Philadelphia. The General wrote some days since to Governor Livingston, requesting he would take

measures to explore Mr. Bankson's conduct and views. He directs you immediately to see the Governor and learn from him, if he has been able to make any discovery, and to take cautious methods to ascertain whether Bankson has been at home, since he left camp, how long, and when he left home, in short any thing that may throw light upon his designs. Let him hear from you as soon as possible about the he subject. Manage the business with caution and address. Yours Affectionately.

To Governor William Livingston

Head Quarters, Valley Forge,
June 1, 1778.

Dear Sir:

I am honoured with yours of the 23rd and 29th Ultimo. The person who delivered me your letter of the 17th was one of our hired Expresses. He now out upon duty, but when he returns I will inquire how he came by the letter. The Christian name of Bankson, who I begged the favor of you to keep an eye upon, is Jacob[28], but as I am now satisfied concerning him, you need not trouble yourself further in the matter....

To Brigadier General William Swallowed

Head Quarters, Valley Forge,
June 1, 1778.

Dear Sir:

I received yours of the 30th May: A person, who I sent down to Chester to observe the movements of the Fleet, left that place on Sunday at dusk, he informs me that upwards of one hundred Sail had come down from Philadelphia and that they had not stopped near Wilmington, but proceeded towards the Capes. If this is so, it is a plain proof that they have no design to land any body of Men to molest our Stores. Captn. McLane who commands a scouting Party upon the Enemy's lines has been this Morning as near Philadelphia as Kensington, from whence he has a full view of the Harbour, he says very few ships remained and those chief armed Vessels. If therefore, upon sending an Office to Chester and another to Wilmington, you find that the Vessels have gone down and are below New Castle, you are immediately to join me, with your whole continental force. I am &ca.

P.S. Bring up your Tents with you and your lightest Baggage, as you will probably march immediately Northward.

To The Board Of General Officers

Head Quarters, Valley Forge,
June 2, 1778.

Gentlemen:

The Adjutant General has directions to send you one Shanks[29] formerly an Officer in the 10th Pennsylvania Regiment, charged with being a spy for the Enemy. There is a British deserter a serjeant of Grenadiers, who will attend as a Witness against him. His own confession is pretty ample. But to make the evidence as full as possible, I have directed Col. Morgan to send up the persons, who took the criminal, in order to ascertain the circumstances of his apprehension. To avoid the formality of a regular trial, which I think in such a case ought to be dispensed with, I am to request you will examine him and report the result; and if his guilt is clear, his punishment will be very summary.[30] If the Witnesses expected from Colonel Morgan, should not arrive speedily, so that it would detain the Board too much to wait for them; they may proceed to the examination, without them, but if it shod appear that their presence may materially affect the merits of the inquiry, I would wish it not to be brought to a conclusion. If it should be thought unessential, I should be glad the examination may be definitive. I am, etc.

P.S. I wish your report to be as full as possible, clear as to the criminality of the person, expressive of your opinion whether he is a proper subject for an example, and what kind of punishment may be most proper.

General Orders

Head Quarters, W. Plains,
Monday, September 14, 1778.

Parole St. Augustine. Countersigns Salem, Sandown.

After Orders
At a General Court Martial held in the Highlands January the 13th, 1778, by order of Major Genl. Putnam whereof Colo. Henry Sherburne, was President, Matthias Colbhart of Rye, in the State of New-York, was tried for holding a Correspondence with the Enemy of the United States, living as a Spy among the Continental Troops and enlisting and persuading them to desert to the British Army, found guilty of the whole Charge alledg'd against him and in particular of a breach of the 19th Article of the 13th Section of the Articles of War and therefore sentenced to be punished with Death, by hanging him by the Neck until he is dead.[30] Which Sentence was approved of by Major General Putnam. His Excellency the Commander in Chief orders him to be executed tomorrow morning nine o'Clock on Gallows Hill.

To Major General Alexander McDougall

Head Quarters, Middle Brook,
March 25, 1779.

Dear Sir:

I duly received your favour of the 20th instant. Mr. H.——-[31] has just delivered me that of the 22nd. (The Letter and inclosures referred to in it are not yet come to hand.) I have had a good deal of conversation with Mr. H-——. He appears to be a sensible man capable of rendering important service, if he is sincerely disposed to do it. From what you say, I am led to hope he is; but

nevertheless, if he is really in the confidence of the enemy, as he himself believes to be the case, it will be prudent to trust him with caution and to watch his conduct with a jealous eye.

I always think it necessary to be very circumspect with double spies. Their situation in a manner obliges them to trim a good deal in order to keep well with both sides; and the less they have it in their power to do us mischief, the better; especially if we consider that the enemy can purchase their fidelity at a higher price than we can. It is best to keep them in a way of knowing as little of our true circumstances as possible; and in order that they may really deceive the enemy in their reports, to endeavor in the first place to deceive them. I would recommend, that the same rule should be observed in making use of Mr. H——, who notwithstanding the most plausible appearances may possibly be more in earnest with the enemy than with us. By doing this we run the less risk and may derive essential benefit. He is gone on to Philadelphia.

Which so far as it affected the troops under your command you will be pleased to assist me in executing as speedily as possible. I am, etc.

To Major General Alexander McDougall

Head Quarters, Middle Brook,
March 28, 1779.

Dear Sir:

I yesterday Evening was favd. with yours of the 21st instant with the several inclosures to which it refers.

——-[32] is gone to Philada. and will call upon me in his way back. In my last I took the liberty to drop you a hint upon the subject of the danger of our putting too much confidence in persons undertaking the office of double Spies. The person alluded to in the present instance appears very sensible, and we should, on that account, be more than commonly guarded until he has given full proofs of his attachment. The letter directed to Genl. Haldimand[33] was evidently intended to fall into our Hands. The manner of contriving that, and some other circumstances, makes me suspicious that he is as much in the interest of the enemy as in ours. I am etc.

Joseph Hyson [34]

Joseph Hyson was a Marylander, living in London where he was an unemployed seaman. While carousing among the bars, he met William Carmichael, a fellow Marylander and personal secretary to Silas Deane in Paris, who was visiting England and also liked to frequent the shadier sites of London. The two men became very close friends. When Carmichael was sent to England to recruit seamen to command privateers and munitions ships clandestinely fitted in France, he approached Hyson, who readily agreed because he was broke and wanted, he said, to see America again.

After Hyson was recruited by Carmichael, he was approached by Reverend John Vardill, a British agent of William Eden, an under-secretary of state, who directed British intelligence during the early years of the American Revolution. The meeting took place on 12

February 1777 and Hyson agreed to work for British intelligence. A plan, briefed to the British Admiralty which gave its approval, was devised whereby Hyson would slip out of England for France. After Hyson's arrival in France, he was to collect coastal and other maritime information on the country while waiting to take possession of one of the ships. Once he commanded a ship, he was to use elaborate signals, worked out with the British navy to make it appear that the ship was captured rather than Hyson having sailed it into British hands.

Hyson safely arrived in France and, while his ship was being fitted, he spent a great deal of time with Carmichael and the American Commissioners, Benjamin Franklin and Silas Deane. Hyson also began to collect data on French ports and shipping which he passed to Lt. Col. Edward Smith, a British intelligence officer. Carmichael detected Hyson's spy activities for Smith but did not reveal them to any of the American Commissioners. In fact, Carmichael offered to help Hyson obtain American dispatches, an offer Smith believed could help the British recruit Carmichael.[35] The British did try to recruit Carmichael but he rejected there overtures.

Benjamin Franklin and Silas Deane decided to send the Commissioners' important dispatches to the Continental Congress earlier than expected and selected a Captain Folger to take them aboard his ship. To get the dispatches to Captain Folger, Captain Hyson was selected as the courier. Hyson traveled to Havre, France where he turned over the dispatch pouch to Folger. Folger, after his arrival in America, gave the pouch to the Committee of Correspondence of the Continental Congress. When the Committee opened the pouch, they discovered a wad of blank paper. While the substituted pouch was on its way to America, Hyson delivered the real pouch to Lt. Col. Smith in London, who immediately turned it over to William Eden. Eden, in turn, displayed the entire pouch contents to King George III, who was often a harsh critic of the spies, alluding to his mistrust of them.

Hyson was paid for his services. Lord North gave him 200 pounds and a promise of 200 pounds a year. "He was an honest rascal, and no fool though apparently stupid."[36] An apt remark considering that Hyson returned to France to renew his contact with the American Commissioners. He could not understand why the Commissioners rejected any contact with him. The only one who came to visit him was Carmichael. He failed to realized that Carmichael was directed to make contact with him in order to get Lt. Col. Smith to come to Paris to meet with the Commissioners.

The Commissioners wanted to use Smith as a broker to determine if the British government was agreeable to negotiating a peace. When word was received on 30 November 1777 that General John Burgoyne surrendered, this plan was shelved. Hyson's value to the Commissioners was ended although he was offered the job of taking some dispatches to America. He refused. The French told him to leave their country or be arrested as a spy.

Hyson requested funds from Smith, who sent the request to Eden. Eden responded that he would support giving Hyson 40 pounds if Hyson would set sail and try to overtake either Silas Deane or Carmichael who had departed France in separate ships carrying dispatches. Hyson left for England, where he signed on a man-of-war, the Centaur, in which he was a key player in betraying an American munitions ship to the British. This is the last anyone heard of Hyson.

Lydia Darragh

Though it has been disputed as to accuracy and, indeed, truth, the story of Lydia Darragh deserves mention. Darragh, listening through a

paper-thin wall of her home where British officers met, learned of British plans for the 4 December march on Philadelphia. Smuggling her notes in a "dirty, old needlebook" she was able to report the British would march out on 4 December and surprise General Washington at Whitemarsh with their superior forces against Washington's unprepared Continentals.

She reported that there would be 5,000 men under General William Howe, 13 pieces of cannon, baggage wagons and 11 boats on wheels, or pontoon equipment. The British did pull out of Philadelphia with more than 5,000 men on the night of 4 December, rolled through the city going in the wrong direction toward the Schuylkill River. Washington's intelligence and estimates were correct. He had strengthened the front, not the rear, and the British surprise failed.

After a day of confrontation, Howe withdrew to Philadelphia "like a parcel of damned fools." It was to his report of the Whitemarsh fiasco that General Charles Cornwallis first appended his view that the conquest of America was impossible. On other occasions, Lydia concealed reports in shorthand only her older brother, Lt. Charles Darragh could read, and covered them as buttons which her 14 year-old son wore on his clothing when traveling on regular visits to her brother. Charles would then decode the shorthand and deliver the report to Washington.

James Armistead

James Armistead was a slave who, with his master's permission, joined Marquis de Lafayette's service when the young French General arrived in Williamsburg in March 1781. Armistead had repeated success in penetrating the British lines and bringing out intelligence on Cornwallis' forces. Lafayette later commended the agent's "essential services," noting "His intelligences from the enemy camp were industriously collected and more faithfully reported."

As a courier between Lafayette and American agents in the Norfolk area, Armistead won this accolade from Lafayette: "He properly acquitted some important communications I gave him." But, the most valued role of this agent involved deception. Posing as a refugee, he crossed Cornwallis's lines, where he was recruited as a British spy and dispatched back against Lafayette.

Lafayette prepared a false order from himself to General Daniel Morgan, in which Morgan was instructed to move non-existent troop replacements into certain positions. With the properly crumpled and abused letter in hand, Armistead returned to the British, reporting that he had found no changes in the American position, but displaying the torn paper that he claimed to have found along the roadside, but could not read.

Cornwallis accepted the bait and did not learn he had been tricked until Lafayette completed the military operation. Cornwallis, during a courtesy visit to Lafayette after the British defeat at Yorktown, recognized Armistead on Lafayette's staff, and realized for the first time that his trusted agent, had, in actuality, been an American agent.

Following the war, the Virginia Assembly voted James Armistead his freedom and in later years approved both a bonus and a lifetime pension for his intelligence work, conducted "at the peril of his life." James reciprocated the honor, adopting the new surname, Lafayette.

John Honeyman

John Honeyman was denounced by George Washington as a traitor as part of a plan to get the American spy a warm welcome when he fled to the British lines. The "traitor" label worked so well that once

Honeyman, who used the cover of butcher and horse trader, had his house raided by patriots. In order to expedite Honeyman's return, Washington issued order that Honeyman, upon returning to American lines, was to be "captured alive" and taken to Washington directly so that Washington could interrogate the "dangerous rascal" personally.

Honeyman, would of course, subsequently manage to escape back to British lines and provide deception information, as he did in telling the Hessians that Washington was not prepared to attack Trenton on Christmas.

Daniel Bissell

On 8 June 1783, Sargeant Daniel Bissell of the 2nd Connecticut Regiment was awarded the Honorary Badge of Military Merit, one of three men in the American Revolution to be cited with the award now known as the Military Order of the Purple Heart. Bissell was bestowed the award for his work as a military spy.

In August 1781, Lt. Col. Robert Harrison, Washington's aide-de-camp, dispatched Bissell into New York to gather intelligence. Finding he could not exfiltrate the city, he masqueraded as a Loyalist and joined Benedict Arnold's provincial regiment. For over a year, Bissell gathered intelligence, committing it to memory.

In September 1782, he was able to escape through British lines and report to Washington. Not only was Bissell able to report first-hand on British fortifications, and intelligence gathered from others, he was able to present a twelve-month analysis of the British method of operation, which Washington commended him on.

Bissell's ideological motivation became clear when he refused both an honorable discharge and a pension for his work as an intelligence agent for Washington; he felt the nation could ill-afford the loss of his services, and he believed the nation should not be tasked with the pension payments.

David Gray

David Gray, a captain in the 1st Massachusetts, was highly effective in obtaining intelligence about the Loyalists and their plotting, which earned him the attention of Washington, who employed him as a spy. Gray made a number of trips to Conneticut and Long Island, New York and finally managed an introduction to Col. Beverly Robinson at British intelligence headquarters. He was recruited by Robinson as a courier to carry letters to Tories in New York, Conneticut, Vermont, and New Hampshire, which he did; after first delivering them to Washington for examination. After about a year with the British, he was sent to Canada with dispatches from Sir Henry Clinton.

The XYZ Affair

In 1798 a political scheme by three emissaries from French Foreign Minister, Charles Maurice de Talleyrand, outraged the American public, when it surfaced in the United States. The three emissaries, known by the initials, X, Y, and Z, attempted to bribe three American commissioners, who were seeking a treaty of commerce and amity with France. The uproar cause by the attempted bribe led to a complete break in relations with France and an undeclared naval war for two years.

The French, upset by the Jay Treaty of 1794 between the United States and Great Britain, giving Great Britain favored-nation status, felt the Americans were becoming too pro-British. The French were at war

with Great Britain and began to seize American ships on the high seas looking for contraband believed headed for British ports. Suffering staggering financial losses, American ship owners demanded reprisals against the French.

In December 1796, the American minister to France, Charles C. Pinckney, tried unsuccessfully to present his credentials to the French Directory. This diplomatic slap in the face resulted in a heated outcry in America against the French. John Adams, the newly elected President, desired better relations with France and to avoid war. On 31 May 1797 he named a three-member commission, Pinckney, John Marshall and Elbridge Gerry, to negotiate with the French government. However, when they arrived in Paris in October 1797 to begin negotiations on a new commercial and friendship treaty, the French Directory refused to meet them. Instead, Talleyrand sent three emissaries to meet with them.

The emissaries advised the American commissioners that a "gift" of $25,000 to the Foreign Minister and a loan of $10 million to France was a prerequisite to any negotiations. Two other conditions demanded by the emissaries was an apology by the President for his past critical remarks about France and a reaffirmation by the United States of the old Franco-American Alliance of 1778. Although diplomatic bribes were customary, Pinckney, furious from twiddling his thumbs waiting for an appointment with Talleyrand, said, "Not a sixpence." His diplomatic note to President Adam was more articulate, "Millions for defense but not one cent for tribute."

The American commissioners decided to appeal to Talleyrand directly in a diplomatic note. Talleyrand did not respond for two months and when he did, his reply was terse. He blamed the Americans for the problems, said the President should have sent only Republicans (Pinckney and Marshall were Federalists) to negotiate and stated he would deal only with Gerry. Talleyrand also said that if Gerry left France, war between the two countries was likely. Although the commissioners made no concessions to the French, Pinckney and Marshall returned to the United States, leaving Gerry in France. Gerry's presence in France did not sit well with the Americans and President Adams recalled him.

President Adams informed Congress about the failed mission and provided Congress with the XYZ correspondence. The Federalists were overjoyed by the news. Alexander Hamilton suggested raising an army of 10,000 men. George Washington said he would come out of retirement to lead the new army, but in title only. Washington wanted Hamilton as his second-in-command. President Adams, fearful of promoting Hamilton over several Revolutionary War officers, who then might lead a coup against him, decided to authorize the building of 40 frigates and lesser warships. An undeclared naval war ensued for two years (1798-1800) in which American naval forces captured 84 armed French ship while only losing one. The Convention of 1800 ended the fighting. The diplomatic dispute ended six months later when Napoleon Bonaparte officially received the American commissioners to France.

NOTES

19. This article is copyrighted by Eric Evans Rafalko and used with his permission.

20. Secret New England Spies of the American Revolution, ed. by Edmund R. Thompson (The David Atlee Phillips New England

Chapter, Association of Former Intelligence Officers, Kennebunk, Maine, 1991, p. 73).

21. Revolutionary Diplomatic Correspondence of the United States, ed. by Francis Wharton, U.S. Department of State, 6 vols., Washington, Government Printing Office, 1889, pp. 78-80.

22. Silas Deane to the Secret Committee of Congress, August 18, 1776, in The Deane Papers, ed. Charles Isham, 5 vols, New York Historical Society Collections, Vols. XIX-XXIII, New York, 1886-1891, XIX, p. 206.

23. Bemis, Samuel F., The Diplomacy of the American Revolution, New York, D. Appleton Co., 1935, pp. 44-45.

24. Dr. Edward Bancroft to the Most Honorable Marquis of Carmarthen, September 17, 1784, Samuel F. Bemis, British Secret Service and the French-American Alliance, American Historical Review, XXIX, No. 3 (April, 1924), p. 493.

25. There was no organization within the government known as the British Secret Service. Intelligence collection was conducted by major figures within the Foreign Ministry or military for their own purposes. In this respect, Eden was probably in charge of a small group of intelligence collectors for Lord Suffolk.

26. Dr. Edward Bancroft to the Most Honorable Marquis of Carmarthen, September 17, 1784, op. cit., p. 493.

27. Secret New England Spies of the American Revolution, ed. Edmund R. Thompson, op. cit., p. 80.

28. Jacob Bankson was one of Washington's spies.

29. Thomas Shanks, formerly an ensign of the Tenth Pennsylvania Regiment. He had been cashiered Oct. 12, 1777, for stealing shoes.

30. The board voted 10 to 4 that he was a spy and 8 to 6 that he ought to suffer death.

31. Elijah Hunter, assistant commissary of forage, at Bedford, N.Y.

32. Elijah Hunter. In the draft he is designated "H------."

33. Lieut. Gen. Frederick Haldimand, Governor of Canada.

34. This article was written by Frank J. Rafalko, Chief, Community Training Branch, National Counterintelligence Center.

35. Smith obtained this information which he communicated to Eden in "Information obtained by Lt. Col. Smith during the six weeks of his intercourse with Capt. Hyson, in February and March 1777," Mar 27-28, 1777, Stephens's Facsimiles of Manuscripts in European Archives relating to America, 1773-1783, no. 670.

36. William Eden to George III, Oct 20, 1777, Stevens, op. cit., no. 275.

CONTINUE CHAPTER 1

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

The Burr Conspiracy

When Vice President Aaron Burr killed Alexander Hamilton in a duel in 1804, he also killed his chance to be president. Wanted for murder in New York, he fled the state and went to Philadelphia. Realizing that he had no future on the east coast, Burr, in a frantic effort to salvage his destroyed political power and heavily in debt, conceived a plan to seek political fortunes beyond the Alleghenies. He first contacted the British Minister, Anthony Merry, living in Philadelphia. He offered Merry his services in any efforts by Great Britain to take control over the western part of the United States. Merry, who hated the United States, wrote his Foreign Ministry that while Burr was notoriously profligate, nevertheless, his ambition and spirit of revenge would be useful to the British government. Merry became a strong supporter of Burr's schemes.

One of Burr's schemes was to organize a revolution in the West, take the Ohio and Mississippi Valleys and form them into a separate republic. His other scheme was to establish a republic bordering the United States by seizing Spanish possessions. To gain further support for his plans, Burr approached an old friend, General James Wilkinson; both had served as aides to then Colonel Benedict Arnold during the Quebec expedition. Wilkerson played a crucial role in the conspiracy for he not only conspired with Burr but conspired against him.

Wilkinson, after being commissioned a captain in the Continental Army in 1776, rose rapidly in rank and position. Assigned as aide-de-camp to General Horatio Gates, Wilkinson became involved in a plot, called the Conway Cabal, to replace George Washington as commander-in-chief with Gates. Wilkinson, himself, leaked aspects of the plot, probably believing in doing so he could gain some advantage for himself, but his scheme and the original plot failed. Wilkinson lost his job and military honors but kept his rank.

Despite this reversal, Wilkinson proceeded with several conspiracies. Replacing George Rogers Clark as leader in Kentucky, Wilkinson embarked on an attempt to separate Kentucky from Virginia. At the same time, he reasoned that an opportunity existed to make money from national resentment toward Spain. He traveled to New Orleans, where he convinced the Spanish authorities he was secretly working for the partition of the United States. He offered his services to the Spaniards, who identified him as "agent 13" in Spanish messages. Washington and Hamilton both thought that Wilkinson was a spy for the Spanish but felt that his loyalty could be purchased with a promotion.

Not satisfied with his intrigues involving Kentucky statehood and working an agent for the Spanish, Wilkinson accepted in 1792 a

commission as brigadier general of a volunteer army fighting Indians north of the Ohio River. He then contrived to replace his commander, General "Mad Anthony" Wayne. Wilkinson succeeded only because Wayne died in 1796. He then seized Detroit from the British and became its military governor. His administration was short-lived as the citizens protested his greed and he returned to the South.

After arriving in the South, Wilkinson wheeled and dealed in land speculation and lucrative Army contracts and contrived to become governor or surveyor-general of the Mississippi Territory. President George Washington became uneasy about Wilkinson's activities and ordered his surveillance. Wilkinson discovered the surveillance and was able to have the surveillant withdrawn. Presidents John Adams and Thomas Jefferson did not share Washington's distrust of Wilkinson. In fact, in 1803 Jefferson fully trusted Wilkinson that he commissioned him to be one of two individuals to take formal possession of the Louisiana Purchase from the French.

In New Orleans, Wilkinson returned to his old ways and acted on Spanish fears concerning Florida, which was Spanish territory until 1819. For his ruse he received a $12,000 bribe. He purchased a boatload of sugar, took it to New York to sell and while there began secret negotiations with Burr, Jefferson's vice-president.

Burr, aware that war between the United States and Spain over boundary disputes was a possibility because of various Spanish conspiracies to achieve control of the lower Mississippi Valley, made covert plans with Wilkinson to invade and colonize Spanish territory in the West. They also schemed to establish an independent "Empire of the West" on a Napoleonic model. The conspirators even considered invading and annexing Mexico to add to their empire with New Orleans as capital.

Burr was dropped from the presidential ticket by Jefferson and in April 1805 commenced to put his plans into motion. He again approached the British via Minister Merry. He informed Merry that Louisiana was ready to break with the United States and once it did all the western country would follow suit. To be successful, Burr requested that Britain assure his protection, provide him with a half of million dollar loan, and dispatch a British naval squadron to the mouth of the Mississippi River. The British might have entertained Burr's requests but Prime Minister Pitt died and was succeeded by Charles James Fox, a life-long friend of the United States. Fox considered the Merry-Burr discussions indiscreet, dangerous and damnable and recalled Merry to England on June 1, 1806. Having failed to secure British aid in an attempt to separate western states from the United States, Burr then headed west across Pennsylvania. In Pittsburgh, he procured a riverboat and embarked down the Ohio River. He stopped to visit Harman Blennerhassett, a wealthy, gentleman-scholar and Irish emigrant, who lived with his wife Margaret on an island in the middle of the river. Burr explained his plan to Blennerhassett, who enthusiastically expressed his support by giving Burr money. Burr used the funds to later purchase the Batrop lands on the Ouachita River, in present-day northern Louisiana, to serve as his base of operations into the Southwest.

Burr continued down the river to New Orleans, recruiting frontiersmen, filibusters, adventurers, and others along the way. When he arrived in New Orleans in 1806, he was fervently welcomed because his game plan to colonize or conquer the Spanish possessions touched an appealing cord in many of the people. As rumors of his plan reached Washington, the political establishment suspected that Burr was talking treason. Wilkinson, who was stationed on the Sabine River on the

Spanish border with the United States, learned of Washington's reaction and decided to inform on Burr to avoid being charged with treason himself. On November 25, 1806 a courier arrived in Washington carrying a dispatch for President Jefferson. In the dispatch, Wilkinson warned President Jefferson about Burr's threatening plan. Jefferson ordered Burr arrested and he was apprehended in late 1806 near Nachez, Mississippi, while attempting to flee into Spanish territory.

In May 1807, Burr was tried for treason in front of U.S. Chief Justice John Marshall in the circuit court at Richmond, Virginia. Jefferson prepared an account of Burr's criminal activity for Congress and wanted to present it to the court but Marshall requested President Jefferson appearance instead. The President refused, consequently establishing a precedent for future presidents. Marshall, who was not on amicable terms with Jefferson found Burr not guilty, explaining that Burr committed no overt act of treason. Although innocent of the charges against him, Burr was never able to overcome the accusations. He died in New York City in 1836.

In 1805, Jefferson appointed Wilkinson governor of the Louisiana Territory. To distance himself from Burr, Wilkinson made an effort to cozy up to Jefferson. His effort was successful as he averted indictment by the Richmond, Virginia grand jury investigating Burr. These efforts, however, caused him to neglect his duty as governor. The situation became so serious that troops were deployed to calm an angry populace, upset by his mismanagement.

After his wife died in 1807, Wilkinson appeared to lose the shrewdness that saved him in the past. He was reappointed by Jefferson to govern Louisiana but his administration was so openly corrupt that President Monroe ordered a court-martial in 1811. The court found him not guilty. Even his military acumen failed him. During the war of 1812, he made a complete mess of the campaign against Montreal that he lost his commission in the Army.

Wilkinson refused to give up and in 1812, at the age of 64, he once more attempted to defraud the Spanish. Using the cover as agent for the American Bible Society, he traveled to Mexico City to seek a Texas land grant. He secured the grant, but died in 1825 before fulfilling all of its provisions.

The Alien and Sedition Acts 1798

Following publication of the XYZ correspondence, Congress passed the Alien and Sedition Acts. Prompted by a spirit of nationalism by the Federalists, the real targets of the acts were the anti-Federalist editors and pamphleteers of English and French extraction. The Alien Acts were never enforced but did cause a number of French refugees to flee the country or go into hiding. The Sedition Act extended the jurisdiction of the federal courts but there was serious questions as to its constitutionality. The law was never challenged in court. In 1812 the Supreme Court ruled that the federal courts do not have common law jurisdiction in criminal cases. Of the twenty-five persons arrested under the Sedition Act only ten were convicted.

The Naturalization Act-June 18, 1798

An Act supplementary to and to amend the act, entitled "An act to establish an uniform rule of naturalization," and to repeal the act heretofore passed on that subject.

Section 1*. Be it enacted...,* That no alien shall be admitted to become a citizen of the United States, or of any state, unless ...he shall have declared his intention to become a citizen of the United States, five years, at least, before his admission, and shall, at the time of his application to be admitted, declare and prove, to the satisfaction of the court having jurisdiction in the case, that he has resided within the United States fourteen years, at least, and within the state or territory where, or for which such court is at the time held, five years, at least, besides conforming to the other declarations, renunciations and proofs, by the said act required, any thing therein to the contrary hereof notwithstanding: Provided that any Alien, who was residing within the limits, and under the jurisdiction of the United States, before...(January 29, 1795,)...may, within one year after the passing of this act-and any alien who shall have made the declaration of his intention to become a citizen of the United States, in conformity to the provisions of the act (of Jan. 29, 1795), may, within four years after having made the declaration aforesaid, be admitted to become a citizen, in the manner prescribed by the said act, ... *And provided also,* that no alien, who shall be a native, citizen, denizen or subject of any nation or state with whom the United States shall be at war, at the time of his application, shall be then admitted to become a citizen of the United States....

Section 4*. And be it further enacted,* That all white persons, aliens,...who, after the passing of this act, shall continue to reside in any port or place within the territory of the United States, shall be reported,...to the clerk of the district court of the district, if living within ten miles of the port or place, in which their residence or arrival shall be, and otherwise, to the collector of such port or place, or some officer or other person there, or nearest thereto, who shall be authorized by the President of the United States, to register aliens: and report, as aforesaid, shall be made in all cases of residence, within forty-eight hours after the first arrival or coming into the territory of the United States, and shall ascertain the sex, place of birth, age, nation, place of allegiance or citizenship, condition or occupation, and place of actual or intended residence within the United States, of the alien or aliens reported, and by whom the report is made....

Section 5*. And be it further enacted,* That every alien who shall continue to reside, or who shall arrive, as aforesaid, of whom a report is required as aforesaid, who shall refuse or neglect to make such a report, and to receive a certificate thereof, shall forfeit and pay the sum of two dollars; and any justice of the peace, or other civil magistrate, who has authority to require surety of the peace, shall and may, on complaint to him made thereof, cause such alien to be brought before him, and there to give surety of the peace and good behavior during his residence within the United States, or for such term as the justice or other magistrate shall deem reasonable, and until a report and registry of such alien shall be made, and a certificate of such surety, such alien shall and may be committed to the common goal, and shall be three held, until the order which the justice or magistrate shall and may reasonable make, in the premises, shall be performed....

The Alien Act-June 25, 1798, An Act concerning Aliens

Section 1*. Be it enacted...,* That it shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order, which order shall

be served on such alien by delivering him a copy thereof, or leaving the same at his usual abode, and returned to the Office of the Secretary of State by the marshal or other person to whom the same shall be directed. And in the case any alien, so ordered to depart, shall be found at large within the United States after the time limited in such order for his departure, and not having obtained a *license* from the President to reside therein, or having obtained such a *license* shall not have conformed thereto, every such alien shall, on conviction thereof, be imprisoned for a term not exceeding three years, and shall never after be admitted to become a citizen of the United States. *Provided always, and be it further enacted,* that if any alien so ordered to depart shall prove to the satisfaction of the President, by evidence to be taken before such person or persons as the President shall direct, who are for that purpose hereby authorized to administer oaths, that no injury or danger to the United States will arise from suffering such alien to reside therein, the President may grant a *license* to such alien to remain within the United States for such time as he shall judge proper, and at such place as he may designate. And the President may also require of such alien to enter into a bond to the United States, in such penal sum as he may direct, with one or more sufficient sureties to the satisfaction of the person authorized by the President to take the same, conditioned for the good behavior of such alien during his residence in the United States, and not violating his license, which license the President may revoke, whenever he shall think proper.

Section 2. *And be it further enacted,* That it shall be lawful for the President of the United States, whenever he may deem it necessary for the public safety, to order to be removed out of the territory thereof, any alien who may or shall be in prison in pursuance of this act; and to cause to be arrested and sent out of the United States such of those aliens as shall have been ordered to depart therefrom and shall not have obtained a license as aforesaid, in all cases where, in the opinion of the President, the public safety requires a speedy removal. And if any alien so removed or sent out of the United States by the President shall voluntarily return thereto, unless by permission of the President of the United States, such alien on conviction thereof, shall be imprisoned so long as, in the opinion of the President, the public safety may require....

Section 6. *And be it further enacted,* That this act shall continue and be in force for and during the term of two years from the passing thereof.

The Alien Enemies Act_July 6, 1798, An Act respecting Alien Enemies

Section 1. *Be it enacted...,* That whenever there shall be a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government,... all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. And the President of the United States shall be, and he is hereby authorized,... to direct the conduct to be observed, on the part of the United States, towards the aliens who shall become liable, as aforesaid; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necesary in the premises and for the publlic safety....

The Sedition Act-July 14, 1798

An Act in addition to the act, entitled "An act for the punishment of cerain crimes against the United States."

Section 1*. Be it enacted...,* That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place of office in or under the government of the United States, from undertaking, performing or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice or attempt shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousands dollars, and by imprisonment during a term not less than six months nor exceeding five years; and further, at the discretion of the court may be holden to find sureties for his good behavior in such sum, and for such time, as the said court may direct.

Revolutionary Soldier

PHOTO

Section 2. That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and mallows writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combination therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done inpursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nations against the United States, their people or government, then such person therof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

Section 3. That if any person shall be prosecuted under this act, for the writing or pusblishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense, the truth of the matter contained in the publication charged as libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

Section 4. That this act shall continue to be in force until March 3, 1801, and no longer....

END OF CHAPTER 1

William H. Seward

Allan Pinkerton

Layfayette Baker

Henry Beebee Carrington

Spies

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Layfayette Baker[14]

Born in New York in 1826 and reared in the Michigan wilderness, Layfayette Baker engaged in mechanical and mercantile pursuits in the state of his birth and in Philadelphia in 1848 before departing, in 1853, for California. Three years later he was an active member of the Vigilance Committee. This experience and his admiration of Francios Vidocq (1775-1857), an infamous Paris detective whom Baker came to imitate, whetted his appetite for intrigue and the life of the sleuth. When hostilities broke out between the North and the South, Baker happened to be heading for New York City on business. When he became aware of the mischief and misdeeds of Confederate spies and saboteurs in and around Washington, he set out for the capital determined to offer his services as a Union agent.[15]

Layfayette Baker
PHOTO

Arriving in the District of Columbia, Baker obtained an interview with General Winfield Scott, commander of the Army and himself not unfamiliar with spy services. In need of information about the rebel forces at Manassas, Scott, having already lost five previous agents on the mission, solicited Baker's assistance. After an adventure of daring and dash, the intrepid Baker returned three weeks later with the details sought by General Scott. The success of the mission earned Baker a permanent position with the War Department.[16]

The next assignment given Baker involved ferreting out two Baltimore brothers who were running the Union blockade to supply munitions to the Confederates. This he did, breaking up the smuggling operation and earning himself a considerable amount of press publicity.[17]

These activities came to the attention of Secretary Seward who hired Baker at the rate of $100 a month plus expenses[18] and sent him off to prowl wherever espionage, sabotage, or rebel spy agents were thought to be lurking.[19] Assisted by three hundred Indian cavalrymen, Baker was later ordered to probe the Maryland countryside for the presence of rebel agents and Confederate sympathies.

His mission took him to Chapico, Leonardstown, Port Tobacco, Old Factory, and the farmland of St. George's, St. Charles and St. Mary's counties.[20] As his column advanced, they punished the disloyal. As a result, "he left behind a trail of burning buildings, frightened men,

women and children, terrified informers, (and) bullet-pierced Secesh Tobacco planters.[21]

As a consequence of this campaign, Baker attempted to interest Postmaster General Montgomery Blair in a purge of disloyal Maryland postmasters, replacing them with Union stalwarts or closing the stations. Blair was well aware of disloyalty among some of the Maryland postmasters and earlier had ordered their displacement. In a report to the Secretary of State, Baker claimed he had obtained unlimited authority to conduct the postmaster purge and requested a military force of two hundred to three hundred men to police the localities in Maryland where these disloyal officials had been discovered. The proposal was ignored but Baker had a variety of other tasks to occupy him as Seward's intelligence chief.[22]

With enough endurance for a dozen men, he worked almost without rest to educate himself in the ever-spreading operations of the rebels and their sympathizers. He traveled to Canada to see for himself what the South was doing to build a fire in the rear of the Union: he made the acquaintance of police chiefs of the big northern cities: he personally took prisoners to the harbor forts to look over conditions; he uncovered and jotted down identities of suppliers of war goods to the South; he acquired a firsthand knowledge of Secesh-supporting newspapers, in sedition-ridden New York, New Jersey, and the seething West. Only on rare occasions, when official duty took him there, did he see his wife Jennie, who had gone to the security of her parent's home in Philadelphia.[23]

As a consequence of Lincoln's St. Valentine's Day directive regarding the release of political prisoners and limiting "extraordinary arrests" to "the direction of the military authorities alone," Baker was recommended to the War Department and its new Secretary, Edwin M. Stanton. In accepting Baker's services, Stanton warned him of the grave and desperate situation facing the government, advised him that he would never be permitted to disclose the authority for his actions, and gave notice that he would be expected to pursue all enemies of the Union, regardless of their station, power, loyalty, partisanship, or profession. Baker's detective service was to be the terror of the North as well as the South, secretly funded, and accountable exclusively and directly to the Secretary of War.[24]

The enemies of the state took many forms. An enemy could be a pretty girl with swaying hips covered by an acre of crinoline, carrier of rebellion-sustaining contraband goods. Or an enemy could be a contractor selling the Union shoddy clothing. Or an enemy could be a Copperhead sapping the strength of the Union by discouraging enlistments. An enemy could also be a Union general with larceny in his soul, gambling away the pay of his soldiers. He could be a guerrilla with a torch firing a government corral within sight of the White House.[25]

For three years, Baker gathered intelligence on the enemies of the Union, reporting his findings to Stanton and Lincoln. In addition, at their direction and sometimes on his own authority, he functioned as an instrument for directly punishing the enemy or for arresting and incarcerating them. Utilizing his intelligence sources, Baker identified and prejudged the despoilers of the Union; relying upon extraordinary military authority and martial law, he seized his foe in his capacity as a Federal policeman; and as the custodian of the Old Capitol Prison and its nefarious annex, the Carroll Prison, he served as jailer of those he captured.

Mary E. Walker, Winner of the Medal of Honor,
who worked for Layfayette Baker.
PHOTO

Of Baker's Commander-in-Chief, one authority has commented: "No one can ever know just what Lincoln conceived to be limits of his powers."[26]

In his own words, the Sixteenth President wrote:

> " . . . my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that Constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life and limb must be protected; yet often a limb must be amputated to safe a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had ever tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of the government, county, and Constitution all together."[27]

And in the more contemporary view of Clinton Rossiter:

> "Mr. Lincoln subscribed to a theory that in the absence of Congress and in the presence of an emergency the President has the right and duty to adopt measures which would ordinarily be illegal, subject to the necessity of subsequent congressional approval. He did more than this; he seemed to assert that the war powers for the Constitution could upon occasion devolve completely upon the President, if their exercise was based upon public opinion and an inexorable necessity. They were then sufficient to embrace any action within the fields of executive or legislative or even judicial power essential to the preservation of the Union. (He) . . . implied that this government, like all others, possessed an absolute power of self-defense, a power to be exerted by the President of the United States. And this power extended to the breaking of the fundamental laws of the nation, if such a step were unavoidable.[28]

The presence of this operating viewpoint at the highest level of the Executive Branch, coupled with his own personal ambitions for power and prestige, contributed significantly to Baker's zealous, authoritarian, and often illegal manner of carrying out his War Department mission. Nevertheless, Baker must be recognized as a professional thoroughly familiar with the methods and tactics of his profession. Reflecting a classically Machiavellian perspective, he once wrote:

> "It may be said that the deception and misstatements resorted to, and inseparable from the detective service, are demoralizing and prove unsoundness of character in its officers. But is must be borne in mind that, in war, no commander fails to deceive the enemy when possible, to secure the best advantage. Spies, scouts, intercepted correspondence, feints in army movements, misrepresentations of military strength and position, are regarded as honorable means of securing victory over the

> foe. The work of the detectives is simply deception reduced to a science or profession; and whatever objection, on ethical grounds, may lie against the secret service, lies with equal force against the strategy and tactics of Washington, Scott, Grant, and the host of their illustrious associates in the wars of the world. War is a last and terrible resort in the defense of even a righteous cause, and sets at defiance all of the ordinary laws and customs of society, overriding the rights of property and the sanctity of the Sabbath. And not until the nation learns war no more, will the work of deception and waste of morals, men and treasures cease."[29]

Establishing offices at 217 Pennsylvania Avenue, in close proximity to both the White House and the War Department, Baker began gathering recruits and organizing his unit. Operating without official status, the group was generally referred to as the Secret Service Bureau. Its personnel, known only to Baker in terms of number and complete identity, bore no credentials other than a small silver badge.[30] Secretly commissioned as a colonel; Baker initially represented himself, when absolutely necessary, as an agent of the War Department. Later, he publicly cited his military rank and held the title of Provost Marshal.

He initiated the nation's first police dossier system although the rebels, the Copperheads, and the misguided among the Loyalists in the North charged him with poking his private eyes into the homes of the innocent. He gathered systematically the first criminal photo file, enabling a more efficient pursuit of the enemies of the nation. He instituted a policy of seizing suspects in the dead of the night when their resistance to interrogation and their ability to seek help would be at the lowest ebb. He made a science of the interrogation of prisoners, using teams of detectives to work over a suspect until he was satisfied he either had the full story or he could drag no more information from his victim.

He established a secret fund for building and feeding a vast army of informers and unlisted agents. No one except he knew the full range of his organization. Even his most trusted aides were not allowed to know the identity of all of his operatives.[31]

For reasons of both security and strategy, Baker's agents were divided into daylight and nighttime units—the men in one group did not know the identity of those in the other—and another section counted operatives who infiltrated and trafficked in the capital's high society.[32] He cultivated contacts with the police in the nation's society. He cultivated contacts with the police in the nation's major cities[33] and kept a close watch on Confederate activities in Canada.[34] By the summer of 1863, a branch office had been set up in New York City [35] and he succeeded in placing his personnel in the Post Office for purposes of inspecting the mails.[36]

On two occasions Baker's spy service gathered intelligence which probably contributed to the downfall of General McClellan: Baker's personal penetration of the Confederate forces at Manassas resulted in the discovery that the fortifications and artillery which were supposedly keeping McClellan's army at bay were actually earthen and wooden fakes and later Lincoln utilized the services of one of Baker's agents to secretly observe McClellan's conduct on the battlefield.[37] With the decline of McClellan, Allan Pinkerton, whom Baker regarded as "sagacious," departed from the scene, leaving some agents and the spy field to Baker.[38] The only other threat to Baker's supreme command of the secret service operations was the reputed organizer of the old Mexican Spy Company, Ethan Allen Hitchcock, but he was founded to

be an old man seized with mysticism and pursuits of alchemy with no desires for any responsibility in the hostilities.[39]

In June of 1863, Baker gained an open commission in the army with the rank of colonel, the opportunity to wear the Union uniform, and command of a military police force he had sought for some time.[40] The exact size of the unit is not known, or its losses, or its complete record of action. After much pressuring from Baker, Stanton agreed to establish the troop utilizing authority entitling the District Columbia to a battalion of infantry and cavalry for use within its confines.[41] Placed under a direct authority of the Secretary of War, the first Regiment Cavalry, known as "Baker's Rangers," consisted, ironically, of recruits from Robert E. Lee's former command, the Second Dragoons, renamed the Second Regular United States Cavalry at the outbreak of the war.[42]

Hundreds of men sought places in the new regiment; some offered bribes. Whether the attraction was the promise that no soldier in the Baker command would ever be sent outside the immediate vicinity of the District of Columbia or whether Baker's fame inspired all types of adventurers to flock to his banner was the subject of much conjecture at that time.[43]

In an appeal to the Governor of New York,
Baker wrote:

> ". . .the duties to be performed by this regiment demand on the part of both men and officers qualities of a high order, both mental and physical. Among these, I may enumerate intelligence, sobriety, self-dependence, bodily vigor, the power of endurance, and though last not least, that knowledge of the horse which results from early practical experience and management of that noble animal.[44]

The personal qualifications of Baker's recruits, of course, cannot be assessed. By their actions, however, they demonstrated great military ability, intense loyalty to their commander, and a complete insensitivity to the property, liberties and lives of those they encountered as enemies. For reasons of high morality and public image, the Rangers were unleashed upon the gambling parlors and vice dens of Washington.[45] Soon, however, they began engaging in forays of destruction against enemies of the Union beyond the confines of the capital.[46]

The Rangers were an auxiliary to Baker's intelligence activities; they were his agents of espionage, enforcement, and protection. Secret operatives gathered information in both the cities and the countryside of the Potomac region. Baker devoured their reports, conferred with Stanton and/or Lincoln, and then set out with enforcements against the subversives.

In addition to ferreting out spies, blockade runners, and locals giving aid and comfort to the rebels, Baker engaged in three major intelligence enterprises: unmasking crimes in the Treasury Department, smashing the Northwest conspiracy, and capturing the President's assassin.[47] The opportunity to probe the Treasury Department regarding allegations that it had become a bawdy house and command post for certain predatory interests arose around Christmas, 1863, when Treasury Secretary Salmon P. Chase invited Baker to investigate the situation.

There was growing talk of scandals in the Treasury Department. Newspapers were saying that the hundreds of girls busy scissoring the

new greenbacks were hussies in the night. There were oyster feasts in the bonnet room. Clerks were making off with sheets of uncut currency.

Counterfeiters were discovering it was easier to steal a plate and run off bales of money rather than go to the trouble of making an imitation engraving in some hideaway. The Treasury's own police seemed helpless to stem the tide of corruption and debauchery. The Blair family, avowed enemies of Chase, was giving support to the rumors. (Postmaster General) Montgomery Blair's brother, Frank, cried out for congressional inquiry.[48]

The probe was charged and politically explosive. Seward, eyes upon the 1864 election and the White House beyond, might well have wanted Lincoln's top detective mired in the scandals, defused and defamed along with most of the Administration. In Hanson A. Risley, special Treasury agent, Seward had his own source of intelligence. So close were the two men that Risley gave over one of his daughters to Seward to adoption and, after Mrs. Seward's death, the old man sought her for his second wife.

In detailing Baker to Treasury, Stanton probably thought he would be the best man to vindicate the President as untainted, honest and ignorant of the conditions there. Himself a frequent critic of Lincoln, the Secretary of War nevertheless realized that public confidence in the President must be maintained in the midst of the country's perils and he might well have been aware that Lincoln had no direct involvement in the treasury calamities.

Factions within Congress were ready to intervene to attack Lincoln, Chase, and Baker. Ultimately, a committee of investigation was formed, probed the situation, and beclouded the facts and the guilt of those involved.

Baker plunged into the Treasury probe with ferocity and determination. He temporarily relinquished command of the Rangers and established an office in the dark basement of the Treasury building. His techniques were direct and dauntless; he stalked the printing facilities and subjected clerks and lesser officials to ruthless and merciless interrogation. At one juncture he halted a funeral cortege in the midst of the city, seized the corpse of a Treasury girl and had an examination made to determine if her death had resulted from an abortion.[49]

And what did Baker find? At the outset he discovered that young James Cornwell, who had the function of burning mutilated bonds and notes, had pocketed $2,000 worth of notes. Cornwell was convicted and sent to jail for this offense, the only individual to be prosecuted for crimes against the Treasury in this probe.

Next, Baker alleged that two printers who had sold the Treasury new presses, paper, and a technique for printing currency were conspiring to sell the government worthless machinery and processes. Their presses were weakening the upper floors of the Treasury building and their security procedures were virtually non-existent, allowing ready access to both plates and process. In the midst of the inquiry, the new presses began malfunctioning and greater demands were placed on the building for "improved" printing devices.

Baker discovered that the head of the department of printing and engraving, Spencer Clark, was involved with a number of young women who were cutting and preparing new currency. An associate of Clark's was also implicated and Baker named both men for dismissal. Eventually it came to pass that it was Secretary Chase who was to resign and the great Treasury scandal passed into history.[50]

In mid-November of 1863, a full month before the Treasury investigation got underway, rumors of a dangerous conspiracy along the Canadian border began circulating. Baker's agents pursued the facts of the matter and by late spring of the following year a fairly clear image of the attack planned by the Confederates was evident. In Richmond, Judal P. Benjamin, Secretary of State for the rebel government, a holder of three cabinet posts in the Confederacy, and a man of imagination, conceived a desperate plan of havoc utilizing secret societies reminiscent of the later Klu Klux Klan guerrillas. Warriors behind Union lines would burn down New York City, free rebel troops imprisoned in the North to loot and pillage throughout the industrial Northeast, and seize Chicago, Buffalo, and Indianapolis. The plan failed to recognize the drift of northern morale; those disenchanted with the war still supported Lincoln, sought the Union as was and the Constitution as is, and otherwise had no interest in or sympathy for a separate Confederate nation.

In the aftermath of the destructive campaigns of Generals Sheridan in the Shenandoah Valley and Sherman in Georgia, the rebels were ready for unconventional warfare of their own making.

The Copperhead firebrand Clement Vallandigham was recruited to obtain support for a new nation composed of states adjacent to the Canadian border. Army officers in civilian dress were dispatched north to act as terrorists. The first target for revenge was Chicago. Assembled in Toronto, the band of insurgents made their plans—all of which were carefully recorded by a Baker informer.

Commanders of military prisons were informed of these developments and advised to be prepared for uprisings within or attacks from outside of their institutions. Baker advanced a squadron of agents to Toronto to maintain surveillance of the conspirators who were followed and observed as they straggled into Chicago in the midst of the Democratic National Convention. More than 2,000 civilian-clad Confederate soldiers were scattered around the city.

At the height of the convention proceedings, the area would be put to the torch. While police and firemen fought the flames, an attack would be made on Camp Douglas and its prisoners freed. The banks would be looted, City Hall seized, and the police headquarters occupied. Thus, the second largest city in the land fell to rebel control.

Politics among the conspirators caused a postponement of their assault until Election Day. After reassembling in Toronto, burnings and attacks on local authorities were scheduled for simultaneous occurrence in Chicago, New York, Cincinnati, and Boston. Surveillance of these preparations continued and information from the informer flowed to Baker.

Offensive actions were unleashed against the terrorists. Without warning, General Benjamin F. Butler, seasoned in maintaining the security and serenity of New Orleans, marched into New York with 10,000 Union troops as the clock moved toward Election Day. Confederate arsonists abandoned their grandiose plan of havoc, set a few fires in some hotels (which were quickly distinguished), and fled to Canada. Across the border, they soon learned that they had been fortunate in their escape. A Baker spy in Chicago brought about the ruination of terrorist activities in that city and a Union operative in Indiana gathered enough information to implicate almost the entire band of Confederate conspirators in that state.

While these elements were being rounded up and jailed, Union authorities took an imprisoned Confederate officer into their intelligence corps, swore him to loyalty to the Union cause, and released him to make

contact with some of the remaining members of the Northwest Conspiracy. Followed by Baker's agents, the man soon met with a group seeking to liberate 3,000 rebel officers incarcerated on Johnson's Island in Lake Michigan. The intervention of this spy cost the conspirators a cache of arms and the loss of a few men in Chicago and indirectly contributed to the scuttling of the Johnson's Island mission.

By late fall, 1864, the Northwest Conspiracy had collapsed and its principal leaders and organizers had been jailed.[51] The excitement and stimulation of the chase ended. Baker founded himself in an unfamiliar situation. He was given no public credit for his part in smashing the great conspiracy. On the contrary, his enemies increased their efforts to build up the ugly image of the Bastille master, and he continued to be identified in the public mind with unjust arrests and imprisonment, invasions of the rights of private persons and rumored profiteering. Baker still knew that, as a secret agent, the details of his activities must remain secret.

If, however he had hoped that this sensational case would change the attitude toward him in Congress and Administration circles, or would convince the Copperheads that he put the Union before personal gain, he must have been sadly disappointed. His success in securing and transmitting information which led to the dramatic collapse of the great conspiracy and the punishment of its leaders in the North still brought him no evidence that his services were to be fairly judged by the results he achieved for the Union cause.[52]

Baker had just completed a successful investigation of fraud and deception surrounding the draft, bounty-hunting, defrauding sailors out of prize money, and efforts at morally corrupting Union troops in the New York City area when he received the news of Lincoln's assassination. Undoubtedly he felt guilt for not having had more advance information about the conspiracy against the President and for not having had agents near the Chief Executive when the murderer struck. Upon receiving word that Lincoln had been shot and was dead, Baker threw himself into the pursuit and capture of those responsible for the crime. After producing a handbill, the first to be circulated for a nationally wanted criminal, describing John Wilkes Booth in detail, Baker set about interrogating everyone and anyone who knew anything about the conspirators involved in the assassination.[53]

Stanton went along with the detective's thinking and supported his tigerish moves to stalk his prey. One by one, Booth's accomplices were rounded up. Baker's rival police agencies did most of the work. But he took charge of the prisoners, dragged incriminating admissions from them, put black hoods on their heads, and stuffed them in the hold of a monitor in the river.[54]

Finally, Baker found Booth's track, pursued him with a command of cavalry, and came at least to the Garrett farm where the assassin had taken refuge in a barn. His prey cornered, Baker confronted the killer, demanded his surrender or the alternative of firing the barn. In the midst of negotiations and flames, Booth was shot by either himself or by Sergeant Boston Corbett. Baker took charge of the body and later sought a portion of the rewards for capturing Booth. The amount subsequently awarded Baker was reduced to $3,750 from a potential of $17,500: the secret service chief continued to be unpopular with the Congress.[55]

With the death of Lincoln, Baker became the protector of the new President, Andrew Johnson, and set up the first White House secret service details in the history of the Republic.[56] With the peace of Appomattox, however, the career of the spy chief began to rapidly

decline. The rebel foe of wartime now walked the streets of the capital. Many of the prostitutes and gamblers Baker had jailed under military law were again free. These, together with political enemies, taunted and reproached the once powerful secret service, a vestige of war, which seemed to have no future mission.

Nevertheless, Baker attempted to carry on in the old style. His task was to protect the President: his immediate foe, he surmised, were various female pardon brokers, lately sympathetic to the South, who prevailed upon the President to grant clemency and forgiveness to all manner of rebels. In attempting to halt this traffic in and out of the White House, Baker incurred the wrath of President Johnson and a lawsuit that successfully damaged his status and role. In the midst of the trial, he was routinely mustered out of the army and effectively left without a friend or defender.[57] He departed Washington in disgrace, returned to his wife in Philadelphia, wrote his memoirs in lieu of finding other work, contracted spinal meningitis and died on the evening of July 3, 1868.

Lafayette Baker was a zealot who, imbued with a strong sense of righteousness and a taste of vigilantism, in the name of a cause became oblivious to the ends-means relationship underlying his function. In his defense of the Union and democratic government, he resorted to extreme actions obnoxious to popular rule and, in some instances, in violation of constitutional guarantees. He actively sought to exceed his intelligence role and became policeman, judge, and jailer. His desires in this regard, and his capacity for achievement of same, were fostered and fed by the exigencies of the moment and the liberties Lincoln took in administering (or not administering) the law.

When Lincoln died and the war ended, Baker became a political pariah with a vestigial function. His activities had annoyed many, frightened some, and made bitter enemies of an important and powerful few. With the onset of peace in the Nation, he was virtually stripped of his organization and official status and left vulnerable to legal, political, and financial reprisals. These forces converged, coalesced, and crushed. Due to the secret nature of Baker's operations and his tendency to embellish fact, the full account of the activities of this spy chief may never be known. In all likelihood, his record of service will always be controversial, and of debatable value.

Henry Beebee Carrington[58]

Henry Beebee Carrington conducted intelligence operations against political enemies—the Copperheads and rebel conspirators attempting to undermine the Union cause. Born in Connecticut in 1824, Carrington became an ardent abolitionist in his youth, graduated from Yale in 1845, and taught for a while in the Irving Institute at Tarrytown, New York. Under the influence of the school's founder, Washington Irving, he subsequently wrote Battles of the American Revolution, which appeared in 1876. He was also to write seven other major titles. Leaving New York, he taught at the New Haven Collegiate Institute while pursing a law degree at his old alma mater.

Henry Beebee Carrington
PHOTO

In 1848 he moved to Ohio and entered upon a law practice. Over the next dozen years Carrington represented a variety of commercial, manufacturing, banking, and railroad interests and became a pioneer in Republican politics. A close friend and supporter of Governor Salmon P. Chase, he was subsequently appointed to a position to reorganize the state militia (1857). He subsequently became an adjutant general for

Ohio, mustering nine regiments of militia at the outbreak of the Civil War. He then was commissioned a colonel of the 18th United States Infantry and took command of an army camp near Columbus.

In neighboring Indiana, Governor Olive P. Morton had need of Carrington's services. For reasons not altogether clear—perhaps it was his partisan political past and /or his ardent abolitionism—Carrington was ordered, upon the request of Morton, to organize the state's levies for service.

When Carrington arrived in Indiana, political warfare between the adherents of the administration and its opponents was beginning in earnest. The favorite weapon of the Republicans was that ephemeral and elusive order, the Knights of the Golden Circle. Carrington joined in wholeheartedly. On December 22, 1862, he blamed the appalling rate of desertion on the treasonable secret societies, whose penetration of the army was shown by knowledge among soldiers of a "battle sign" which would save them from rebel bullets.

In a long report dated March 19, 1863, he described the situation as so alarming that it bordered on open revolt. He claimed that the Knights had ninety-two thousand members between sixteen and seventy who were drilling constantly. They were plotting to seize the arsenals, the railroads, and the telegraph in order to revolutionize Indiana and "assert independent authority as a state." They communicated with Confederates, in particular with General Morgan, whose picture hung in many homes and who name was "daily praised." Thousands of them believed the bold raider would shortly appear to "raise the standard of revolt in Indiana." If he did, Carrington was sure Morgan could raise "an army of 20,000 traitors."[59]

What prompted these comments by Carrington and where he get his information? The answer to these questions appears to derive from the activities of Governor Morton. Taking advantage of the crisis conditions that the war created, Morton had established himself as virtual dictator of the state. He dealt harshly with rebel sympathizers, Copperheads, Democrats, and anyone opposed to his rule. By the end of 1861, a spy system had been inaugurated to keep watch of these enemies.[60] Carrington was given charge of this intelligence organization and thus became familiar with the "foes of the Union" which it kept under surveillance. There is strong evidence that Carrington had no desire for combat service and twice Morton intervened to prevent his transferal to the front lines. Thus, it was important that Carrington cast himself in the role of an intelligence chief devoted to maintaining the security of the state, even though disaster appeared to be just around the corner.

In March 1863, Carrington was promoted to brigadier-general and made commander of the District of Indiana of the Department of the Ohio, later renamed the Northern Department. By this time, however, he had intelligence activities organized and operating under his direction. His secret service:

> " . . . was composed of spies, informers, betrayers, and outside secret agents. Inside officials who were jealous of more important leaders were worked on; the itch for money played a part; in quite a few instances, unsuspecting loyal men who had joined the casts were amazed at the lengths to which love of constitutional rights or Southern sympathies could carry the assertion of dissent. From many sources, and for almost as many motives, disclosures flowed in to Carrington's headquarters."[61]

Claiming to have between two and three thousand men reporting to him, Carrington enlisted the services of almost anyone who would provide information about an "enemy." Unsolicited reports were gratefully accepted as well. The amateur sleuths and informers were supplemented with a few choice agents and detectives. Spies apparently were paid from state funds at the rate of $100 per month, over six times the amount received by a Federal soldier.[62]

Early in 1863 Carrington claimed to have emissaries at the meetings of the secret societies. In April 1864, he asked Adjutant General Lorenzo Thomas for money to organize a twelve-man detective force. One of his agents said he had eighteen men at such work early in 1864.

General Alvin P. Hovey, who succeeded Carrington August 25, 1864, continued his espionage organization. Colonel Conrad Baker, the state provost marshal, also employed informers who reported directly to him. At least one of the district provost marshals, Colonel Thompson, had an agent who worked for him among Democrats of the Seventh District. He signed his reports only as "H.," and his identity was not even known to Colonel Baker, Thompson's supervisor.

Carrington claimed he participated personally in his work, once attending "in disguise" a meeting of the Sons of Liberty in Indianapolis. Be that as it may, the general was probably not exaggerating when he claimed to know every morning what had happened in the lodges the night before. Not only did he have his own spies, but also he kept in close touch with other officials who conducted espionage.[63]

While Carrington's operatives were effective in breaking up the Sons of Liberty, the Knights of the Golden Circle, and elements of the Northwest Conspiracy, they also contributed to arbitrary arrests, infringements upon the freedom of speech and freedom of association, and otherwise maintained a corrupt and despotic regime. The manner in which the intelligence organization was recruited—utilizing betrayers, jealous and disgruntled officials, informers, and invalidated hearsay from unsolicited sources—caused it to traffic in unreliable information of generally more political than military value. And the suspicion prevails that the whole arrangement served to maintain Governor Morton's administration and coincidentally counteracted Confederate operatives who happened to count among his foes.

General Alvin P. Hovey replaced Carrington in August 1864. With less than a year of warfare ahead of him, Hovey assumed control of the espionage
organization as the new commander of the Indian District. It is not immediately evident if he made any changes in the intelligence operation other than to gain access to the funds seized from bounty jumpers to pay his agents.[64] If the spy system did not collapse at the end of the war, it must certainly have been discarded in 1867, when Governor Morton resigned to enter the United States Senate.

Carrington was first mustered out of service as a brigadier-general of volunteers, rejoined his old regiment in the Army of the Cumberland, completed war duty and saw Indian campaigns in the West. He built and commanded Fort Phil Kearny but lost the respect of his fellow officers due to his reputation as a "political warrior" and his demonstrated lack of aggressiveness in several Indian skirmishes. Before a decision to remove him from command could be implemented, Carrington became further embroiled in controversy.

In December 1866, a force of fifteen hundred to three thousand Indians massacred a force of eighty officers and men under Captain William J.

Fetterman. The disaster was attributed to Fetterman's disobeyance of Carrington's order to proceed on a certain route of march: instead, he had directly engaged the war party from their rear while they were attacking a group of woodcutters.

Stanton's Letter

The Secretary of War
Washington City, D.C.
May 2, 1863—11 a.m.

Major-General Hooker,

We cannot control intelligence in relationship to your movements while your generals write letters giving details. A letter from General VanAllen to a person not connected with the War Department describes your position as entrenched near Chancellorsville.

Can't you give his sword something to do, so that he will have less time for a pen?

/s/ Edwin M. Stanton

The Indians turned on Fetterman's force and annihilated them. Because no one had heard Carrington's orders to Fetterman, coupled with existing distrust of the colonel's leadership, rumors persisted that the men had been ordered into tragedy. General Grant moved to court-martial Carrington but, at the suggestion of General William T. Sherman, submitted the matter to a court of inquiry, which subsequently exonerated Carrington. Nevertheless, Carrington was relieved of command and, with his military career ruined; he resigned and spent the rest of his life attempting to convince the public of his innocence in the incident. He also wrote a number of books and taught military science at Wabash College in Indiana before his death in 1912.

Spies

Belle Boyd
Belle Boyd is probably the Civil War's most famous spy; but, in the view of a present-day student of her career, she is also the War's most overrated spy.

Belle Boyd
PHOTO

A Shenandoah Valley girl, Belle Boyd was only 17 years old in 1861. However, she was persevering in her efforts to aid the South by procuring useful information on Northern activities, much of it for the use of General "Stonewall" Jackson. To support her claims to success in secret service, Miss Boyd held an honorary Confederate Army rank, as well as the firm opinion as to her abilities of the entire North (especially that of its counterintelligence officers). The extent to which her efforts actually aided Southern arms is, however, uncertain and will probably remain so. One can admit that she was a woman of great spirit and charm.

On several occasions, the Union forces captured Belle Boyd, and each time she was released from imprisonment. However, Miss Boyd's activities became increasingly a matter of public knowledge, thus reducing her effectiveness.

Early in 1864, her health somewhat undermined, Miss Boyd decided to go to England. Jefferson Davis concurred in this decision, as she could be used as a courier to carry dispatches on her trip. On the day after her ship sailed from Wilmington, North Carolina, it was captured by a Northern warship and escorted to Boston.

Ensign Harding was placed in charge of the prize, and, on the trip north, he became completely mesmerized by Belle Boyd, finally proposing marriage, an offer that she accepted. Arriving in Boston, Miss Boyd was shortly exiled to Canada, from whence she went to England.

Through carelessness, Ensign Harding permitted the captain of the blockade-runner to escape in Boston, and Harding was cashiered from the Navy. He too made his way to England, where he and Belle Boyd were married. While in England in 1865, Belle Boyd published her memoirs, which is considered to be essentially sound with the usual embellishments of color and detail.

Spencer Kellogg Brown

After brief service in the Union Army, Spencer Brown enlisted as a sailor on a Federal gunboat on the Mississippi River. With the permission of his commander, he "deserted" in January 1862, to begin an espionage mission within the Confederate lines. Brown succeeded in making his way back to General Ulysses S. Grant's headquarters during the battle of Shiloh with useful information on the Confederate order of battle.

In August 1862, Brown was captured while on a naval mission to blow up a Confederate vessel. He was charged with being a Union spy and a deserter from the Confederate Army. The charge of desertion was based on his alleged "service" with Confederate troops while accompanying them on his espionage mission before the battle of Shiloh earlier in 1862. He was executed in the fall of 1863.

While Spencer Brown is only a minor figure as a spy, he is remembered in part because the Confederacy executed him as a spy in defiance of a rule of military law adhered to by the Union forces. This rule was that when a person, who was formerly a spy, was subsequently taken prisoner while not engaged in espionage, he would not be tried as a spy.

Rose O'Neil Greenhow

Rose O'Neil Greenhow was the widow of the celebrated Dr. Robert Greenhow, who was librarian and chief translator of the Department of State from 1831-1850. Because of her husband's status, she was one of the chief figures in Washington society during that period. A native of Port Tobacco, Maryland, in 1861, she identified herself with the cause of the South in the Civil War and became the first of the Confederate secret agents in the nation's capital.

Rose O'Neal Greenhow
PHOTO

She was arrested on 21 August 1861 by Allan Pinkerton, chief of the Secret Service on the staff of General McClellen, at the instigation of President Abraham Lincoln. She was first imprisoned in her own home at 16th and H Streets, NW (where the Hay-Adams Hotel now stands) and then for five months in the Capital Prison, which stood where the Supreme Court building now sits. Her little daughter and namesake, Rose, then age eight, shared her imprisonment with her.

Historians and writers have overestimated the value of Greenhow's spying for the South. Except for confirming that General Irvin McDowell's was moving his troops to Manassas, which gave General P. G. Beauregard the time he needed to prepare for battle, Greenhow's

espionage activities were of little value to the Southern cause. Much of her information was obtained by having people walk around Washington, D.C. and report to her what they saw. She did have one "knowledgeable" source, Senator Henry Wilson, who chaired the Senate's Military Affairs Committee. He was reportedly her lover but it is doubtful that he provided any important military or political information to her.

She, like many spies, also failed to destroy incriminating evidence she kept in her house. After her arrest, a search of her home by Pinkerton's men, discovered copies of her intelligence reports. Although Greenhow used a code to write portions of her reports, she also left a copy of one of the plain-text messages, which allowed Pinkerton to decipher her messages.

After her arrest she continued to send messages to her Confederate handler, Thomas Jordan, who was General Beauregard's adjutant.

Historians cite this fact to prove Greenhow's resourcefulness but any counterintelligence analysis shows just the opposite. Pinkerton was no fool. He kept an airtight watch on Greenhow, allowing only a few visitors to see her, and punishing any of the guards who failed to inspect anything leaving the house. In fact, the Confederates no longer trusted any information she sent to them.

She was released on 1 June 1862 and taken through the Union lines to Richmond, Virginia, where she resided for a short time. While in Richmond, she wrote a book, *My Imprisonment and the First Year of Abolition Rule in Washington.* In autumn 1862 she boarded a ship, which ran the Union blockade at Wilmington, North Carolina and landed in England via Nassau. In London she had her book published. She also represented the Confederacy in diplomatic negotiations with England and France.

She decided to return to the United States and, in the fall of 1864, she boarded a ship that attempted to run the blockade at Wilmington. The ship ran aground in high seas at Cape Fear River. Greenhow was determined to go ashore and persuaded the captain to lower a small boat. The small boat capsized and all aboard was saved but Greenhow who drowned.

C. Lorain Ruggles

C. Lorain Ruggles was a member of the 20th Ohio Volunteer Infantry, serving in the Mississippi-Tennessee Theater as a scout, spy and detective. He claimed to be the brother of a Confederate general, in whose command he sometimes operated. Ruggles expressed his philosophy as follows: "People often ask me, 'What is the essential qualification of a good spy?' My answer is, 'It requires an accomplished liar.' I mean by that a man that can successfully practice deception. I do not mean that a man must be a habitual liar. There is nothing that I despise more than a man whose word cannot be relied upon. Whether deception, as I have practiced it in the discharge of my duty as a spy, is a moral wrong, I shall not attempt here to argue. Of this much I am sure: it has many times saved my life, and perhaps the lives of thousands of others, besides saving immense sums of money to the Government."

One of Ruggles' superiors, Brigadier General Wiles, stated that "I never knew him to give false information," and Ruggles' book contains several official comments on his success. Ruggles' book is titled, *Four Years a Scout and Spy*. It was ghost written for him by one of his officers, Major Edward C. Downs, who enlisted Ruggles in 1861. The book went through several editions, and in a later edition, Ruggles listed himself as the author and eliminated Major Downs' introduction. The title was also changed to *Perils of Scout Life*.

Henry Bascom Smith

Lieutenant Henry Smith (whose self-assumed post-war rank was that of major) was occupied for much of the Civil War in basic counterintelligence work, including detection of blockade-runners and supervision of Confederate prisoners. Smith operated in Baltimore, Maryland, a center of secret service activity for both the Union and the Confederacy.

He joined the Union army as a second lieutenant in a New York heavy artillery regiment in January 1862. The following May his unit was ordered to Baltimore. After several adventures as a prisoner escort, Smith was appointed Assistant Provost Marshal at Fort McHenry, where he had his first experience in counterintelligence activities. He wrote: "Confederate mail carrying, spy promoting, blockade promoting, recruiting for Confederate service, were being engineered right from among these prisoners. I under-grounded it all. Through this channel, I enlisted for the Confederate service... to discover their actions...."

Smith did not "under-ground" by any means all such activity at Baltimore, but even so his claim is more modest, and more convincingly presented, than those others who overemphasized or glorified their intelligence and counterintelligence worth. His secret service rationale also was less overstated than most others.

Felix Grundy Stidger

Felix Stidger, after serving part of the war in a Kentucky (Federal) regiment, took his discharge and went to work as a detective. Despite his Union background, he was accepted as a member of the Copperhead secret societies in Kentucky, Indiana and Ohio. He was so successful in his penetration that he rose to a high office in the society. His penetration was very instrumental in the arrest and prosecution of the chief conspirators.

Although he had testified in public, Stidger waited nearly 40 years to publish his story. While his story is not entirely verifiable, it is among the most trustworthy of the Civil War secret service memoirs. In producing such an account, Stidger unwittingly lent credence to his belief that the Copperheads trusted him because his manner had a certain straightforwardness about it. He wrote: "I know of no other reason why I should have been able to look them so steadily in their eyes except an innate consciousness of my being in the performance of a just and honorable duty to my government."

Benjamin Franklin Stringfellow

Following the First Battle of Bull Run, Frank Stringfellow was trained as a scout under the command of Colonel J.E.B. Stuart. He became one of Stuart's better scouts and spies, and is one of the few Confederate intelligence operatives whose service can be even slightly documented. He is said to have spent weeks in occupied Alexandria collecting information; was in the environs of most of the great battles fought by the Army of Northern Virginia; was captured once and exchanged.

Of Captain Stringfellow's service, Colonel Stuart wrote, "In determining the enemy's real design, I rely upon you, as well as the quick transmission of the information. ... Your service is too important and may be worth all the Yankee trains." Lauded by Confederate President Jefferson Davis, *Stringfellow* summed up: "My business was to get information."

Elizabeth Van Lew

Her parents were northerners who had moved to Richmond, Virginia, where they became prominent citizens and where Elizabeth was born. Her father John Van Lew died when she was a young girl, leaving her and her mother to carry on. They stayed in Richmond but did not hold

with southern thinking. They freed their family slaves and used their money to purchase relatives of their slaves in order to set them free also. Elizabeth was considered an eccentric by Richmond society.

When the Civil War came, Elizabeth became the center of a northern spy network, called the Richmond Ring. She established five safehouses from which messages could be relayed to Union lines. The information came from a variety of sources. She succeeded in planting one of her former slaves within the Confederate White House of Jefferson Davis. She coordinated the underground activities of her brother, John Newton Van Lew and a black marketeer, Frederick Lohmann.

She secured the services of Samuel Ruth, the superintendent of the vital Richmond, Fredericksburg & Potomac Railroad. Ruth was effective in making the railroad inefficient, causing delays in moving valuable Confederate troops and supplies, without raising suspicion.

The Confederates arrested Ruth for aiding southerners, who no longer wanted to live in the Confederacy, to defect to the north. She [sic] was tried but the charges were dismissed for lack of evidence.

Elizabeth came under Confederate counterintelligence scrutiny because she and her mother visited and provided food and clothing to Union Army officers held in Richmond's notorious Libby prison. Union operatives tasked Elizabeth to obtain from the prisoners the latest information on battle information and estimates of Confederate army strength. Even when prison authorities refused to allow her to speak with the prisoners, she was able through other means to secure the information. Confederate counterintelligence made every effort to catch her. They kept her house under constant surveillance and conducted unannounced and random searches of her home. In the end, they failed to find any incriminating evidence against her.

When the Confederate Government abandoned Richmond, Elizabeth raised the American flag and welcomed General Ulysses Grant into her home upon his arrival in the city. After the war, she put in a claim to be reimbursed for her expenses. She was supported in her effort by then President Grant, but Congress rejected the claim. She might have died penniless but the Union officers she comforted in Libby prison raised enough funds to provide her with a steady income for the rest of her life.

NOTES

14. Dr. Harold R. Relyea, Analyst in American National Government, Government and General Research Division, Congressional Research Center, Library of Congress, for the Select Committee on Intelligence and printed in *Supplemental Reports on Intelligence Activities, Book VI, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, United States Senate, 1976.

15. See L.C. Baker, *History of the United States Secret Service*, Philadelphia, King and Baird, 1868, pp. 15-20; Jacob Mogelever, *Death to Traitors*: The Story of General Lafayette C. Baker, *Lincoln's Forgotten Secret Service Chief*. New York, Doubleday and Company, 1960, pp. 22-48.

16. Baker, op. cit., pp. 45-72; Mogelever, op. cit. pp. 48-62.

17. Baker, op. cit., pp. 72-84; Mogelever, op. cit. pp. 68-72.

18. Mogelever, op. cit., p. 73.

19. See Baker, op. cit., pp. 85-101.

20. Ibid., pp. 102-111; Mogelever, op. cit., pp. 74-79.

21. Mogelever, op.cit., p. 79.

22. See Ibid., pp. 79-81.

23. Ibid., p. 84.

24. See Mogelever, op. cit., pp. 86-88.

25. Ibid., p. 89.

26. Wilfred E. Binkley, *President and Congress*. New York, Alfred A. Knopf, 1947, p. 126.

27. Letter to Albert G. Hodges (April 4, 1864) in Roy P. Baslet, ed. *The Collected Works of Abraham Lincoln* (Vol. 8). New Brunswick, Rutgers University Press, 1953, p. 281.

28. Rossiter, op.cit., p. 229.

29. Mogelever, op.cit., p. 91.

30. Ibid., pp. 95, 169.

31. Ibid., p. 111.

32. Ibid., pp. 169-170.

33. Ibid., p. 109.

34. Ibid., p. 242; also see Baker, op. cit., pp. 174-178.

35. Ibid., p. 241.

36. Ibid., p. 164.

37. See Ibid., pp. 101-107, 139-140.

38. See Ibid., p. 108.

39. See Ibid., p. 107-108.

40. See Baker, op.cit., pp. 195-203.

41. Mogelever, op. cit., p. 214; the District of Columbia had only one cavalry unit during the civil war but counted the First and Second Regiment Infantry, serving from 1861 until 1865, and several short-lived infantry battalions and militia companies which were hastily organized in 1861 and mustered out by the end of the year.

42. Ibid., pp. 215-216.

43. Ibid., p. 220.

44. Ibid., p. 221.

45. See Baker, op. cit., pp. 241-253; Mogelever, op.cit., pp. 245-248.

46. Generaly see Mogelever, op.cit., pp. 213-241.

47. Baker's own account of his bureau's activities and his troops' adventures is thin and, compared with the Mogelever account which relies on Baker's correspondence and the letters and diaries of relatives, fails to convey the questionable nature of their operations or their

possible illegality; see Baker, op. cit., pp. 147-198, 230-241, 253-261, 329-378, 384-452.

48. Mogelever, op.cit., p. 249; in 1863 (12 Stat 713 at 726) Congress authorized the Secretary of the Treasury to appoint three revenue agents "... to aid in the prevention, detection, and punishment of frauds upon the revenue." These were the small beginnings of the Treasury Department's intelligence organization and the only designated investigative force available to the Secretary at the time of the Baker inquiry.

49. See Mogelever, op. cit., p. 252.

50. Generally, see Ibid., pp. 252-278; Baker, op. cit., pp. 261-287.

51. Generally, see Baker, op. cit., pp. 452-476; Mogelever, op. cit., pp. 278-292; John W. Headley, *Confederate Operations in Canada and New York*, New York and Washington, The Neale Publishing Company, 1906, pp. 211-382.

52. Mogelever, op.cit., 291-292.

53. See Ibid., p. 337.

54. Ibid., p. 339.

55. Generally, see Baker, op. cit., pp. 476-567; Mogelever, op. cit., 342-385.

56. Mogelever, op. cit., p. 386.

57. Generally, see Baker, o. cit., pp. 582-693; Mogelever, op. cit., pp. 385-419.

58. Dr. Harold R. Relyea, Analyst in American National Government, Government and General Research Division, Congressional Research Center, Library of Congress, for the Select Committee on Intelligence and printed in *Supplemental Reports on Intelligence Activities, Book VI, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, United States Senate, 1976.

59. G.R. Tredway, *Democratic Opposition to the Lincoln Administration in Indiana*. Indianapolis, Indiana Historical Bureau, 1973, pp. 209-210.

60. Ibid., p. 216.

61. Milton, op. cit., pp. 76-77.

62. Tredway, op. cit., p. 217.

63. Ibid., p. 216; also see William Dudley Foulke. *Life of Oliver P. Morgan* (Vol. 1). Indianapolis-Kansas City, The Bowen-Merrill Company, 1899, pp. 405-407; also, for a view of Carrington's spies reporting on each other and otherwise over-ingratiating themselves with unsuspecting rebels, see Tredway, op.cit., pp. 216-217.

64. Tredway, op. cit., p. 218.

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Imperial Germany's Sabotage Operations In The U.S.

As the industrial revolution swept across Western Europe, the nations there sought an outlet for their manufactured products in the less developed regions of the world. Great Britain grabbed the lion's share, but in the decade after 1870 the other European nations moved aggressively to obtain what was left. An imperialistic rivalry was born. France wanted to restore her national spirit after her defeat in 1870. Germany, with an astonishing industrial development and with the most powerful army in the world, demanded "a place in the sun." Russia desired an ice-free port on the Pacific Ocean and Japan searched for new markets to support her overflowing population. In this scramble for markets and territories, Africa was carved up into colonies and protectorates and there was every indication that the same fate awaited Asia.

The rivalries between these European nations were a continuous menace to peace. With Europe wallowing in an orgy of militarism, imperialism, nationalism and intelligence intrigues, it was unlikely that any balance of power could be maintained. It was finally upset in the Balkans where racial hatred and nationalist strivings were complicated by the conflicting ambitions of Austria and Russia.

It was June 28, 1914 in late morning as an inconspicuous Bosnian student waited by a cobble street in Sarajevo. He observed Archduke Franz Ferdinand and his wife drive by on their way to the town hall. The student was Gavrilo Princip, a member of the Young Bosnians, a group that was organized in 1910 to protest against the annexation in 1908 of Bosnia and Herzegovina. A few minutes earlier, another member of the Young Bosnians had tossed a bomb into the Archduke's car but it was deflected by Ferdinand and exploded beneath the security vehicle following the Archduke's car.

After his town meeting, the Archduke ordered his driver to take him to the hospital to visit the injured security guards. Although the driver wanted to take a different road, the Archduke insisted on using the same route where the attack took place. Princip saw them returning and as the Archduke's car passed slowly by, he stepped from the crowd into the street and fired several rounds at point-blank range into the archduke and his wife, killing both. World War I began less than two months later.

Following a century-old tradition, the United States declared a policy of neutrality. President Woodrow Wilson attempted to steer a neutral position among the belligerents but several major influences within the United States eventually caused this policy to be abandoned.

The least effectual of these influences was the heterogeneous character of the American population. When the war in Europe began, about one-third of the American population was foreign-born or of foreign-born parentage. It was this group that the European propagandists first focused their efforts. They had limited success but, in the last analyst,

targeting this audience was of little importance in determining how the United States finally acted.

The other three influences played a greater role in President Wilson's decision to declare war on Germany. The first of these was the economic affect the war had on the United States. It caused a tremendous upswing in the economy. The war was destroying the industrial and agricultural base in Europe and the United States became the major source for all types of commodities, particularly foodstuffs and munitions. All this meant a sudden and widespread prosperity. The profits came almost entirely from the Allied Powers. As Great Britain tightened the blockade around Germany and extended the contraband list, it became difficult to export to the Central Powers (Germany and its allies).

While economic interests were tying the United States more closely to the allied nations, organized propaganda was effectively used. Both the Allied and Central Powers exerted themselves to the utmost to influence public opinion, but in this effort, the allied Powers were far more successful. The success was due to Great Britain's control of the cables and strict censorship, which allowed only the news it wanted Americans to hear from the war front to reach the United States. Honest, unbiased news largely disappeared from American papers after August 1914. According to one journalist, the British censors eliminated three-quarters of the dispatches from American correspondents in Central Europe.[83] The British portrayed themselves as saviors of the world from the Teutonic hordes. The French reminded Americans of their contributions to American independence. Against the skillful Allied propaganda, the blundering efforts of Germany to subsidize the American press and influence American opinion made scant progress and were eventually utterly discredited by 1915.

As Franz Rintelen admitted,

> *Everybody in Germany was raging. Large packets of newspapers had been received from America, and there was not a word of truth in the reports that were being made about the military situation. We were particularly indignant at the numerous stories of atrocities, which had found their way into the American papers. With this kind of journalism it was inevitable that not only the mass of newspaper readers, but gradually also official circles in America, would assume an anti-German attitude.*[84]

The last major influence was the violations of America's neutral rights by the Germans. To the Germans, the United States remained a problem and they had to develop a strategy to deal with it. The strategy they chose was to keep the United States neutral while at the same time closing off the flow of food and war material from the United States to the Allied Powers. The first part of the strategy depended on diplomacy and the second relied on sabotage.

To conduct this strategy in the United States, the German High Command selected Johann Heinrich Count von Bernstorff, the German Ambassador to the United States.

Count Johann von Bernstorff,
German Ambassador to the United States.
PHOTO

"Bernstorff, a seasoned diplomat, came to Washington as Imperial German Ambassador during a placid and superficially cordial period in

German-American relations and played very well what was largely a ceremonial role before the summer of 1914. However, the outbreak of the World War, and particularly his government's decision in early 1915 to launch an unrestricted submarine campaign against merchant shipping, thrust Bernstorff into the center of a diplomatic firestorm that grew in intensity and culminated in an American declaration of war against the German Empire in 1917."[85]

In July 1914, nine days after the Archduke is assassinated in Sarajevo, Bernstorff left the United States for Germany. He believed his summons home was to consult with the German Foreign Ministry. Instead, he met with Section 3B, military intelligence, of the German General Staff. Bernstorff was told that German military intelligence had no experienced officers it can devote to the United States. They informed Bernstorff that all their best officers and espionage agents had been deployed against Germany's enemies in the war, Great Britain, France and Russia. Even if Section 3B could identify a sufficient number of trained agents and mobilize them against the United States, the odds of infiltrating them into America undetected was remote.

Section 3-B told Bernstorff that he was to be Germany's espionage and sabotage chief for the Western Hemisphere. To support his effort, he would be assisted by Captain Franz von Papen, currently military attaché in Mexico who was to be transferred to the United States, Captain Karl Boy-Ed, naval attaché, and Dr. Heinrich Albert, the commercial attaché who would be the finance officer for the sabotage operations. With this small group of men, Bernstorff had to carry out the German strategy against the United States.

Captain Karl Boy-Ed
PHOTO

With Bernstorff in Washington, the other three officials established their operational base in New York City. Albert opened an office at 45 Broadway and von Papen and Boy-Ed use an office in the Wall Street area. Their first task was to identify and recruit agents for their sabotage and subversion operations. The early efforts of the group were ragged and ineffectual.

One of the first enlistee in their plans was Horst von der Goltz, who devised a plan to dynamite the Welland Canal, which linked Lakes Ontario and Erie on the Canadian side of the border, just west of Buffalo. Shippers to transport raw material to American munitions and commodities companies used the Canal.

Using the pretext of blasting tree stumps on a farm, a Captain Hans Tauscher, the Krupp representative in New York obtained dynamite from the Dupont Powder Company. Tauscher gave the dynamite to von der Goltz who stored it at a German safehouse operated by Martha Held. Held's row house at 123 West 50th Street *[FAS note: should be West **15th** Street]* in Manhattan was also the gathering place for German ship captains who docked in New York.

To help him in his plan, von der Goltz, using the alias Bridgeman H. Taylor, engaged the services of several men. Several days after obtaining the dynamite, the small group of saboteurs left New York for Buffalo by train. Following them was the Secret Service. After surveying the canal and seeing that it was heavily guarded, the men got cold feet and abandoned the plan.

Von Papen reported back to Berlin about the failure and von der Goltz was recalled to Germany. Instead of being reprimanded, German military intelligence ordered him to return to the United States. On his return, the ship stopped in England and von der Goltz walked in to Scotland Yard with an offer of information on German air raids on Britain. Scotland Yard arrested him and during his interrogation, he informed them that he prevented a sabotage plot against the Welland Canal. The British extradited him to the United States to stand trial.

Once he was in the hands of the American authorities, von der Goltz repeated his story about the sabotage plot. He also guided Department of Justice officers to the safehouse run by Martha Held. Held was interviewed about the dynamite by the Justice officers but claimed she was asked to hold a suitcase but did not know what it contained. Although Justice was aware of this safehouse, they never investigated nor conducted surveillance against it. Horst von der Goltz was tried convicted and sent to prison in 1916.

The next operational plan conducted by von Papen and Albert was to obtain U.S. passports for use by German army reservists residing in the United States to return to Germany to fight against its enemies. After the reservists reached Germany, military intelligence took the passports and used them to send spies into Britain, France and Russia. The problem was that the Department of State had tightened the loose passport regulations by requiring more extensive proof of American citizenship and a photograph of the applicant. To circumvent the new regulations, the Germans resorted to passport fraud.

Notice in an American Newspaper advising travelers of the danger of sailing on British Ships.
PHOTO

To conduct the operation, von Papen and Albert recruited a German, Hans von Wedell. Von Wedell devised a plan to have American longshoremen, sailors and street bums in the New York environs apply for American passports. Once they had the passports, von Wedell purchased the passport from them for a small amount of money, usually from ten to twenty-five dollars. It was a great scheme and worked well until some of the street-smart individuals realized what was happening and attempted to blackmail von Wedell for more money. American authorities got wind of the scam and began to investigate but Von Wedell left for Cuba before they had a chance to identify him.

Instead of curtailing their operation after von Wedell left, the Germans recruited another individual, Carl Ruroede, to take von Wedell's place. Ruroede's career as a German agent was short-lived. The Department of Justice's investigation had zeroed in on the location of the office used by the Germans. An undercover agent, Albert Adams, was sent in to make contact with Ruroede. Posing as a Bowery bum with pro-German views, Adams was immediately enlisted to procure American passports.

With Department of State support, Adams was given four passports to give to Ruroede. Ruroede, an inexperienced agent, made the foolish mistake of showing Adams how the passports were doctored and saying that the passports were going to be used by four Germans to sail to Europe in a few days.

On 2 January 1915 the Department of Justice arrested Ruroede. The ship, *Bergensfjord*, carrying the four Germans using the false passports, was stopped in the harbor and boarded by Justice officials who

promptly arrested the men. On board the ship was von Wedell but the officials missed him.

A few days prior to sailing aboard the Bergensfjord, von Wedell wrote the following letter, dated 26 December 1914, to von Bernstorff:

> "His excellency The Imperial German Ambassador, Count von Bernstorff, Washington, D.C. Your Excellency: Allow me most obediently to put before you the following facts: It seems that an attempt has been made to produce the impression upon you that I prematurely abandoned my post, in New York. That is not true.
>
> I. My work was done. At my departure I left the service, well organized and worked out to its minutest details, in the hands of my successor, Mr. Carl Ruroede, picked out by myself, and, despite many warnings, still tarried for several days in New York in order to give him the necessary final directions and in order to hold in check the blackmailers thrown on my hands by the German officers until after the passage of my travelers through Gibraltar; in which I succeeded. Mr. Ruroede will testify to you that without my suitable preliminary labors, in which I left no conceivable means untried and in which I took not the slightest consideration of my personal weal or woe, it would be impossible for him, as well as for Mr. Von Papen, to forward officers and `aspirants' in any number whatever to Europe. This merit I lay claim to and the occurrences of the last days have unfortunately compelled me, out of sheer self-respect, to emphasize this to your Excellency.
>
> II. The motives which induced me to leave New York and which, to my astonishment, were not communicated to you, are the following:
>
> 1. I knew that the State Department had, for three weeks, withheld a passport application forged by me. Why?
>
> 2. Ten days before my departure, I learnt from a telegram sent me by Mr. Von Papen, which stirred me up very much, and further through the omission of a cable, that Dr. Stark had fallen into the hands of the English. That gentleman's forged papers were liable to come back any day and could, owing chiefly to his lack of caution, easily be traced back to me.
>
> 3. Officers and aspirants of the class which I had to forward over, namely the people, saddled me with a lot of criminals and blackmailers, whose eventual revelations were liable to bring about any day the explosion of the bomb.
>
> 4. Mr. Von Papen had repeatedly urgently ordered me to hide myself.
>
> 5. Mr. Igel had told me I was taking the matter altogether too lightly and ought to-for God's sake-disappear.
>
> 6. My counsel…had advised me to hastily quit New York, inasmuch as a local detective agency was ordered to go after the passport forgeries.
>
> 7. It had become clear to me that eventual arrest might yet injure the worthy undertaking and that my disappearance

would probably put a stop to all investigation in this direction.

How urgent it was for me to go away is shown by the fact that, two days after my departure, detectives, who had followed up my telephone calls, hunted up my wife's harmless and unsuspecting cousin in Brooklyn, and subjected her to an interrogatory.

Mr. Von Papen and Mr. Albert have told my wife that I forced myself forward to do this work. That is not true. When I, in Berlin, for the first time heard of this commission, I objected to going and represented to the gentleman that my entire livelihood which I had created for myself in America by six years of labor was at stake therein. I have no other means, and although Mr. Albert told my wife my practice was not worth talking about, it sufficed, nevertheless, to decently support myself and wife and to build my future on. I have finally, at the suasion of Count Wedell, undertaken it, ready to sacrifice my future and that of my wife. I have, in order to reach my goal, despite infinite difficulties, destroyed everything that I built up here for myself and my wife. I have perhaps sometimes been awkward, but always full of good will, and I now travel back to Germany with the consciousness of having done my duty as well as I understood it, and of having accomplished my task.

"With expressions of the most exquisite consideration, I am, your Excellency,"

Very Respectfully,

/s/ Hans Adam von Wedell

Ruroede was tried, convicted and sentenced to three years in prison. The four reservists, pleading guilty, protested that they had agreed to return to Germany on false passports out of patriotism, were fined $200 each. As for von Wedell, the British took him off the Bergensfjord on the high seas off the coast of England but the British ship was torpedoed and von Wedell went down with the ship.

Heinrich Friedrich Albert [86]

On 27 July 1915 an ad appeared in the New York Evening Telegram. It read: "Lost on Saturday. On 3:30 Harlem Elevated Train, at 50th St. Station, Brown Leather Bag, Containing Documents. Deliver to G.H. Hoffman, 5 E. 47th St., Against $20. Reward." The ad was seeking to recover the lost briefcase of Heinrich Friedrich Albert, a German lawyer, who was serving as Commercial Attaché and financial advisor to the German Ambassador to the United States, Count Johann von Bernstorff. He was also the paymaster for the German sabotage operations in the United States.

To complement their sabotage operations, the Germans invented the idea of establishing a cover company to conduct a covert operation to induce labor unrest and encourage strikes by laborers at munitions companies in the United States. The conceived plan had three goals: the cover company was to purchase vital raw materials and manufacturing equipment and tools to keep them from reaching legitimate companies; to obtain armaments and powder contracts but not honor them; and to pay astonishing high salaries to its workers, causing other companies to do the same or face worker troubles. The plot called for the Bridgeport Projectile Company, the name selected for the cover company, to begin

construction in Bridgeport, Connecticut in April 1915 and ready for operations in September that same year.

It was a bold plan that never came to fruition because of carelessness on the part of Albert. Albert was at the offices of the Hamburg-Amerika Line, at 45 Broadway in lower Manhattan. George Sylvester Viereck, the editor of the Fatherland, a pro-German publication, joined him there. Viereck was also under investigation by the Secret Service for violations of America's neutrality laws.

Before President Woodrow Wilson signed an Executive Order on 14 May 1915, authorizing surveillance of German Embassy personnel in the United States, the Secret Service was limited to watching clerks, technicians and errand boys for the Germans. After Wilson's order, William J. Flynn, chief of the Secret Service, immediately assigned a ten-man squad to keep the Germans under surveillance. Frank Burke, a young agent, was named head of this unit, located on the top floor of the Customs House at the Battery. Burke initiated coverage on all the significant people he knew involved in German activities, including Viereck.

Viereck, not a trained operative of the Germans, failed to notice that he was under surveillance. Secret Service agent, William H. Houghton, had followed him to the Hamburg-Amerika Line offices. After Viereck entered the building, Houghton telephoned the Custom House in New York and suggested to Frank Burke, that he should join him in case Viereck exited the site with another individual.

Burke and Houghton waited until mid-afternoon before Viereck and Albert came out of the building and proceeded to the uptown-elevated train station at Rector Street. The Germans sat in the middle of the car while Houghton sat opposite them and Burke sat behind them. The Secret Service agents did not know the identity of Viereck's companion at the time but suspected it might be Albert, a man they heard of but never saw before.

Albert was, indeed, an unknown individual to American counterintelligence. He was six-feet tall, heavy-set, and had crosscut saber scars on his right cheek, a dimpled chin and a stubby dark moustache. Every day, Albert rode the elevated train between his office at 45 Broadway and his Ritz-Carlton hotel room. He always carried his briefcase, which was stuffed with Berlin telegrams, communications from German agents, financial records and subordinate reports.

Viereck disembarked at the Thirty-third Street stop, trailed by Houghton. Burke remained on the train watching Albert, who was carrying a briefcase. A woman came on board the train and sat opposite Albert. As the train proceeded to the next stop, Albert closed his eyes and dozed off, his briefcase resting on the seat against the wall of the car.

When the train stopped at Fiftieth Street and was ready to move again, Albert suddenly awoke and realized it was his stop. He sprang from his seat and raced out the back door. The woman called to him about his briefcase but Burke picked it up and rushed out the front door. Albert realizing he left his briefcase on the train, reentered the train only to find it missing. He again ran out of the train looking for the person who took the briefcase.

Seeing Albert between him and the exit stairs, Burke partially covered the briefcase with his coat and using other passengers as cover, stood against a wall until Albert went down the stairs. Burke also made his

way down the stairs behind Albert. When Burke reached the street, Albert spotted him and began to give chase.

Burke hopped on a streetcar heading uptown. He quickly told the conductor that a crazy fellow who had just caused a big scene on the elevated train was pursuing him. The conductor seeing Albert racing after the streetcar, arms flailing, told the motorman not to stop at the next corner. The streetcar continued on, leaving Albert waving helplessly behind.

Knowing he could not retrieve his briefcase, Albert proceeded to the German Club on Central Park West, where he held an impromptu meeting with German Embassy military attaché, Captain Franz von Papen, and naval aide, Captain Carl von Boy-Ed. Based on what Albert told them, they decided that a common thief had taken the briefcase and, after searching through the papers, would find nothing of value. The best way to get the papers back, they reasoned, was to place an ad in the newspapers offering a reward.

When Burke opened the briefcase and saw the papers, he notified Flynn. Flynn, in turn, contacted Secretary of the Treasury, William G. McAdoo, at his summerhouse in North Haven, Maine. Flynn took the briefcase to McAdoo, who with his aids decided that the contents proved beyond doubt that the German Embassy in the United States was violating the neutrality laws. McAdoo then took the papers to President Wilson.

The President asked McAdoo to consult with Col. Edward House, the president's closest advisor, and Secretary of State Robert Lansing. The United States government was in a bind because any use of the papers by the government would show that a government agency had stolen the papers of a fully accredited diplomat. Colonel House suggested that the contents of the papers be given to one of the newspapers to publish. The New York World was chosen and selected papers were given to the editor, Frank I. Cobb, who agreed to publish them without attribution in return for exclusive use of the documents.

The newspaper published the contents on page one and two succeeding pages 15 August 1915. The paper reported that Albert was the master German spy, who, along with van Papen, devised the Bridgeport Projectile Company operation and obtained approval for it from the German military general staff. According to the newspaper, it was their idea to divert legitimate orders from the British and French away from honest American munitions firms to their cover company with the intention of simply storing the gunpowder and shell casings. In fact, they hired an American industrialist, George Hoardley, to build and operate the plant so as to appear it was a genuine business.

The New York World also reported that the German government was financing Viereck's newspaper, The Fatherland. In letters between Viereck and Albert, published on the front page of the New York World, it showed that Albert was providing $1,500 monthly to Viereck. It further revealed that Albert was pushing for more say in how the paper was to be managed.

He told Viereck that future payments were being held in abeyance until there was an understanding between them about the future direction of the paper's policy and that he, Albert, had a voice in its financial management.

Other newspapers picked up the story and were constantly hounding Albert for information. Albert, to try to calm the waters, gave the New York World a 2,500-word statement to print in its entirety. In his

statement, he claimed that the press misinterpreted his papers. No one believed him and he was often mocked by being referred to as "the minister without portfolio."

Although Secretary of the Treasury, McAdoo wanted Albert recalled by the German government, no official U.S. action was taken against him. When the war began, Albert returned home to Germany where he was given responsibility for foreign assets in the country. When the war ended, he took charge of army surplus sales. In 1923, Chancellor Stresmann asked him to form a government in the Weimar Republic but he was unsuccessful in getting the agreement of the various parties. Instead, he left government to become a rich lawyer and advisor to foreign corporations in Berlin. During Hitler's Third Reich, Albert was on the sidelines, having no official role. After World War II be resumed his career in international business.

Paul Koenig

On 22 August 1914, von Papen designates Paul Koenig to recruit and supervise a gang of saboteurs. Koenig owned a small detective company, the Bureau of Investigation that handled requests from the Atlas Line, a subsidiary of the German shipping company, the Hamburg-Amerika Line. To accomplish this new assignment, he established a Secret Service Division within his company and instituted strict operational security methods. He prohibited his agents from meeting with him at his office. Instead, he used various locations, the identities of which were coded using a "safety block system." For example, a street indicated during a telephone conversation meant that the actual meeting would occur five blocks further uptown from the street mentioned.

Paul Koenig

PHOTO

Over the next year he began to put together his sabotage rings. Koenig selects the dock area as the logical place to recruit his members. However, his activities come to the attention of the New York City Bomb Squad. The Bomb Squad was initially organized to investigate crimes of violence but as time goes by, the Squad's attention increasingly focused on the Germans.

One day, members of the Bomb Squad noticed a man apparently working the docks. Inquiries determined that this individual is Koenig, who is employed by the German steamship line. What struck the Bomb Squad as unusual about Koenig's activities, was that they did not appear to be legitimate. The German steamship lines had attempted to send ships to sea under false cargo manifests in order to supply German naval raiders. Because of this violation of American neutrality, the entire steamship line was tied up in Hoboken for the duration of the war. With absolutely nothing to do, the Bomb Squad felt it odd for Koenig to be so busy. They launched an investigation into his activities.

During contact with the Department of Justice, the Bomb Squad was informed that Koenig had previously come to their attention but they eventually dropped their surveillance when they came to the conclusion that he was not worth the effort. The Bomb Squad felt otherwise. They surveilled Koenig to several popular German hangouts in the city; one of which was the German Club in Central Park West.

This same club also frequently hosted Albert, Boy-Ed and von Papen.

The Bomb Squad also determined that Koenig conducted much of his business out of his office. Knowing that any attempt to enter the building to collect information would probably come to Koenig's attention, the Bomb Squad placed a tap on his telephone. For some time nothing happened until one day they heard a person calling Koenig several unspeakable names during their conversation. Several days later, the same person called again, which allowed the Bomb Squad to identify the telephone number from which the person placed the call. It was a public telephone at a bar.

The Bomb Squad contacted the bartender who was able to provide a description of the individual using the telephone. The bartender did not know his name but thought he lived at a nearby address. Checks in the neighborhood allowed the Bomb Squad to identify the caller as George Fuchs. Fuchs was a distant cousin of Koenig who recruited Fuchs to spy on the Welland Canal. Later, Fuchs moved to New York City where Koenig hired him to work for $18 a week.

To make contact with Fuchs in a non-threatening way, a letter is sent to him by the Bomb Squad offering Fuchs a possible job. A meeting is later arranged and an undercover police officer, posing as the company representative, met with Fuchs. The undercover officer was able to gain Fuch's confidence. Fuchs confided to the officer the details of the Welland Canal and how he came to New York to work for Koenig. He told the officer that Koenig fired him because of his constant feuding with one of Koenig's operatives and his drinking and disorderly habits. Fuchs was also bitter because Koenig refused to pay him for one days work, a total of $2.57.

The Bomb Squad contacted the Bureau of Investigation and a few hours later, Koenig is arrested. A search of his house turned up his little black, loose-leaf book. In it, Koenig meticulously kept a record of all his agents and their assignments right up to the previous day.

Franz von Rintelen

On 3 April 1915, Franz von Rintelen arrived in New York City aboard the S/S Christianiafjord from Sweden. Before leaving for the United States, he attempted to secure an American passport from the American military attaché in Berlin, Major Langhorne, but was unsuccessful. Instead, he procured a Swiss passport, originally issued to Emily V. Gasche but altered the name to Emile V. Gasche.

Franz von Rintelen

PHOTO

Rintelen's mission was to prevent the shipment of munitions from the United States to the Allies. He claimed he was sent by the German Naval Ministry to replace Carl Boy-Ed, who was considered inefficient and unsatisfactory. He also claimed to have acted independently of Boy-Ed, von Papen and Ambassador Bernstorff. Instead of seeking assistance from the Hamburg-American line, which was used by Boy-Ed, von Papen and Bernstorff, he went to the German Lloyd line.

After his arrival, he probably conferred with Albert, the commercial attaché and sabotage financier, about the current situation in the large American munitions plants and to review financial information gathered by the Reichspress Bureau. He then met with von Papen to obtain the services of Walter Theodore von Scheele. Scheele was a major in the German Army and an intelligence agent. He came to the United States on an industrial espionage mission but was seconded to von Papen after the latter's arrival. Von Papen agreed to Rintelen's

request and Scheele began to build incendiary bombs for use abroad supply ships carrying food and munitions to the Allies.

Besides Scheele, Rintelen gathered about him a select group of recruits to carry out his operational plans. Within this group was an Executive Committee composed of Scheele; Eno Bode, a German citizen and superintendent of the Hamburg-American line; Erich von Steinmetz, also known as Captain Steinberg, Stein, H. Reichart, and Harold Rasmussen, who reported entered the United States disguised as a woman and carrying disease germs; and Otto Wolpert, a German citizen who was the pier superintendent of Atlas Lines. The Executive Committee met on Saturday afternoons at the Hofbrau House at 27th and Broadway in New York City.

Rintelen's plans called for fomenting strikes, firebombing shipping, instigating embargoes and pacifist propaganda, fomenting revolution in Mexico, purchasing munitions for the German government and shipping supplies to Germany. To finance his operation, Rintelen received funds from the Reichsbank through Richard A. Timmerscheidt, a naturalized U.S. citizen of German origin. Timmerscheidt was a partner in the bank of Ladenberg Thalmann & Co. He was also a German finance agent for espionage, propaganda and commerce. Scheele testified that Rintelen's expenditures of $10,000 and over were subject to approval by Albert. Most of the funds expended were not paid directly from Rintelen's bank account but rather was disbursed in certificates of deposit payable to bearer.

On 20 April 1915 Scheele delivered the first lot of 150 firebombs to Wolpert at a meeting at Carl Schimmel's office. Schimmel was responsible for obtaining information as to the exact sailing dates of vessels. Scheele had made the bombs in the engine room of the S/S Friederich der Grosse, NGL pier, in Hoboken. Scheele had constructed each incendiary device to look like a cigar-shaped tube. The tube was sealed at both ends. A thin copper disk separated two chambers within the tube. One of the chambers contained sulfuric acid and the other was filled with picric acid.

The first operation was planned for New Orleans. Steinberg had originally traveled there on 4 April to make arrangements for the distribution of the tetanus, foot and mouth and meningitis germ cultures that he had smuggled into the country. However, the cultures had lost their vitality and he was attempting to revive them but was unsuccessful.

Rintelen ordered Steinberg to return to New Orleans with Bode to recruit individuals to plant the firebombs on ships sailing from New Orleans. They recruited Maurice C. Conners, an American citizen. They offered Conners $25,000 cash for planting the bombs and $5,000 for each ship disabled. Before any activity took place, Rintelen canceled the contract, recalled Steinberg and Bode and sent Scheele to New Orleans. Scheele contacted Conners to renegotiate the contract and offered $5,000 in cash and $10,000 in notes. When Conners accepted the terms, Rintelen, using the alias Hansen, confirmed the arrangements in a telegram. Rintelen sent $5,000 to Scheele through Mechanics and Metals Bank in New York City to the Bank of New Orleans. Scheele withdrew the funds and paid Conners in cash.

Conners recruited two other individuals to help him and all three men traveled to New York. There they conferred with Steinberg, Bode and Scheele, who provided the three men with 80-90 firebombs. The three men returned to New Orleans but never carried out the plan. Conners sold the firebombs to a junk dealer.

Although the first sabotage attempt against shipping was a failure, Rintelen soon saw success. He persuaded a German-American woman he knew to write to the Russian military attaché in Paris, Count Alexis Ignatieff, who was an old friend of hers. In her letter, she informed the Count that she was acquainted with an American importer, E.V. Gibbons (in reality, Rintelen) who wanted to import some wine into the United States. The Count agreed to help and told the woman to have Gibbons use to his to make the purchase. Rintelen did so and promptly paid for the shipment.

Rintelen then wrote to the Count, offering the services of his import-export company to supply goods to Russia. The Count advised Rintelen to contact the Russian purchasing agents in New York and again lent his name to establish Rintelen's credentials.

The Russians awarded Rintelen's false company, E.V. Gibbons & Co. a large contract to deliver munitions and tin meat products. With the Russian contract in his pocket, Rintelen obtained a three million-dollar loan, which he deposited in a bank. Rintelen did no intent to fulfill the contract but the Russians contacted him to request a shorter delivery date and offered to pay a bonus.

Apprehensive that his intrigue might be exposed, Rintelen put together a partial shipment and had it loaded on the *Phoebus*. The Russians paid Rintelen his bonus at the docks. Unknown to them and to the guards that patrolled the decks of the ship with carbines at the ready to discourage pro-German rashness, anti-British stevedores had dropped at least six of Scheele's incendiary devices in hard-to-see crevices in the holds now piled tier upon tier with artillery shells for Russia.

Later *Shipping News* reported: Accidents. *S.S. Phoebus* from New York —caught fire at sea. Brought into port of Liverpool by *H.M.S. Ajax*.

The Russians did not suspect anything. Rintelen again offered his services and filled two large cargo vessels with material. To cover his plans and divert any suspicion from falling on him, Rintelen hired detectives to guard the vessels. After the ships left port, they met the same fate as the *Phoebus*.

The Russians continued to deal with Rintelen until several barges of ammunition suddenly sank as the barges were moved from the Black Tom Island terminal to ships waiting in the harbor. The Russians did not suspect Rintelen of any wrongdoing but demanded immediate delivery of the rest of their large order from him. Rintelen informed the Russians that he had no intention of honoring their order. Following his confrontation with the Russians, Rintelen moved quickly. He paid off his loan at the bank and liquidated his cover company. By the time the Russians obtained legal counsel, the firm of E.V. Gibbons no longer existed.

On 2 May 1915, the British freighter *Kirk Oswald* sailed from New York bound for Archangel, Russia but was diverted to Marseilles, France. On board the ship, French police discovered the incendiary devices and contacted the New York City Bomb Squad. The Bomb Squad began an investigation and pursued several dead end leads. They initially suspected that an individual or individuals had somehow placed the incendiary devices in the sugar bags as the bags were transported from small boats to the ships for loading. Their investigation failed to discover any saboteurs but they did find stealing of sugar by several of the barge captains.

The Bomb Squad had exhausted all their leads and their investigation was going nowhere until they received a telephone call from the French

military attaché in New York. The attaché informed the Bomb Squad about a man who was believed to be involved in purchasing explosive material.

Officers from the Bomb Squad met with the man identified as Wettig. Wettig told his story and cooperated with the officers, who accompanied Wettig as he purchased the material and then delivered it to an address. A check by the officers revealed that the address was a delivery drop site. The actual destination for the package was a garage on Main Street in Weehawken, New Jersey. The officers also determined that the person to whom the package was destined was individual by the name of Fay.

Robert Fay's Suitcase

PHOTO

The officers tried to deliver the package to Fay but he was out when the arrived. They left the package but placed surveillance on the garage. The Bomb Squad picked up Fay's trail and surveilled him and another individual along the Palisades where the two men stopped and disappeared into a wooded area. No attempt was made to follow them.

Surveillance continued on Fay for several days. Because the Bomb Squad had no arrest powers in New Jersey, the Bomb Squad contacted the Weehawken police and also the Secret Service. The three agencies agreed to cooperate and conducted joint surveillance on Fay. When Fay returned to the wooded area along the Palisades, surveillance team members followed them. Fay was arrested and confessed that he was a German agent but initially did not implicate anyone else. Later, he told the authorities that he had been waiting for word from von Papen or Boy-Ed to begin his sabotage operations. He said he never planted any incendiary bombs on any ships. He was tried, convicted and sentenced to eight years in prison. After a month in jail, Fay escaped and traveled to Baltimore where he met with Koenig who provided him with funds and instructed Fay to go to San Francisco. Fay, who feared that he would be killed, disobeyed and fled to Mexico and then to Spain, where he was finally captured in 1918.

Robert Fay being fingerprinted after his arrest.

PHOTO

The Bomb Squad was no closer to catching the saboteurs. A decision was made to send several German-speaking officers into the bars to strike up conversations with the customers. One officer got lucky when one of patrons asked the officer if he would like to be introduced to a man who was doing some work for the Germans. The officer, who used the cover story that he was a special agent for German Ambassador von Bernstorff, was subsequently presented to Captain Charles von Kleist.

At their first meeting, von Kleist never questioned the officer's bona fides but proceeded to tell the officer about an individual named Dr. Walter T. Scheele, who was using von Kleist in his laboratory in Hoboken. According to von Kleist, Scheele claimed to be a member of the German Secret service. Although the laboratory was ostensibly fabricating agricultural chemicals, von Kleist said its genuine operation was to manufacture incendiary devices. He provided further information on the other members involved in the operation and how the devices were assembled. The reason von Kleist unburdened his soul to the officer was his anger at Scheele because he was owed $134 in back pay and Scheele would not pay up.

The officer asked von Kleist if he would be willing to meet with a man, who was close to Wolf von Igel and in a position to get von Kleist his back pay if what he said was true. Without any hesitation, von Kleist agreed.

Several days later the Bomb Squad officer and one of his colleagues, posing as the man close to von Igel, met with von Kleist. Again von Kleist repeated his story and offered to show the two officers proof. He took them to the back yard of his house where he dug up one of the empty bomb containers.

The officers then proceeded to arrest von Kleist and took him to their headquarters. Thomas Tunney, the chief of the Bomb Squad, interviewed von Kleist, who repeated his story. After von Kleist was finished, Tunney stepped out of the room for several minutes. A workman was nearby repairing a light fixture and von Kleist, having heard the workman speak some English with a German accent, asked the workman if he would deliver notes to several people. The workman agreed.

Oblivious to the fact that he had been conned twice by two police officers pretending to be someone they were not, von Kleist readily accepted the workman as a legitimate workman. In fact, the workman was another police officer planted in the room. The police used the notes written by Von Kleist as calling cards.

Unfortunately, Scheele escaped arrest and fled to Cuba but was later arrested by the Havana police. The other members of Scheele's operation and von Kleist were tried, convicted and sentenced to 18 months in jail.

In late April, Rintelen met David Lamar at the offices of Frederico Stallforth, a German citizen and financier, who provided funds to Poncho Villa. Lamar, a U.S. citizen, was formerly employed by J.P. Morgan & Co. but was dismissed and became a crooked stock manipulator known as the "Wolf of Wall Street." Rintelen and Lamar conceived a plan to foment strikes in munitions factories and shipping agencies. Their goal was to force an embargo on munitions by Presidential or Congressional action, hinder the manufacture and shipping of munitions by attacks on financial institutions and by litigation against pro-Ally business organizations, to create a peace sentiment in the country, and to crystallize pro-German sentiment.

Rintelen provided $300,000 to $400,000 to Lamar, who was considered to be the brains and the propelling force behind the conspiracy. Lamar's experience on Wall Street and his anti-trust agitation, his knowledge of conditions and individuals, his genius for manipulation and his lack of scruples, seemed an ideal fit for Rintelen's plan. However, Rintelen later realized that Lamar had swindled him.

Lamar's scam of Rintelen did not mean that the plan was not put into effect. The group hired Frank Buchanan, former President of the International Union of Structural Workers, who was serving in Congress as the representative of the Seventh District (Northern Chicago area). Buchanan was expected to introduce and lead the fight in Congress for embargo legislation. He served the cause well until he was paid; thereafter he went on a prolonged drunk and was useless.

Rintelen was now under intense investigation by American authorities. He decided to leave the United States. Having failed to procure an American passport, he used his Swiss passport in the name of Emile Gasche on which he had entered the U.S. He departed the United States on 3 August 1915 aboard the *Noordam*. When he arrived in Britain on

13 August, British port Control officers arrested him. The British interned him.

Rintelen and several others were indicted by a Federal Grand Jury in December 1915, under the Sherman Act for conspiracy to instigate strikes. However, it wasn't until April 1917 that Rintelen was extradited to the United States from Great Britain. Rintelen was tried, convicted and sentenced to one year in prison. This was the first of several indictments of Rintelen. He was later indicted, tried and convicted of a conspiracy to obtain a U.S. passport by perjury, for a plot to destroy the ship S.S. *Kirk Oswald*, and for firebomb conspiracy.

In his jail cell in the Tombs, in New York City, Rintelen asked the Swiss Embassy to protest to the German government concerning his treatment and requested retaliation against members of the Allied Mission to Russia. The German government, through the Swiss Embassy, presented a note to the State Department regarding Rintelen. In the note, they stated that they have been unable to effect an improvement in the situation of Rintelen or his release and threaten reprisals. They proposed to exchange Rintelen for one Siegfried Paul London, who was condemned in Warsaw as a spy.

Secretary of State Robert Lansing answered the note, refusing to consider the release of Rintelen. He denied that reprisals in such a case would be legitimate and suggested that the German Government consider the large number of German subjects interned in the United States who could be made the subject of similar action.

Black Tom Island

The single, most important munitions and gunpowder assembly and shipping center in the United States to supply the Allies was located at Black Tom Island in New York harbor. Because of its importance, it became an obvious target for sabotage. For more than one year the German sabotage leaders, von Papen and Boy-Ed, focused on the facility and viewed it as a critically important target that had to be hit. Despite the recall of von Papen and Boy-Ed in 1915, the targeting of the Black Tom Island facility continued.

On Sunday, 30 July 1916 New York harbor "erupted in one of the greatest military explosions prior to the holocaust of Hiroshima nearly four decades later."[87] Several days after the explosion had destroyed the entire facility, federal officials and the media attributed the massive blast to carelessness not to sabotage. In fact, the investigation by the police departments of New York and New Jersey and by federal authorities, which lasted many years, failed to clearly determine how the tremendous blaze originated.

The Bayonne police department acquired the first lead when Anna Chapman contacted them to report her suspicions regarding a lodger at her boarding house. She told Captain John J. Rigney, chief of the police department that her lodger, Michael Kristoff, had returned to the house about 4 A.M. the morning of the explosion and proceeded to pace the floor for a long time. She further stated that she had noticed that whenever Kristoff was out-of-town there had been reported explosions or fires at those locations. She further added that one-day she observed a letter written by Kristoff to an individual, whose name was something like Graentnor, demanding large sums of money.

The Bayonne Police Department contacted the New York City Bomb Squad and the Department of Justice to brief them on Chapman's information. Surveillance of Kristoff began and for three weeks he was followed. The police eventually arrested him but no real evidence had been gathered to make the prosecution's case and he was released.

The Lehigh Valley Railroad hired the William J. Burns Detective Agency to investigate Kristoff. One of the detectives gained Kristoff's confidence by using the cover as an anarchist. Kristoff told the detective that he was responsible for the Black Tom Island blast. He also introduced the detective to David Grossman, who confirmed Kristoff's involvement in the Black Tom Island affair.

The Kingsland Site

Following the success of Black Tom Island, the next target selected by the German saboteurs was the Canadian Car and Foundry Company at Kingsland. The company had been contracted by the Russians to manufacture artillery shells. The company executives decided not to take any chances with security for their plant. They constructed a six-foot fence around the plant and hired security guards to conduct 24-hour patrols around the perimeter and to screen each worked as they entered the plant.

The group of saboteurs operated under the direction of Frederick Hinsch. Hinsch recruited a German national Curt Thummel, who changed his name to Charles Thorne. Hinsch instructed Thorne to obtain employment at the Kingsland site. Thorne is hired as assistant employment manager. In this position he facilitated the hiring of several operatives sent by Hinsch to infiltrate the factory. One of the men hired is Theodore Wozniak.

Unknown to the saboteurs, a British spy informed the British Secret Service that an individual by the name of Wozniak is a German or Austrian agent. According to the British source, Wozniak has obtained employment with a company located in Kingsland. Fortunately for the saboteurs, the British ignored the information.

After the Kingsland plant is completely destroyed, police and federal investigators uncovered the source of the fire. It started at Wozniak's workbench in Building 30. Like the Black Tom Island explosion, there is no conjecture that sabotage caused the destruction.

Executives of the company launched their own investigation and it pointed to Wozniak. They engaged the services of private detectives to follow Wozniak but he slipped away from them and disappeared.

When the United States declares war on Germany, the German Ambassador von Bernstorff returned home. Three days later, on 17 February 1917, three Germans are arrested for attempting to sabotage the Black Tom Island facility, which had been rebuilt. Under a wartime situation, sabotage was no longer an option since the penalty was death to anyone caught in the act. With the ringleaders gone, the other German saboteurs fled the United States.

CONTINUE CHAPTER 3

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

Department Of State And Counterintelligence[88]

Shortly after the Office of the Chief Special Agent in Washington was created in 1916, Joseph "Bill" Nye was appointed the first chief special agent. Nye, who also held the title of special assistant to the Secretary of State, reported directly to Secretary of State, Robert Lansing. The office worked out of two locations, Washington and New York, and operated on confidential funds from the Secretary's Office.

Secretary of State, Robert Lansing
PHOTO

There was no formal reporting of the Office's activities and there was no listing of the Office in the Department's organization or telephone book. The size of the Office was never mentioned, but there were a handful of agents plus some "dollar-a-year" men who had volunteered their services-businessmen, lawyers and from other professions. They covered the entire United States in their operations, and some were sent overseas on special missions.

In 1916, as the United States entry in World War I loomed on the horizon, Secretary Lansing directed Nye to tap the telephones of the German embassy in Washington and report directly to him, daily. Who made the actual telephone tap installation was never mentioned but it was quite clear that the Office of the Chief Special Agent performed the monitoring operation.

One important result of the tap pertained to the Zimmerman Telegram. Nye was able to report in advance to the Secretary why the German ambassador was going to call on him at 4 p.m. on January 31, 1917. At that meeting, the ambassador advised Lansing that the German government would launch unrestricted submarine warfare in the Atlantic the next day. Nearly four weeks later, President Woodrow Wilson addressed Congress, asking for a declaration of war.

Each morning at 8 the chief special agent placed on the Secretary's desk a memorandum summarizing information developed during the proceeding 24 hours. Many projects were apparently assigned or approved directly by the Secretary and were reported back only to him.

After World War I, the scope of the Office's special activities diminished greatly. Robert C. Bannerman replaced Nye in 1920. The dollar-a-year men departed, leaving a few agents working out of the New York office, with only the chief special agent left in Washington. In 1927 the chief special agent began reporting to the assistant secretary for administration, Wilbur Carr. However, he still retained his title of special assistant to the Secretary and did report directly to him on sensitive matters.

From 1920 to 1940, jurisdiction for investigation of passport and visa frauds was unclear. Neither Justice, the FBI nor Immigration claimed absolute authority. The Office began to do passport and visa fraud

investigations, working with the U.S. attorneys in various cities to obtain prosecutions. In many of these cases, the passport aspect was incidental to a much larger problem-Soviet and German espionage. The investigation of passport frauds in New York led to the discovery of a Soviet intelligence network and succeeded in exposing for the first time the existence of such Soviet operations. In addition, a ring of professional gamblers who operated on the Atlanta run of most steamship lines was broken up through prosecutions on passport frauds.

The accomplishments through the turbulent years of 1920-1940 were carried out by a minimal staff of special agents; at times no more than six. In 1936, when Robert L. Bannerman entered on duty with the Office of the Chief Special Agent in New York City, the New York office had a special agent-in-charge and four special agents. The Washington office consisted of his father and four clerks; no agents were assigned there.

Some of the duties included passport and visa frauds; special inquiries on behalf of consular officers abroad; various inquiries on individuals and organizations of interest to the Department of State; liaison with all Federal agencies in New York, particularly Immigration and Customs; liaison with the police in New York and the Royal Canadian Mounted Police; arranging port courtesies for visiting foreigners; and providing protective arrangements in the U.S. for visiting heads of state.

All investigations were handled in person; none was conducted by correspondence. Each agent handled about 30 to 40 cases per month. For cases outside New York, the agents would share the travel.

From Robert Lansing, With Enclosure

Private and Confidential

My Dear Mr. President:
Washington November 20, 1915

There has been an unfortunate and probably unavoidable lack of coordination between the different Departments of the Government charged with investigation of violations of law, growing out of the activity of agents of the belligerent Governments in this country. It seems to me that it would be advisable to have a central office to which results of investigations could be reported day by day and the proper steps taken to continue such investigations in the most efficient way. With the idea in view I submit to you a memorandum on the subject. This Department is not anxious to assume additional duties but, unavoidable, all these investigations-or at least the majority of them-have an international phase which should be not only considered but, I think, should control the action of other Departments.

The memorandum rests primarily on the idea that the Counselor for this Department should be the clearing house for the secret reports of the various Departments, and he could-if it seems advisable, and I think it does-furnish duplicates of his information
day by day to the Secretary of the Treasury and the Attorney General, who are especially interested in these investigations.

I should be pleased to receive your views upon the subject, or any suggestion which you may have as to a better plan of coordination of work.

Faithfully yours,

Robert Lansing
Enclosure

It is understood that the attached memorandum deals only with the preliminary collection of information and investigations for the purpose of determining the importance of the information received. As soon as it appears that any laws have been violated or apparently violated the case would be turned over to the Department of Justice in the regular and orderly way.

The intent of the plan proposed is to keep this preliminary investigation free from delays and centralized in such a way as to keep the scattered threads together. It is also intended to keep the President accurately informed from day to day and the State Department constantly in touch with what is going on. The daily reports as summarized for the Counselor for the State Department should be forwarded in duplicate to the Secretary of the Treasury and the Attorney General.

Confidential: Memorandum

A great amount of information, some of it important, much of it trivial and a considerable part of it, misleading or absolutely untrue, is coming to various departments of the Government regarding the activities of people throughout the United States, who are alleged to be endangering the friendly relations of this Government with other governments by undertaking unneutral enterprises, some of which are criminal and some of which are merely indiscreet. Almost all of the acts reported, if true, require careful consideration from the viewpoint of our relations with other nations before this Government's action in the matter is determined.

The information may be divided roughly into information as to acts violating a law and for which the offenders can be prosecuted in the courts, and acts which are not technical violations of law but which are calculated to place the United States in the position of permitting violations of neutrality if they are not stopped. Under the latter may properly come certain acts of accredited representatives of foreign governments. Some of these matters can only be handled by confidential representatives to the accredited heads of the foreign governments involved that such acts are distasteful to our Government and must be discontinued.

There is another class of acts committed by citizens of the United States, either entirely on their own initiative or through influences which cannot be definitely traced and which can only be stopped by publicity, and in some cases the matters involved would be of such a delicate nature as to make it inadvisable even to call attention to them in an official way.

This information is at present coming to the Department of State, the War Department, the Navy Department, the United States Secret Service and the Department of Justice. Doubtless other Departments, such as Commerce, Post Office, and even Interior, receive or could gather information as well. It is seldom that information received is sufficiently definite even to warrant investigation and it is only by piecing together information from a number of sources that any practical lead can be obtained. At present there is no assurance that the various scattered scraps of information which when put together make a clear case will go to the same place. For instance, one item may be received by the Secret Service, the Navy may receive other information-all of which, when put side by side, makes a fairly clear case, but none of which when scattered

through the different Departments seems of importance. It is evident that a single office where all this information must be instantly transmitted without red tape is absolutely necessary to an effective organization.

In view of the diplomatic questions involved it seems obvious that the receiving office should be under the Department of State. Otherwise grave errors may be made by well meaning but misdirected efforts. After this information has been received there are at present three ways in which it may be taken care of: The Department of Justice, the Secret Service and the Post Office Inspectors. The Department of Justice is charged with the gathering of evidence by which the Attorney General may proceed to prosecute for a definite crime; the Secret Service is charged with the protection of the President and the protection against counterfeiting and customs frauds; the Post Office Department is charged with watching for violations of the United States mail. None of these Departments is legally or by organization fitted to handle these matters alone and efficient cooperation without a central directing force with authority to supervise their operations and to assign them their respective work cannot be accomplished practically. There is the further objection that a case turned over by the State Department to any one of these investigating departments or bureaus is lost sight of and its daily developments are unknown for weeks and sometimes months.

To cure this situation, it is suggested:

That an Executive Order be issued placing all these matters under the authority of the Department of State, directing all Government officials and Departments to transmit immediately to the Department of State any information received along these lines and to collect at the request of that Department any information asked for. The Order should also direct that the Post Office Department, the Secret Service and the Department of Justice place their men when requested at the disposal of the Department of State for the purpose of investigating these matters.

It is suggested that the Department of State should assign the Counselor, as being able to decide the legal questions which sometimes arise, without waiting for reference, as the head of the system, acting, of course, always under the Secretary of State and, through him, under the President himself.

It is not thought that any additional force for the Department of State would be required beyond possibly a thoroughly trustworthy stenographer, and if the work is unusually heavy a filing clerk, as it will be absolutely necessary to maintain a card index and to keep each case separate and up to day.

From Robert Lansing

> *Personal and Private*
> My dear Mr. President:
> *Washington November 29, 1915*
>
> I feel that we cannot wait much longer to act in the cases of Boy-Ed, von Papen, and von Nuber. I believe we have enough in regard to the activities of these men to warrant us to demand of the German Government the recall of the first two named and to cancel the exequatur of von Nuber, giving notice to the Austro-Hungarian Government that we have done so.
>
> The increasing public indignation in regard to these men and the general criticism of the Government for allowing

them to remain are not the chief reasons for suggesting action in these cases, although I do not think that such reasons should be ignored. We have been over-patient with these people on account of the greater controversies under consideration for several months and did not wish to add to the difficulties of the situation by injecting another cause of difference. In my opinion action now cannot seriously affect the pending negotiations, and it would be well to act as expeditiously as possible.

In case you agree with me as to the action which should be taken would you favor informing Bernstorff orally that his attaches are *personae non gratae* or make a formal written statement to that effect without telling him in advance?

In the von Nuber case I would suggest that the Austrian Charge be told that we intend to cancel the *exequatur* of von Nuber.

As you know, I believe that we will soon have to go even higher up in removing from this country representatives of belligerents who are directing operations here. It would appear that these higher officials consider our patience to be cowardice. If this is so, the removal of subordinates would indicate our earnest purpose and would, I believe, help rather than hinder the progress of present negotiations.

I hope a decision can be reached speedily in this matter, as it should in my judgment be done, if at all, before Congress meets.

I enclose memoranda on German and Austrian officials here, among which you will find statements regarding the three mentioned.

From Walter Hines Page

London, Feb. 24, 1917,
5747. My fifty-seven-forty-six,
February 24, 8 a.m.

Confidential, For the President and the Secretary of State.

Balfour has handed me the text of a cipher telegram from Zimmermann, German Secretary of State for Foreign Affairs, to the German Minister to Mexico,[89] which was sent via Washington and relayed to Bernstorff on January nineteenth. You can probably obtain a copy of the text relayed by Bernstorff from the cable office in Washington. The first group is the number of the telegram, one hundred and thirty, and the second is thirteen thousand and forty-two, indicating the number of the code used. The last group but two is ninety-seven thousand five hundred and fifty-six, with Zimmerman's signature. I shall send you by mail a copy of the cipher text and of the de-code into German and meanwhile I give you the English translation as follows:

"We intend to begin on the first of February unrestricted submarine warfare. We shall endeavor in spite of this to keep the United States of America neutral. In the event of this not succeeding, we make Mexico a proposal of alliance

> on the following basis: make war together, make peace together, generous financial support and an understanding on our part that Mexico is to reconquer the lost territory in Texas, New Mexico, and Arizona. The settlement in detail is left to you. You will inform the President of the above most secretly as soon as the outbreak of war with the United States of America is certain and add the suggestion that he should, on his own initiative, invite Japan to immediate adherence and at the same time mediate between Japan and ourselves. Please call the President's attention to the fact that the ruthless employment of our submarines now offers the prospect of compelling England in a few months to make peace. Signed, ZIMMERMAN."

The receipt of this information has so greatly exercised the British Government that they have lost no time in communicating it to me to transmit to you, in order that our government may be able without delay to make such disposition as may be necessary in view of the threatened invasion of our territory.

The following paragraph is strictly confidential.

Early in the war, the British Government obtained possession of a copy of the German cipher code used in the above message and have made it their business to obtain copies of Bernstorff's cipher telegrams to Mexico, amongst others, which are sent back to London and deciphered here. This accounts for their being able to decipher this telegram from the German Government to their representative in Mexico and also for the delay from January nineteenth until now in their receiving the information. This system has hitherto been a jealously guarded secret and is only divulged now to you by the British Government in view of the extraordinary circumstances and their friendly feeling towards the United States. They earnestly request that you will keep the source of your information and the British Government's method of obtaining it profoundly secret but they put no prohibition on the publication of Zimmermann's telegram itself.

Zimmerman Telegram
PHOTO

The copies of this and other telegrams were not obtained in Washington but were bought in Mexico.

I have thanked Balfour for the service his Government has rendered us and suggest that a private official message of thanks from our Government to him would be beneficial.

I am informed that this information has not yet been given to the Japanese Government but I think it not unlikely that when it reaches them they may make a public statement on it in order to clear up their position regarding the United States and prove their good faith to their allies.

President Woodrow Wilson discussing his dilemma at the time of the Zimmerman Telegram:

> *You have got to think of the President of the United States as the chief counsellor of the Nation, elected for a little while but as a man meant constantly and every day to be the Commander-in-Chief of the Army and Navy of the United States, ready to order them to any part of the world where the threat of war is a menace to his own people.*

And you cannot do that under free debate. You cannot do that under public counsel. Plans must be kept secret.

Knowledge must be accumulated by a system which we have condemned, because it is a spying system. The more polite call it a system of intelligence.

You cannot watch other nations with your unassisted eye. You have to watch them with secret agencies planted everywhere.

Let me testify to this my fellow citizens, I not only did not know it until we got into this war, but did not believe it when I was told that it was true, that Germany was not the only country that maintained a secret service. Every country in Europe maintained it, because they had to be ready for Germany's spring upon them, and the only difference between the German secret service and the other secret services was that the German secret service found out more than the others did, and therefore Germany sprang upon the other nations unaware, and they were not ready for it.

Counterintelligence: Pre-World War I

The first federal domestic counterintelligence program originated shortly before the United States entered World War I in 1917. The initial threat perceived by federal officials was the activity of German agents, including sabotage and espionage directed at the United States in the period before America entered the war. Although the neutrality laws were on the books, no federal statue made espionage or sabotage a crime. Attorney General Thomas W. Gregory proposed such legislation in 1916, but Congress took no action before American entry into the war. Nonetheless, the Executive Branch went ahead with development of a domestic security intelligence capability.

Several federal agencies expanded their operations. The Secret Service, which was established in the Treasury Department to investigate counterfeiting in 1865, had served as the main civilian intelligence agency during the Spanish American War. With $50,000 in War Department funds, the Secret Service had organized an emergency auxiliary force to track down Spanish spies, placed hundreds of civilians under surveillance, and asked the Army to arrest a number of alleged spies.[90] After the assassination of President William McKinley by an anarchist in 1901, the Secret Service was authorized to protect the President. Its agents were also assigned to the Justice Department as investigators until 1908 when Congress forbade the practice. In 1915 Secretary of State William Jennings Bryan decided that German diplomats should be investigated for possible espionage and he requested and received President Woodrow Wilson's permission to use the Secret Service.[91]

The military had performed extensive security intelligence functions during the Civil War, although operations were largely delegated to commanders in the field. When the military discontinued its surveillance programs after the War of Northern Aggression, as the South refers to the Civil War, Allan Pinkerton, who had worked for the War Department under President Abraham Lincoln founded a private detective agency. The Pinkerton agency and other private detective forces served both government and private employers in later years, frequently to spy upon labor organizing activities.[92] In the year

immediately before American entry into World War I, military intelligence lacked the resources to engage in intelligence operations. Therefore, preparation for war rested largely with the Secret Service, and it main competitor, the Justice Department's Bureau of Investigation.

In 1885 the Executive Office Building, then known as the State, War and Navy Building in Washington, D.C., was the first home of Army Intellegince.
PHOTO

The Justice Department's investigative authority stemmed from an appropriation statue first enacted in 1871, allowing the Attorney General to expend funds for "the detection and prosecution of crimes against the United States."[93] The Attorney General initially employed several permanent investigators and supplemented them with either private detectives or Secret Service agents. When Congress prohibited such use of Secret Service personnel in 1908, Attorney General Charles J. Bonaparte issued an order authorizing creation of the Bureau of Investigation. There was no formal Congressional authorization for the Bureau, but once it was established, its appropriations were regularly approved by Congress. Members of the House Appropriations Committee debated with Attorney General Bonaparte over the need for safeguards against abuse by the new Bureau. Bonaparte emphasized, "The Attorney General knows or ought to know, at all times what they are doing." Some Congressmen thought more limits were needed, but nothing was done to circumscribe the Bureau's powers.[94]

A Navy Spy

On 5 May 1917, George Roenitz, ex-chief clerk of the Commandant, Naval Station, Pearl Harbor, was arrested and charged with espionage. Rather than stand trial, Roenitz plead guilty to a charge of unlawful possession of documents pertaining to the Naval Station and received a one year prison sentence and a fine of $250. Because he was discharged from the military in February 1917, Roenitz could not be courts-martial and was sentenced in civilian court. There was no information that he had passed the information on to a foregin power but he was suspected of being a German spy.

Passage of the Mann Act and other federal statues prohibiting interstate traffic in stolen goods, obscene materials, and prizefight films soon expanded the criminal investigative responsibilities of the Justice Department and its Bureau of Investigation.

By 1916 Attorney General Gregory had expanded the Bureau's personnel from 100 to 300 agents, primarily to investigate possible violations of the neutrality laws. The Attorney General objected to the Secret Service's investigations of activities which did not involve actual violations of federal laws. However, when President Wilson and Secretary of State Robert Lansing expressed continued interest in such investigations, Attorney General Gregory went to Congress for an amendment to the Justice Department's appropriations statute which would allow the Bureau to do what the Secret Service had already begun doing. With the agreement of the State Department, the statute was revised to permit the Attorney General to appoint officials not only

to detect federal crimes, but also "to conduct such other investigations regarding official matters under the control of the Department of Justice or the Department of State, as may be directed by the Attorney General." This amendment to the appropriations statute was intended to be an indirect form of authorization for investigations by the Bureau of the Investigation, although a State Department request was seen as a prerequisite for such inquiries.[95]

Under the direction of A. Bruce Bielaski, the Bureau concentrated at first on investigations of potential enemy aliens in the United States. According to the authorative history of the Justice Department:

Bruce Bielaski
PHOTO

The Bureau of Investigation made an index of aliens under suspicion. At the end of March 1917, just before the entrance of the United States into the war, the chief of the Bureau submitted a list of five classes of persons. One class, ninety-eight in number, should be arrested immediately on declaration of war. One hundred and forty should be required to give bond. Five hundred and seventy-four were strongly suspected. Five hundred and eighty-nine had not been fully cleared of suspicion. Three hundred and sixty-seven had been cleared of specific offenses. Others, after investigation, had been eliminated from the lists.[96]

Theoretically, the threat of dangerous aliens was the responsibility of the Immigration Bureau in the Labor Department. As early as 1903 Congress had enacted legislation requiring the deportation within three years of entry of persons holding anarchist beliefs or advocating "the overthrow by force or violence of the Government of the United States."[97] In early 1917 the immigration laws were amended to eliminate the three year limit and require deportation of any alien "found advocating or teaching the unlawful destruction of property...or the overthrow by force or violence of the Government of the United States."[98] Nevertheless the Immigration Bureau lacked the men, ability, and time to conduct the kind of investigations contemplated by the statute.[99]

As the United States entered World War I, domestic security investigations were the province of two competing civilian agencies-the Secret Service and the Bureau of Investigation-soon to be joined by military intelligence and an extensive private intelligence network called the American Protective League.

The American Protective League

The American Protective League (APL) was a voluntary association of patriotic citizens acting through local branches which were established in cities and counties throughout the country to operate under the control of a National Board of Directors. The league was formally created on 22 March 1917, two weeks before the American declaration of war, and, on that same date, became designated as an auxiliary to the Bureau of Investigation of the Department of Justice.[100] The orginal idea for such an organization had been conceived by *A.M. Briggs* of Chicago, who then continued to function as Chairman of the National Board of Directors. The two other members of this national triumverate were *Victor Elting* and *Charles Daniel Frey.* The league itself was ultimately composed of some 250,000 male citizens, representing "every commercial, industrial, professional, social and economic level in American life."[101] Moreover, its members were provided with

credentials in the form of a membership card and badge showing that the holder was connected with the Department of Justice.[102] These cards were actually issued in certain circumstances by the military intelligence division.

American Protective League Publication

PHOTO

Although strongly supported during its entire career by Attorney General Thomas W. Gregory, the APL was never free from violent criticism. In June 1917, for example, Secretary of the Treasury William G. McAdoo, who was always on the alert to prevent any unauthorized use of the words "secret service" by an agency other than his own Secret Service of the United States, not only wrote to Gregory to register a complaint[103] but also to President Wilson himself in order to lodge a general protest against the whole organization. For the President, McAdoo even chose to compare the APL with the Sons of Liberty of the American Revolution "through which many injustices and abuses resulted."[104] This historical comparison by McAdoo is neither cogent nor valid. A more fitting description of the prejudicial side of the APL would be the New York Bar Association Report of 1919 which discussed vigilante associations in World War I:

> *"...These associations did much good in awakening the public to the danger of insidious propaganda but no other one cause contributed so much to the oppression of innocent men as the systematic and indiscrimate agitation against what was claimed to be an all-pervasive system of German espionage."*

Defending the league, however, Gregory was able to answer McAdoo:

> *"...you state that your attention has been called to this association and that it seems to you it would be dangerous to have such an organization operatingin the United States, and you ask if there is any way which we could stop it… Briefly stated, the American Protective League is a patriotic organization, composed of from eighty to one hundred thousand members, with branches in almost six hundred cities and towns, was organized with my approval and encouragement, and has been tremendously helpful in the work of the Bureau of Investigation of the Department of Justice. It has no official status and claims none. Its members serve without the slightest expense to the Government, and not a single officer or member receives compensation from any source."*[105]

Beyond any question, the APL did provide the military security officials of the War Department with a tremendous amount of invaluable assistance in the conduct of their many difficult investigative chores. It was found convenient during November 1917, therefore, after the headquarters of the league moved from Chicago to Washington, to commission Charles Daniel Frey, one of the three national directors, as an Army captain. While still remaining a league official, he was then assigned to the departmental military intelligence agency for the express purpose of processing all cases requiring APL action. This task soon assumed such proportions that a regular APL liaison group was established and, in April 1918, made a separate subsection of MI.3. The civilian chief of this new group was Urban A. Lavery, who continued to act in that role until September 1918, when he was replaced by Captain

John T. Evans. By the time of the Armistice, the APL subsection was using the services of 39 clerks, stenographers and typists.

National Directors, American Protective League (l-r) Charles Frey, Albert Briggs, Victor Elting. American Protective League Publication

PHOTO

Counterintelligence In World War I

Shortly after the declaration of war, Congress considerably strengthened the legal basis for federal investigations by enacting the Espionage Act of 1917, the Selective Service and Training Act, and other statutes designed to use criminal sanctions to assist the war effort. But Congress did not clarify the jurisdiction of the various civilian and military intelligence agencies. The Secretary of War established a Military Intelligence Section under Colonel Ralph Van Deman, who immediately began training intelligence officers and organizing civilian volunteers to protect defense plants. By the end of 1917 the MIS had branch offices throughout the United States to conduct investigations of military personnel and civilians working for the War Department. MIS agents cooperated with British intelligence in Mexico, with their joint efforts leading to the arrest of a German espionage agent during the war.[106]

A major expansion of federal intelligence activity took place with the formation of the American Protective League, which worked directly with the Bureau of Investigation and military intelligence. A recent FBI study recounts how the added burdens of wartime work led to the creation of the League:

To respond to the problem, Attorney General Thomas W. Gregory and then Bureau Chief A. Bruce Bielaski, conceived what they felt might suffice to answer the problem. The American Protective League (APL) composed of well-meaning private individuals, was formed as a citizen's auxiliary to "assist" the Bureau of Investigation. In addition to the authorized auxiliary, ad hoc groups too it upon themselves to "investigate" what they felt were un-American activities. Though the intentions of both groups were undoubtedly patriotic and in some instances beneficial, the overall result was the denial of constitutional safeguards and administrative confusion. To see the problem, one need only to consider the mass deprivation of rights incident to the deserter and selective service violator raids in New York and New Jersey in 1918, wherein 35 agents assisted by 2,000 APL operatives, 2,350 military personnel, and several hundred police rounded up some 50,000 men without warrants of sufficient probable cause for arrest. Of the 50,000 arrestees, approximately 1,500 were inducted into the military service and 15,000 were referred to draft boards.[107]

The FBI study also cites the recollection of an Agent of the Bureau of Investigation during World War I regarding the duplication of effort:

How did we function with relation to other agencies, both federal and state? In answering this query, I might say that while our relationship with the Army and Navy Departments was extremely cordial at all times, nevertheless there was at all times an enormous overlapping of investigative activities among the various agencies charged with winning the war. There were probably seven or eight such active organizations operating at full force during the war days and it was not an uncommon experience for an Agent of this Bureau to call upon an individual in the course of his investigation, to find out that six or seven

other government agencies had been around to interview the party about the same matter.[108]

The Secret Service opposed the utilization of American Protective League volunteers and recommended, through Treasury Secretary McAdoo, establishment of a centralized body to coordinate domestic intelligence work. The Treasury Department's proposal was rejected in early 1918, because of the objections of Colonel Van Deman, Bureau Chief Bielaski, and the Attorney General's Special Assistant for war matters, John Lord O'Brien. Thereafter the role of the Secret Service in intelligence operations diminished in importance.[109]

During World War I the threat to the nation's security and the war effort was perceived by both government and private intelligence agencies as extending far beyond activities of enemy agents. Criticism of the war, opposition to the draft, expression of pro-German or pacifist sympathies, and militant labor organizing efforts were all considered dangerous and targeted for investigation and often prosecution under federal or state statutes. The federal Espionage Act forbade making false statements with intent to interfere with the success of military, attempting to cause insubordination, and obstructing recruitment of troops.[110] With little guidance from the Attorney General, the United States Attorneys across the country brought nearly 2,000 prosecutions under the Espionage Act for disloyal utterances.[111] Not until the last month of the war did Attorney General Gregory require federal prosecutors to obtain approval from Washington before bringing Espionage Act prosecutions. John Lord O'Brien, the Attorney General's Special Assistant, recalled "the immense pressure brought to bear throughout the war upon the Department of Justice in all parts of the country for indiscriminate prosecution demanded in behalf of a policy of wholesale repression and restraint of public opinion."[112]

In addition to providing information for Espionage Act prosecutions, intelligence operations laid the foundation for the arrest, of which some 2,300 were turned over to military authorities for internment and the remainder released or placed on parole.[113]

War Department General Order

26 August 1918
This order reestablished the Military Intelligence Division (MID), General Staff when it re-formed the General Staff into four divisions designated: Operations; Military Intelligence; Purchase, Storage and Traffic; and Plans. Appointed to head the reestablished MID was Col. Marlborough Churchill. The functional assignment then given to the new Division was:

Gen. Marlborough Churchill
PHOTO

This division shall have cognizance and control of military intelligence, both positive and negative, and shall be in charge of an officer designated as the director of military intelligence, who will be an assistant to the Chief of Staff. He is also the chief military censor. The duties of this division are to maintain estimates revised daily of the military situation, the economic situation, and of such other matters as the Chief of Staff may direct, and to collect, collate, and disseminate military intelligence. It will cooperate with the intelligence section of

the general staffs of allied counties in commection with military intelligence; prepare instructions in military intelligence work for the use of our forces; supervise the training of personnel for intelligence work; organize, direct, and coordinate the intelligence service; supervise the duties of military attaches; communicate direct with department intelligence officers and intelligence officers at posts, camps, and stations; and with commands in the field in matters relating to military intelligence; obtain, reproduce and issue maps; translate foreign documents; disburse and account for intelligence funds; cooperate with the censorship board and with intelligence agencies of other departments.

The term "negative" intelligence fell into gradual disgrace following World War I and was replaced by "counterintelligence."

From Albert Sidney Burleson

Dear Mr. President:
(Washington) November 30, 1918

I am this moment in receipt of your letter of date November 27th in which you express the opinion that the mail censorship is no longer performing a necessary function. I thoroughly concur in the view expressed and shall accept your letter as a direction to me to bring same to an end.

On the same day you wrote me I received a letter from Mr. Swagar Sherley, Chairman of the Committee on Appropriations, advising me that "it is the purpose of the Committee on Appropriations of the House of Representatives to begin hearings next Monday with the view of returning to the Treasury such appropriations and the cancellation of such authorizations, or parts thereof, granted in connection with the prosecution of the war, as no longer may be required under present conditions" and requesting me to take immediate steps to furnish him "the available information" upon which the Committee could base action looking to the accomplishment of its purpose. I will make known to the Chairman of the Committee on Appropriations the action which has been take in connection with mail censorship and also advise him that I have reduced the clerical force used in connection with the enforcement of Espionage and Trading with the Enemy Acts in so far as they relate to the Postal Establishment to the lowest possible basis. These are the only activities carrying appropriations which have been imposed on the Post Office Department during the progress of the war.

Faithfully yours,

A.S. Burleson

From Newton Diehl Baker

Dear Mr. President:
Washington, December 27, 1918

It is suggested that in view of the armistice, it would be advisable to modify the Executive Order of September 26, 1918, concerning the censorship of submarine cables, telegraph and telephone lines as far as it affects the telegraphic and telephonic censorship.

The pressure of military necessity is removed, and the activities of German agents in Mexico are no longer of a sort to require so elaborate and expensive an organization for their observation or control.

CONTINUE CHAPTER 3

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

The Witzke Affair: German Intrigue On The Mexican Border, 1917-18 [114]

[deleted at the author's request]

The Espionage Act May 16, 1918

Be it enacted, That section three of the Act...approved June 15, 1917, be...amended so as to read as follows:

"***Section 3***. Whoever, when the United States is at war, shall willfully make or convey false reports or false state-ments with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports or false state-ments, or say or do anything except by way of bona fide and not disloyal advice to an investor...with intent to obstruct the sale by the United States of bonds...or the making of loans by or to the United States, or whoever, when the United States is at war, shall willfully cause...or incite... insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct... the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag...or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government...or the Constitution...or the military or naval forces... or the flag...of the United States into contempt, scorn, contumely, or disrepute...or shall willfully display the flag of any foreign enemy, or shall willfully...urge, incite, or advocate any curtailment of production in this country of any thing or things... necessary or essential to the prosecution of the war...and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both....

From Edward Mandell House

Paris Nov 12, 1918

Number 99. Secret for the President. Referring further to our number 61, I beg to suggest the following:

The whole problem of securing political intelligence, establishing an adequate counter espionage organization and providing protection for

The Office of Naval Intelligence: A Proud Tradition of Service
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From Robert Lansing, With Enclosure
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Counterintelligence: Pre-World War I
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you and for the personnel, papers, and property of the American representatives at the Peace Conference should be dealt with, I believe, along the following lines:

I. *Political Intelligence*

At the present time the United States officials in Europe charged with considering political and economic questions presented by the termination of the war are receiving practically no dependable information concerning political and economic conditions in the following countries: Poland, Bohemia, Ukraine, Austria, Servia (including
Yugo-Slavia), Hungary, Bulgaria, Albania and Turkey. From Roumania and Greece some information is obtained but it is very incomplete. I consider it essential that we at once set up instrumentalities in these localities which will furnish us with information concerning political conditions in these countries and that this information concerning political conditions in these countries and that this information should come to us through American eyes. I do not think it will be difficult promptly to set up an organization for this purpose and I suggest that I be authorized to proceed along the following lines:

A. After conferring with Hoover and learning his plans for relief, to select men from among the United States military and naval forces now in Europe and from any other available sources, who shall be appointed for the time being agents of the Department of State. These men to constitute the basis of a "political intelligence section" of the American delegation to the Peace Conference.

B. To dispatch the men so selected as soon as practicable to do so, to points such as Warsaw, Lemberg, Posen, Prague, Bern (Moravia), Budapest (and some point in Transylvania), Kiev, Serejevo, Scutari, Constantinople, and Odessa. One agent should be sent to each place and he should take with him one code clerk with codes, one stenographer and if necessary one interpreter. A courier service also will shortly have to be established to operate between the United States and individual agents and their base from which messages could be forwarded by telegraph to Paris.

C. These agents so selected not to be in any sense accredited to the countries in which they are located. The military and naval men will of course not wear their uniforms. So far as possible the Governments in the localities to which they are sent will be requested to give them assistance in the conduct of their work. These men would work in close cooperation with any relief (arrangements?) (agencies) set up by Hoover.

D. To set up at some point in the Balkans, such as possibly Bucharest, a central office to which these agents can forward (probably for the President by courier only) their reports for transmission to the United States via Paris.

E. To establish at Paris for the assistance of the American delegation at the Peace Conference a "political intelligence section" under the direction of Grew and such other persons as the State Department may send to help him to which would be forwarded all reports from these agents and from other agents of the Department of State already constituted in European countries.

II. *Counter Espionage Organization*

I have conferred with General Nolan the head of the United States Military Intelligence in Europe and I believe that this work should be handed over to him and I suggest that a civil official of the Department of State who has an appreciation of the duty of work desired done should be associated with him.

III. *The protection of the President and of the American delegation at the Peace Conference and their papers and property.*

I suggest that the most practical method of handling this problem is through the use of the military authorities working under the direction of General Nolan who is entirely familiar with the peculiar conditions presented by this kind of work in France.

Almost all of the personnel to do the work outlined in paragraph one can be obtained here in Europe. I should very much appreciate an expression of your views respecting this important matter. If the plan as outlined is promptly approved it can be put into operation before the Peace Conference is called.

Edward House

The Red Scare Period

The end of the war in 1918 did not bring about the termination of counterintelligence operations. The Bureau of Investigation shifted its attention from critics of the war to the activities of radical and anarchist groups. The new threat was dramatized vividly by a series of terrorist bombings in 1919, including one explosion on the doorstep of Attorney General A. Mitchell Palmer's residence. Congress responded with calls for action, although the applicable provisions of the Espionage Act had expired at the end of the war and no new federal criminal statute was enacted to replace it. Instead, state statutes and the deportation provisions of the Immigration Act became the basis for the federal response.

Attorney General A. Mitchell Palmer
PHOTO

Attorney General Palmer authorized two major revisions in Justice Department counterintelligence operations in 1919. First, he established a General Intelligence Division in the Justice Department, headed by J. Edgar Hoover, who had served during the war as head of the Department's program for compiling information on enemy aliens. At the same time, Palmer appointed William J. Flynn, former head of the Secret Service, as Director of the Bureau of Investigation.

Less than two weeks after the GID was established, Flynn ordered a major expansion of Bureau investigations "of anarchistic and similar classes, Bolshevism, and kindred agitation advocating change in sedition and revolution, bomb throwing, and similar activities." Since the only available federal law was the deportation statute, Flynn stressed that the investigations "should be particularly directed to persons not citizens of the United States." Nevertheless, he also directed Bureau agents to "make full investigations of similar activities of citizens of the United States with a view to securing evidence which may be of use in prosecutions under the present existing state or federal laws or under legislation of that nature which may hereinafter be enacted." The instructions discussed the provisions of the recent amendments to the Immigration Act, which expanded the grounds for deportation to include membership in revolutionary organizations as well as individual advocacy of violent overthrow of the government.[156] Director Flynn concluded by urging Bureau agents to "constantly keep in mind the necessity of preserving the cover of our confidential informants."[157]

The results of these investigations were reported to the Department's General Intelligence Division for analysis and evaluation. Overall direction of the work of the GID under Hoover and the Bureau under

Flynn was placed in the hands of an Assistant Attorney General Francis P. Garvan, who had been a division chief in the New York district attorney's office before the war.[158]

Historians have documented fully the tremendous pressures placed on Attorney General Palmer, not just by his subordinates, but by public opinion, other members of President Wilson's cabinet, and the Congress to act decisively against the radical threat in 1919. For example, Secretary of State Lansing declared in a private memorandum written in July, "It is no time to temporize or compromise; no time to be timid or undecided; no time to remain passive. We are face to face with an inveterate enemy of the present social order." The Senate unanimously passed a resolution demanding that Palmer inform it whether he had yet begun legal proceedings against those who preached anarchy and sedition. According to his biographer, after passage of the Senate resolution, Palmer decided that the "very liberal" provisions of the Bill of Rights were expendable and that in a time of emergency there were "no limits" on the power of the government "other than the extent of the emergency."[159]

The principal result of the Justice Department's counterintelligence activities, in coordination with Immigration Bureau investigations, was the infamous "Palmer raids" on the night of January 2, 1920. Bureau of Investigation and Immigration Bureau agents in thirty-three cities rounded up some ten thousand persons believed to be members of the Communist and Communist Labor Parties, including many citizens and many individuals not members of either party. A summary of the abuses of due process of law incident to the raids includes "indiscriminate arrests of the innocent with the guilty, unlawful seizures by federal detectives, intimidating preliminary interrogations of aliens held incommunicado, highhanded levying of excessive bail, and denial of counsel."[160] Apart from the unavoidable administrative confusion in such a large-scale operation, these abuses have been attributed to several crucial decisions by federal officials.

The first was Director Flynn's instructions to Bureau agents that, in order to preserve "the cover of our confidential informants," they should "in no case...rely upon the testimony of such cover informants during deportation proceedings."[161] Consequently, Flynn's assistant Frank Burke, advised the Immigration Bureau that informants should not be called as witnesses and that immigration inspectors should "make an effort to obtain from the subject a statement as to his affiliations." The success of eliciting incriminating admission depended, in turn, upon decisions which made possible the prolonged detention and interrogation of arrested persons without access to counsel. In previous deportation proceedings, defense attorneys had urged aliens to remain silent. Therefore, it was necessary to amend the immigration regulation which allowed "attorneys employed by the arrested persons to participate in the conduct of hearings from their very commencement."[162] The head of the Justice Department's General Intelligence Division, J. Edgar Hoover, reiterated this request for a modification of immigration procedures.[163] Three days before the raids the regulation was revised to permit hearings to begin without the presence of counsel.

Another barrier to effective interrogation was the alien's right to bail. Three weeks after the round-up, J. Edgar Hoover advised the Immigration Bureau that to allow aliens out on bail to see their lawyers "defeats the ends of justice" and made the revision of immigration regulations "virtually of no value."[164] Hoover later told immigration officials that since the purpose of the raids was to suppress agitation, he

could not see the sense of letting radicals spread their propaganda while out on bail.[165] He also urged the Immigration Bureau to hold all aliens against whom there was no proof on the chance that evidence might be uncovered at some future date "in other sections of the country."[166] However, despite the Justice Department's pleas, the Secretary of Labor ordered a return to previous policies after the raids, once again allowing detained aliens access to legal counsel and admission to bail if hearings were delayed.[167]

An advantage of the amended Immigration Act had been that aliens could be deported simply for membership in a revolutionary group, without any evidence of their individual activity. J. Edgar Hoover urged literal application of the law to all members regardless of the individual's intent or the circumstances involved in his joining the organization.[168] Nevertheless, the Labor Department refused to deport automatically every Communist Party alien, instead adopting a policy of differentiating between "conscious" and "unconscious" membership, declining to deport those who membership in the Socialist Party had been transferred to the Communist Party without the member's knowledge and those whose cases were based on self-incrimination, without counsel or illegally seized membership records. Assistant Secretary of Labor Louis F. Post, who strongly opposed the Justice Department's position, also defied Congressional threats of impeachment in his vigorous defense of due process of law.[169]

During the months following the "Palmer raids," a group of distinguish lawyers and law professors prepared a report denouncing the violation of law by the Justice Department. They included Dean Roscoe Pound, Felix Frankfurter, and Zechariah Chafee, Jr. of the Harvard Law School, Ernest Freund of the University of Chicago Law School, and other eminent lawyers and legal scholars. The committee found federal agents guilty of using thrid-degree tortures, making illegal searches and arrests, using agent provocateurs, and forcing aliens to incriminate themselves. Its report described federal counterintelligence operations in the following terms:

We do not question the right of the Department of Justice to use its agents in the Bureau of Investigation to ascertain when the law is being violated. But the American people have never tolerated the use of undercover provocative agents or "agents provocateurs" such as have been familiar in old Russia or Spain. Such agents have been introduced by the Department of Justice into radical movements, have reached positions of influence therein, have occupied themselves with informing upon or instigating acts which might be declared criminal, and at the express direction of Washington have brought about meetings of radicals in order to make possible wholesale arrests at such meetings.[170]

The initial reaction of the head of the Justice Department's General Intelligence Division to such criticism was to search the files, including military intelligence files, for evidence that critics had radical associations or beliefs.[171]

The work of the General Intelligence Division was summarized by J. Edgar Hoover in a report prepared later in 1920. Even though federal criminal statutes were "inadequate to properly handle the radical situation," Hoover stressed the "need in the absence of legislation to enable the federal government adequately to defend and protect itself and its institutions (from) not only aliens within the borders of the United States, but also American citizens who are engaged in unlawful agitations." Therefore, in addition to providing intelligence for use in the deportation of aliens, the General Intelligence Division (GID)

supplied information to state authorities for the prosecution of American citizens under the broad state sedition laws.

The GID also had expanded "to cover more general intelligence work, including not only the radical activities in the United States and abroad, but also the studying of matters of an international nature, as well as economic and industrial disturbances incident thereto." Hoover described the GID's relationship to the Bureau of Investigation:

While the General Intelligence Division has not participated in the investigation of the overt acts of radicals in the United States, its solo function being that of collecting evidence and preparing the same for proper presentation to the necessary authorities, it has however by a careful review system of the reports received from the field agents of the Bureau of Investigation, kept in close and intimate touch with the detail of the investigative work.

The GID developed an elaborate system for recording the results of Bureau surveillance:

In order that the information which was obtained upon the radical movements might be readily accessible for use by the persons charged with the supervision of these investigations and prosecutions, there has been established as a part of this division a card index system, numbering over 150,000 cards, giving detailed data not only upon individual agitators connected with the radical movement, but also upon organizations, associations, societies, publications and social conditions existing in certain localities. This card index makes it possible to determine and ascertain in a few moments the numerous ramifications of individuals connected with the radical movement and their activities in the United States, thus facilitating the investigations considerably. It is so classified that a card for a particular city will show the various organizations existing in that city, together with their membership rolls and the names of the officers thereof.

The report said little about any tangible accomplishments in the prevention of terrorist violence or the apprehension of persons responsible for specific acts of violence. Instead, groups and individuals were characterized as having "dedicated themselves to the carrying out of anarchistic ideas and tactics"; as "urging the workers to rise up against the Government of the United States"; as having "openly advocated the overthrow of constitutions, governments and churches"; as being "the cause of a considerable amount of the industrial and economic unrest"; as "openly urging the workers to engage in armed revolt"; as being "pledged to the tactics of force and violence"; as being "affiliated with the III International formed at Moscow" and under "party discipline regulated by Lenin and Trotsky"; and as "propagandists" appealing directly to "the negro" for support in the revolutionary movement.

The only references to particular illegal acts were that one group had participated in an "outlawed strike" against the railroads, that one anarchist group member had assassinated the king of Italy, and that Communists had smuggled diamonds into the United States to finance propaganda. The head of the GID did not claim to have identified terrorists whose bombings had aroused public furor. Instead, Hoover reported that the mass arrests and deportations "had resulted in the wrecking of the communist parties in this country" and that "the radical press, which prior to January 2nd had been so flagrantly attacking the Government of the United States and advocating its overthrow by force and violence, ceased its pernicious activities." State sedition prosecutions had served to protect "against the agitation of persons having for their intent and purpose the overthrow of the Government of

the United States." Finally the GID's work had :enabled the government to study the situation from a more intelligent and broader viewpoint."[172]

Parallel to the Justice Department and Immigration Bureau operations, military intelligence continued its wartime surveillance into the post-war era. After a temporary cut-back in early 1919, the Military Intelligence Division resumed investigations aimed at strikes, labor unrest, radicals, and the foreign language press. The American Protective League disbanded, but its former members still served as volunteer agents for military intelligence as well as for the Bureau of Investigation. While the military did not play a significant role in the "Palmer raids," troops were called upon in 1919 to control race riots in several cities and to maintain order during a steel strike in Gary, Indiana, where the city was placed under "modified martial law." Following the 1920 round-up of aliens, J. Edgar Hoover arranged for mutual cooperation between the GID and military intelligence. Reports from the Bureau of Investigation would be shared with the military, and investigations conducted at military request. In return, military intelligence agreed to provide Hoover with information from foreign sources, since the State Department had refused to do so and Hoover was prohibited from having agents or informants outside the United States.[173]

The domestic intelligence structure as finally established in 1920 remained essentially intact until Attorney General Harlan Fiske Stone took office in 1924. Under the Harding Administration and Attorney General Harry Daugherty, the GID was made a part of the Bureau of Investigation under Director William J. Burns, with J. Edgar Hoover becoming an Assistant Director of the Bureau. Although the deportation program was strictly limited by Labor Department policies, the Bureau still supplied results of its surveillance operations to state authorities for the prosecution of Communists.[174] Hoover also prepared a lengthy report for the Secretary of State on Communist activities in the United States. The State Department submitted the information to the Senate to back up its opposition to a resolution to grant diplomatic recognition to the Soviet Union.[175] During this period, the Bureau spelled out its domestic intelligence activities in annual reports to Congress, including summaries of investigation findings on the role of Communists in education, athletic clubs, publications, labor unions, women's groups, and Negro groups. Radical propaganda was "being spread in the churches, schools, and colleges throughout the country." The Bureau also told the Congress that it was furnishing information for prosecutions under state laws punishing "criminal syndicalism and anarchy."[176]

CONTINUE CHAPTER 3

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

Military Intelligence Division

Neglect of Military Intelligence 1919

Prior to our declaration of war with Germany this essential general staff agency which is charged with gathering, collating, and disseminating the military information necessary as a basis for correct military decisions existed only in a rudimentary form. In April, 1917, it consisted of a section of the War College Division comprising a total personnel consisting of two officers and two clerks and supplied with only $11,000 by congressional appropriation for the performance of duty vital to the interests of the Army and the Nation. Every other army of importance was provided with a far-reaching military intelligence service directed by a well-equipped general staff agency recognized as a par with agencies charged with military plans, operations, and supplies. As a result of our neglect of this service, the valuable information gathered by the officers whom we had attached to European armies during the first year and a half of the war was never properly used. We were also without accurate data as to the powerful and insidious espionage , propaganda, and sabotage methods with which Germany at once attempted to thwart our military effort.

Organization of Military Intelligence Division

On July 1, 1918, the Military Intelligence Section, War College Division, General Staff, had been reorganized as the Military Intelligence Branch, Executive Division, General Staff, and consisted of 173 officers, 23 noncommissioned officers, and 589 clerks in Washington, as well as representatives in the more important cities of the United States, in all important foreign countries, and an extensive field force made up of specially chosen and instructed personnel in each military unit at home and overseas. This service had already rendered Gen. Pershing great assistance by supplying him with the required intelligence funds , with competent, loyal interpreters, agents, code and cipher experts, and other special intelligence personnel, with the material peculiarly adapted for intelligence needs.

The Staff reorganization, effected by General Orders, No 80, War Department, August 26, 1918, made the Military Intelligence Service a coordinate division of the General Staff and placed it on a par with similar services of general staffs of other nations of the world. The additional authority and prestige thus provided made it possible for this division to deal with other governmental agencies and with the intelligence services of our allies much more expeditiously and effectively than was possible under the previous imperfect organization. At the time of the armistice the Military Intelligence Division in Washington was made up of a highly specialized personnel consisting of 282 officers, 29 noncommissioned officers and 948 civilian employees, there field force had been greatly improved and enlarged, the assistance furnished the intelligence section of Gen. Pershing's staff was becoming daily more direct and more valuable, as was the staff was becoming daily more direct and more valuable, as was the cooperation with State Department, the Treasury Department, the Department of Justice, the Post Office Department, Naval Intelligence, the War Trade Board, the War Industries Board, and the National Research Council.

The Office of Naval Intelligence: A Proud Tradition of Service

A Tardy Awakening

The Underside of the Mexican Revolution: El Paso 1912

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Since the signing of the armistices the Military Intelligence Division, in spite of the necessary rapid demobilization of its civilian and temporary commissioned personnel, had contributed much valuable information to the American commission to negotiate peace, for which over 20 officer-specialists were furnished, and with which was effectively linked the military attaché system and the intelligence service of the American Expeditionary Forces. Investigation of alleged cases of enemy activity and disloyalty within the civil population in the United States which had been necessary during the period of actual hostilities terminated November 30, 1918, but the enormous financial interests of the United States involved in the cancellation of war contracts and the salvage of surplus stores has made necessary the continuance of a small bureau in this division for the investigation of alleged graft and fraud in connection with such matters. The gathering and effective use of military information is, however, held to be primary function of the Military Intelligence Division in time of peace; and it is upon this principle that the business of this division is now being conducted.

The duties assigned to Military Intelligence Division by General Orders, No. 80, War Department, 1918, are:

> *This division shall have the cognizance and control of military intelligence, both positive and negative, and shall be in charge of an officer designated as the Director of Military Intelligence, who will bean assistant to the Chief of Staff. He is also the chief military censor. The duties of this division are to maintain estimates revised daily of the military situation, the economic situation, and of such others matters as the Chief of Staff may direct, and to collect, collate, and disseminate military intelligence. It will cooperate wit the intelligence section of the general staffs of allied countries in connection with military intelligence; prepare instructions in military intelligence work for the use of our forces: supervise the training of personnel for intelligence work: organize, direct, and coordinate the intelligence service: supervise the duties of military attaches: communicate direct with department intelligence officers and intelligence officers at posts, camps, and stations, and , and with commands in the field in matters relating to military intelligence: obtain, reproduce, and issue maps: translate foreign documents: disburse: and account for intelligence funds: cooperate with the censorship board and with intelligence agencies of other departments of Government.*

In order to perform the duties thus assigned it the Military Intelligence Division has been organized into an Administrative Section and 12 other sections, grouped according to the nature of their functions into three branches, Positive, Geographic, and Negative. The magnitude, importance, and variety of the work of this division can best be shown by a summary of the activities of its various sub-divisions.

The Negative Branch

This branch collects, collates, and disseminates information upon which may be based measures of prevention against activities and influences tending to impair our military efficiency by other than armed force.

This branch was created on August 18, 1918, by uniting four existing sections. The sections so united were the Foreign Influence Section, the Army Section, the News Section, and the military morale Section. In September, 1918, the Travel Section and the Fraud Section were added. On October 19, 1918, the Military Morale Section became the Military

Morale Branch of the General Staff. The organization at the time of the cessation of hostilities, when the branch had reached its highest point of development, consisted of five sections, as follows: Foreign Influence (M.I. 4); Army (M.I. 3); News (M.I. 10); Travel (M.I. 11); Fraud (M.I. 13).

At its maximum the branch employed the services of 202 officers, 60 enlisted men (Corps of Intelli-gence), 65 volunteers (candidates for commissions), and 605 clerks. It directed the activities of thousands of officers and enlisted men in the field and through this organization did the War Department's share in completely foiling the well-laid plans of the enemy to impede our military program. In which aggregate more than the entire appropriation for Military Intelligence.

A consideration of the functions of the several subdivisions of the branch gives a comprehensive view of its activities, which included the handling of cases during the current year in number closely approximating half a million.

The Foreign Influence Section (M.I.4), is the present section from which grew the Negative Branch. As delimited by the diversion of specialties to other sections, the duty of this section in general is the study of espionage and propaganda directed against the United States or against its allies, and also the study of the sentiments, publications, ad other actions of foreign language and revolutionary groups both here an abroad, in so far as these matters have a bearing upon the military situation. The activities of a the section were carried on through seven subsections, as follows:

The Executive Subsection apportioned, supervised and coordinated the work of the section, determined questions of policy and represented the section in its relations ,important officials.

The Departmental subsection studied the intelligence situation in the territories embraced within the several geographical military departments of United States. It investigated enemy espionage activities and channels of communication, the financing of enemy activities and particular cases of enemy influence.

The Propaganda subsection studied and collated information on dissemination by the enemy of doctrines and false rumors aimed to create confusion of thought and so impair our military efficiency. It also studied and suggested methods for meeting and overcoming this imponderable mode to attack.

The Foreign Subsection studied the intelligence situation abroad and , in cooperation with the corresponding agencies of allied powers, determined the nature and extent of enemy secret activity and formulated methods for overcoming its effect.

The Legal and Liaison Subsection maintained liaison with the various Government agencies in Washington through officers familiar with the various departments. Specific recommendations of measures for fire prevention. It organized watch and guard systems for plants engaged in Government work and provided watchmen where necessary. It also devised plans and furnished agents for detecting and preventing sabotage or other malicious interference with the production. In addition, it systematically studied legislation, enacted or pending, proclamations, executive orders, and legal decisions affecting the Intelligence Service.

The Research Subsection took over from other subsections, cases which appeared to have reached unusual significance or importance,

summarized all material information available a prepared such cases for final disposition.

The Labor and Sabotage Subsection handled all matters relating to the prevention or delay of deliveries of war materials by immobilization of resources, control of factories, or raw materials, subversion or intimidation of labor or physical damage to plants or products.

The Army Section (M.I.3) — The Functions of this section is the organization, instruction and supervision of the Negative Intelligence Service within the Military Establishment: more specifically it protects the Army by the prevention and detection of enemy and disloyal activity among the military, including civilian personnel under military authority and in volunteer auxiliary associations. It supervises and coordinates the work of the Negative Intelligence officers stationed with each military unit and promulgates instructions for the operation and maintenance of the Negative Intelligence Service in the field.

The Executive Subsection coordinated the work of the section, assigned personnel and issued the bulletins and instructions which determined policy for the field organization. It also handled a variety of special and miscellaneous matters which did not fall within the province of another subsection. Among such specialties were the observation of conscientious objectors and of foreign church organizations and pacifist religious bodies operating among troops. The intelligence problems arising through there presence in the American Army of large bodies of Negro troops were studied in this subsection and much valuable information was secured and digested.

The Line Subsection cooperated with intelligence officers in line units in the field in investigating cases of disloyalty, sedition or enemy activity, either among troops or at points where troops were stationed. It also investigated and reported upon the antecedents and personal character for loyalty and integrity of candidates for commissions in the line of the Army. The duties of this section included not only the observations of dangerous tendencies or incidents arising within military units, but also those which operated from without directly upon the Army personnel.

Three other subsections performed for the technical and administrative corps and departments duties identical with those which the Line Subsection handled for the line of Army. This work was grouped as follows: (a) General Staff, Judge Advocate General's Office, Adjutant General's Office, Corps of Engineers, Ordnance Department, Quartermaster Corps, and Motor Transport Corps. (b) Medical, Dental, and Veterinary Corps and the Chemical Warfare Service. (c) Signal Corps ad Air Service.

The Personnel Subsection served all other subsections by conducting preliminary investigations of candidates for commissions and other persons under investigation, and so from further consideration all whose character for loyalty and integrity proved to be questionable. This subsection also performed a valuable service in detecting applicants for commissions in technical branches who had previously been rejected or discharged for cause from other branches of the service. One result of the investigations of this group was to prove the utter unreliability of letters of recommendation in estimating the fitness of individuals. Approximately 15,000 cases were handled during the emergency.

The Statistical Subsection, by means of maps and indexes, kept records of all military units in the United States and of the Intelligence organization of each; of the various cooperating agencies and of the

status of the field service in general. It had custody of all literature issued by the section and attended to the mailing of circulars, bulletins, and instructions. It coordinated the administrative work of the field and the office. This subsection maintained liaison with statistical offices of other branches of the War Department.

The Instruction Subsection, studied the development of the Negative Intelligence system, evolved general principles and specific policies of general application and promulgated the result for the improvement of the service. It developed a well-considered plan for the personal instruction of Negative Intelligence officers, and prior to the signing of the armistice conducted schools for two groups of officers brought in from the field instruction.

The Plant Protection Bureau._This was a civilian organization which originated in the Air Service as a measure of protection for the airplane production program. It was taken over by Military Intelligence and its scope enlarged to include the protection of Government plants and construction projects as well as all private plants engaged in war work. This bureau systematically studied and inspected fire risks and made recommendations of measures for fire prevention. It organized watch and guard systems for plants for engaged in Government work and provided watchmen where necessary. It also devised plans and furnished agents for detecting and preventing sabotage or other malicious interference with the production of war material. Approximately 5,000 plants were under the inspection of this bureau, which employed and operative force of 373 and supervised the activities of thousands of guards and watchmen. Offices were maintained at Boston, Springfield, New Haven, Bridgeport, New York, Albany, Syracuse, Buffalo, New ark, Philadelphia, Baltimore, Nitro, Atlanta, Nashville, Pittsburgh, Cleveland, Dayton, Indianapolis, Detroit, Chicago, Milwaukee, Minneapolis, Davenport, St. Louis, Fort Worth, San Francisco, and Los Angeles.

An important by-product of the activities of this bureau arose from its intimate knowledge of the operation of plants working on Government contracts whereby it was in a position to frustrate false claims and overcharges. No account was kept from which an accurate statement can be made of the total savings effectuated in this way. One item amounted to $600,000. and the total is estimated as $2,000,000.

Liaison with American Protective League: American Protective League was a volunteer civilian organization of 3000,000 members, operating under the supervision of the Department of Justice, and thoroughly covering the United States. By special arrangement with the Department of Justice this agency of information was placed at the disposal of Military Intelligence Division, and to facilitate communication directly with the various local branches of the league a Liaison Subsection was created under the direction of an officer of Military Intelligence, who was also an officer of the American Protective League.

The News Section (M.I.10)_On June 11, 1918, the Director of Military Intelligence was appointed to represent the War Department on the Censorship Board and the work incidental to this additional duty was at first handled in several sections of the Negative Branch. On August 16, 1917, the Director of Military Intelligence assumed the duty of Chief Military Censor and this section, which was originally called the Censorship Section, was created to handle increased volume of work entailed.

Censorship_In practice it was found that much of the organization necessary to examine publications and communications for censoring served equally well for collecting and digesting current news in a

manner which proved to be of great value to the War Department. As time progressed these informational functions became more and more important and when, with the close of hostilities, the censorship became unnecessary, this feature of the section, now called the News Section, was continued. At its maximum the section had 15 subsection, as follows:

The Executive Subsection coordinated and supervised the work of the section, handled necessary administrative details, together with miscellaneous matters which did not fall within the province of any other subsection, and maintained liaison with the boards of experts in other departments.

The Legal Subsection advised on the legal aspects of the censorship and recorded the precedents established upon rulings obtained from the staff of technical experts organized in the various bureaus of the War Department to cooperate with the Chief Military Censor.

The Postal Subsection maintained liaison with the Post Office Department and handled those matters which arose through the duties of the Chief Military Censor as War Department member of the Postal Censor ship Board.

The Prisoner of War Subsection censored all mail to or from prisoners of war held by the United States in the several war prison camps and coordinated the work in this country with that done abroad.

The Telegraph and Telephone Subsection conducted the censorship of telegraph and telephone messages to Mexico during the period that the regulation were in force.

The Radio Subsection supervised the interception of radio messages originating in Mexico and through this service obtained much invaluable information regarding the activities and intentions of the enemy.

The Official Photograph Subsection censored all official motion and still pictures and made appropriate recommendations to the Signal Corps, the Historical Branch, an the Committee on Public Information.

The Commercial Motion Picture Subsection surveyed the private motion picture field for harmful propaganda or indiscreet revelations and in conjunction with Customs Intelligence censored the importation and exportation of films.

The Photographic Permit Subsection in cooperation with the Committee on Public Information handled the matter of official permits to make photographs on or about military camps and reservations.

The Press Subsection examined newspapers and periodicals to detect violations of the voluntary press censorship, advised the press regarding the suppression of information which might be of military value to the enemy, and attended to the accrediting of war correspondents.

The Foreign Language Press Subsection examined publications in foreign languages published in the United States land foreign language material entering this country.

The Book Subsection examined books, pamphlets, posters and all publications other than newspapers and periodicals, reported on such as were contrary to the interests of the United States, and recommended repressive measures where necessary.

The Propaganda Subsection examined periodicals and publications clearly engaged in propaganda activities for the purpose of ascertaining if their teachings are inimical to the interests of the United States.

The Digest Subsection prepared a daily news summary, a semi-weekly digest of editorial opinion for transmission to France, and a weekly press review for the Secretary of War.

The Clipping Bureau maintained a newspaper and magazine clippings service for all of the Military Intelligence Division and several other branches of the General Staff.

The Signal Intelligence Service was housed in this building from 1929 to 1942. The building was located on Constitution Avenue in Washington, D.C.
PHOTO

END OF CHAPTER 3

CHAPTER 4 CONTINUED

Attorney General Harlan Stone's Reforms

In April 1924, a new Attorney General took charge of a scandal-ridden Department of Justice. Harlan Fiske Stone, former Dean of the Columbia Law School, had been appointed by President Calvin Coolidge to replace the late President Warren Harding's political crony Harry Daugherty. Stone confronted more than simply corruption in the Justice Department when he took office. The Department's Bureau of Investigation had become a secret political police force. As Stone recalled later, "The organization was lawless, maintaining many activities which were without any authority in federal statutes, and engaging in many practices which were brutal and tyrannical in the extreme."[50]

Attorney General Stone asked for the resignation of the Bureau Director William J. Burns, former head of the Burns Detective Agency, and directed that the activities of the Bureau "be limited strictly to investigations of violations of the law, under my direction or under the direction of an Assistant Attorney General regularly conducting the work of the Department of Justice." Stone also ordered a review of the entire personnel of the Bureau, the removal of "those who are incompetent and unreliable," and the future selection of "men of known good character and ability, giving preference to men who have had some legal training."[51] The Attorney General chose the young career Bureau official, J. Edgar Hoover, as Acting Director to implement these reforms, largely because of Hoover's reputation within the Justice Department as an honest and efficient administrator.[52]

John Edgar Hoover
PHOTO

A principal problem Stone faced was the Bureau's domestic intelligence operation. He was vividly aware of the violations of individual rights committed in the name of domestic security at the time of the 1920 "Palmer raids." He had joined a committee of protest against Attorney General Palmer's round up of radical aliens for deportation and had urged a congressional investigation. When a Senate Judiciary Subcommittee began hearings in 1921, its first order of business was a letter from Stone calling for "a thoroughgoing investigation of the conduct of the Department of Justice in connection with the deportation cases."[53]

In considering *J. Edgar Hoover* for the position of permanent Director of the Bureau of Investigation, Attorney General Stone was aware that he had played a major role in the "Palmer raids" as head of the Justice Department's General Intelligence Division. Roger Baldwin of the

American Civil Liberties Union told Stone that he was skeptical of Hoover's ability to reform the Bureau.

With the Attorney General's knowledge, Baldwin met with Hoover to discuss the future of the Bureau. Hoover assured Baldwin that he had played an "unwilling part" in the activities of Palmer, Daugherty, and Burns. He said he regretted their tactics but had not been in a position to anything about them. He intended to help Stone build and efficient law enforcement agency, employing law school graduates, severing connections with private detective agencies, and not issuing propaganda. Most important from the American Civil Liberties Union's point of view, the Bureau's "radical division" would be disbanded. Baldwin wrote Stone, "I think we were wrong in our estimate of his attitude," and announced to the press that the ACLU believed the Justice Department's "red-hunting" days were over.[54]

When Attorney General Stone arrived in 1924, he requested a review of the applicability of the federal criminal statutes to Communist activities in the United States. Various patriotic organizations had urged that Communists be prosecuted under the federal sedition conspiracy law, but the courts had
ruled that this Civil War statute required proof of a definite plan to use force against the government.[55] Justice Department lawyers also rejected prosecution under the Logan Act, enacted in the 1790s to punish hostile communications between American citizens and a foreign country.[56] These conclusions buttressed the Attorney General's decision to abolish the Bureau's domestic intelligence operations, although Stone told Roger Baldwin of the ACLU that he had no authority to destroy the Bureau's intelligence files, without an Act of Congress.[57]

Attorney General Stone may also have contemplated the possibility of future investigations under Congress's prewar revision of the Justice Department appropriations statute. He asked Acting Director Hoover whether the Bureau would have the authority to investigate Soviet and Communist activities within the United States for the State Department in connection with the question of recognition of the Soviet government. Hoover replied that the appropriations act did allow such investigations, upon formal request by the Secretary of State and approval of the Attorney General. The
Acting Director stressed that such investigations "should be conducted on an entirely different line than previously conducted by the Bureau of Investigation" and that there should be no publicity "because any publicity would materially hamper the obtaining of successful results."[58]

After 1924, the Bureau of Investigation continued to receive information volunteers to it about Communist activities, and Bureau field offices were ordered to forward such data to headquarters. But the Bureau made "no investigations of such activities, inasmuch as it does not appear that there is any violation of a Federal Penal Statute involved."[59] Military intelligence officers still had a duty, under an Army emergency plan, to gather information "with reference to the economical, industrial and radical conditions, to observe incidents and events that may develop into strikes, riots, or other disorders and to investigate and report upon the industrial and radical situation."

However, by 1925 the military lacked adequate personnel and requested the Bureau of Investigation to provide information on "radical conditions."[60] J. Edgar Hoover replied that the Bureau had discontinued "general investigations into radical activities," but would communicate

to the military any information received from specific investigations of federal violations "which may appear to be of interest" to the military.[61]

Despite the curtailment of federal intelligence operations, it would be misleading to say that domestic intelligence operations ceased in the United States after 1924. The efforts of state and local authorities to investigate possible violations of state sedition laws continued in many parts of the country. Moreover, private industry engaged the services of detectives and informers to conduct surveillance of labor organizing activities. These industrial espionage programs reached their peak in the early 1930's.

A Senate committee investigations in 1936 exposed these tactics and influenced at least one private detective firm, the Pinkerton Agency, to discontinue its anti-labor spying. The Senate inquiry documented the efficient techniques developed by labor spies for destroying unions. They wreaked havoc on union locals, generating mistrust, inciting violence, and reporting the identities of union members to hostile employers.[62]

On one major occasion early in the Depression, military intelligence was reactivated temporarily. Army Chief of Staff Douglas MacArthur ordered corps area commanders in mid-1931 to submit reports on subversive activities in their areas. When the "bonus marchers" began arriving in Washington in 1932 to demand veteran benefits, military intelligence agents investigated Communist influence with the help of American Legion officials, reserve officers, and other volunteers.

Military intelligence reports exaggerating the threat of "insurrectionists" among the veteran protestors contributed to the decision to use troops in a mass assault to clear the demonstrators out of Washington. Criticism of this operation led military authorities to instruct that intelligence officers be more discreet although they continued to gather intelligence on civilian groups.[63]

Therefore, while Attorney General Stone had stopped the Justice Department's intelligence efforts in 1924, safeguards did not exist against state, private or military intelligence operations. Moreover, the Bureau of Investigation retained its massive domestic intelligence files from the 1916-1924 period, as well as the vague legal authority under the appropriations act to conduct investigations going beyond the detection of federal crimes if a future Attorney General and a Secretary of State should direct it to do so.

Nevertheless, when Congressman Hamilton Fish and members of a Special House Committee to Investigate Communist Activities in the United States proposed legislation authorizing the Bureau of Investigation to investigate "Communist and revolutionary activity" in 1931, Director Hoover opposed it. He told Congressman Fish that it would be better to enact a criminal statute and not expand the Bureau's power beyond criminal investigation, especially since the Bureau had "never been established by legislation" and operated "solely on an appropriation bill."[64]

Hoover advised the Attorney General a year later,

The work of the Bureau of Investigation at this time is...of an open character not in any manner subject to criticism, and the operations of the Bureau of Investigation may be given the closest scrutiny at all times...The conditions will materially differ were the Bureau to embark

upon a policy of investigative activity into conditions which, from a federal standpoint, have not been declared illegal and in connection with which no prosecution might be instituted. The Department and the Bureau would undoubtedly be subject to charges in the matter of alleged secret and undesirable methods...as well as to allegations involving charges of the use of "Agents Provocateur."
Hoover assumed that the Immigration Bureau with jurisdiction to deport Communist aliens conducted such investigation and, if it did not, "would be subject to criticism for its laxity along these lines." Thus, the Director's position was not based on opposition to the idea of domestic intelligence itself, but rather on his concern for possible criticism of the Bureau if it were to resume "undercover" activities which would be necessary "to secure a foothold in Communistic inner circles" and "to keep fully informed as to changing policies and secret propaganda on the part of Communists."[65]

Letter Hoover to Lang

September 18, 1925

Commander E.K. Lang
Office of Naval Intelligence
Navy Department
Washington, D.C.

There has just come to my attention certain information which I thought might be of some interest and value to you. The son of a friend of mine in New York has succeeded in picking up Nijui Novgorod Soviet Government Radio laboratory on his short wave set. The transmission is now experimental, as announced by the operation of the Soviet station.

It has occurred to me that the Navy short wave station might probably be interested in this information and might be able to pick up some code which would be interesting to decipher. The set which the son of this friend of mine is using was made by him and I have no doubt but that other parties who really have an interest in getting information from Russia are operating sets that are receiving messages from the Soviet station. Knowing that the Soviets are still disseminating propaganda and are in touch with parties on this side, it occurred to me that the medium of the radio would be excellent to use in sending code messages.

Very truly yours,

/s/ J. Edgar Hoover
Director

Navy Department Memo

Navy Department
Office of Chief of Naval Operations
Washington

22 September 1925

From: Officer-in-Charge, Code and Signal Section
To: Lieut. Comdr. E.K. Lang, U.S.N.

SUBJECT: Messages from Nujui Novgorod Soviet Government Radio Laboratory

Reference: Letter from Mr. J. Edgar Hoover, of 18 September 1925

1. The Navy short wave receiving sets are all engaged in handling traffic or in experimental work and cannot be spared for the purpose of copying foreign traffic in which the State Department may be interested.

2. It is suggested that you request this amateur, through Mr. Hoover, to copy such traffic from the Nujui Novgorod Radio Laboratory as he can, and forward it direct to the Office of Naval Intelligence. This traffic will probably be in plain language (if for propaganda) and can be translated by your Translating Section.

3. Such parts of this traffic as may be in cipher can be forwarded to the Code and Signal Section.

/s/ D. J. Friedell

Special Committee To Investigate Un-American Activities

This committee was established in 1934 and chaired by Representative John W. McCormack from Massachusetts. The committee was charged with investigating activities by Communists, Nazis and Fascists. The committee concluded that communism was not sufficiently strong enough to harm the United States but its continued growth did represent a future danger to the country. The committee's report cited that attempts were being made from abroad and by diplomatic or consular officials to influence Americans. They also found that some efforts were being made to organize some of the citizens and resident aliens and said that constitutional rights of Americans had to be preserved from these "isms." They found Nazism, Fascism and Communism all to be equally dangerous and unacceptable to American interest.

To solve the problem, the Committee recommended that a law be enacted:

1. that required the registration of all publicity, propaganda, or public relations agents, or other agents who represent any foreign country;

2. that the Secretary of Labor have authority to shorten or terminate any visit to the United States by any foreign visitor traveling on a temporary visa if that person engaged in propaganda activities;

3. that the Department of State and Department of Labor negotiate treaties with other nations to take back their citizens who are deported;

4. that Congress make it unlawful to advise, counsel or urge any military or naval member, including the reserves, to disobey the laws and regulations governing such forces;

5. that Congress enact legislation so the U.S. Attorneys outside the District of Columbia can proceed against witnesses who refuse to answer questions, produce documents or records or refuse to appear or hold in contempt the authority of any Congressional investigating committee; and

6. that Congress make it unlawful for any person to advocate the overthrow or destruction of the United States Government or the form of government guaranteed to the States by Article IV of the fourth section of the Constitution.

On the basis of the Committee's recommendation, Congress enacted the McCormack Foreign Agents Registration Act in 1938.

The FBI Intelligence Program, 1936-1938

Instructions were issued to FBI agents immediately after Director Hoover's meeting with the President and the Secretary of State. FBI field offices were ordered "to obtain from all possible sources information concerning subversive activities being conducted in the United States by Communists, Fascists, representatives or advocates of other organizations or groups advocating the overthrow or replacement of the Government of the United States by illegal methods."[66]

Theoretically, this directive included purely domestic matters besides the international Communist and Fascists movements. There is no indication; however, that the President or the Attorney General were advised of this order; and the communications between the FBI Director and his superiors made no mention of advocacy of overthrow of the government. Instead, the terms used in 1936 were "general intelligence" and subversive activities."

Following the Hoover-Roosevelt meetings, FBI officials also began developing a systematic organization for intelligence information "concerning subversive activities." The following general classifications were adopted:

Maritime Industry

Activities in Government Affairs

Activities in the Steel Industry

Activities in the Coal Industry

Activities in the Newspaper Field

Activities in the Clothing, Garment and Fur Industries

General Strike Activities

Activities in the Armed Forces of the United States

Activities in Educational Institutions

General Activities—Communist Party and Affiliated Organizations

Activities of the Fascists

Anti-Fascists Movements

Activities in Organized Labor Organizations

Steps were also taken to determine whether certain individuals were "available for service in the capacity of an informant," to "index the material previously submitted," and to "prepare memoranda dealing individually with those persons whose names appear prominently at the present time in the subversive circles." The Director was to receive daily memoranda on "major developments in any field" of subversive activities.[67]

The President's instructions had dealt with relations between the FBI and other federal agencies. At this initial meeting with Hoover, the President said that the Secret Service "had assured him that they had informants in every Communist group," but Roosevelt believed this" was solely for the purpose of getting any information upon plots upon his life." He told Hoover that the Secret Service "was not to be brought in on this matter of protecting his life and the survey which he desired to have made with on a much broader field." In addition, the President suggested that Hoover "endeavor to coordinate any investigation along similar lines which might be made by the Military or Naval Intelligence Services."[68]

The Director told his subordinates that he had advised the Attorney General that he would "coordinate, as the President suggested, information upon these matters in the possession of the Military Intelligence Division, the Naval Intelligence Division, and the State Department.[69]

The FBI and the military intelligence proceeded along these lines in 1937-1938. The President designated Attorney General Cummings "as Chairman of a Committee in inquire into the so-called espionage situation" in October 1938, and to report on the need for "an additional appropriation for domestic intelligence." The Attorney General advised the President that a "well defined system" was functioning, made up of the FBI, the Military Intelligence Division, and the Office of Naval Intelligence, whose heads were "in frequent contact and are operating in harmony." He recommended that the appropriations be increased by $35,000 each for MID and ONI and by $300,000 for the FBI. He also submitted a plan prepared by Director Hoover in consultation with the military agencies. He observed that "no additional legislation to accomplish the general objectiveness seems to be required" and that "the matter should be handled in strictest confidence."[70]

The FBI Director's memorandum spelled out the reasons why legislation was considered undesirable. Hoover believed the FBI's expansion could "be covered" by the language in the appropriations statute relating to "other investigations" conducted for the State Department: [71]

> *Under this provision investigations have been conducted in years pasts for the State Department of matters which do not in themselves constitute a specific violation of a Federal Criminal Statute, such as subversive activities. Consequently, this provision is believed to be sufficiently broad to cover any expansion of the present intelligence*

and counter-espionage work which it may be deemed necessary to carry on. . . .

In considering the steps to be taken for the expansion of the present structure of intelligence work, it is believed imperative that it be proceeded with, with the utmost degree of secrecy in order to avoid criticism or objections which might be raised to such an expansion by either ill-informed persons or individuals having some ulterior motive. The word "espionage" has long been a word that has been repugnant to the American people and it is believed that the structure which is already in existence is much broader than espionage or counterespionage, but covers in a true sense real intelligence values to the three services interested, namely, the Navy, the Army, and Justice. Consequently, it would seem undesirable to seek any special legislation which would draw attention to the fact that it was proposed to develop a special counter-espionage drive of any great magnitude.[72]

Hoover noted that Army and Navy Intelligence did not need additional legislation "since their activities...are limited to matters concerning their respective services."

The FBI Director reviewed the current and proposed future operations of each of the three intelligence agencies. The FBI had set up a General Intelligence Section to investigative and correlate information dealing with "activities of either a subversive or a so-called intelligence type."

Each FBI field office had "developed contacts with various persons in professional, business, and law enforcement fields" to obtain this information. The following was a break-down of the subject matter in the Intelligence Section: "Maritime; government; industry (steel, automobile, coal, mining, and miscellaneous); general strikes; armed forces; education institutions Fascists; Nazi; organized labor; Negroes; youth; strikes; newspaper field; and miscellaneous." All information "of a subversive or general intelligence character pertaining to any of the above" was reviewed and filed at FBI headquarters, with index cards on individuals which made it possible to identify the persons "engaged in any particular activity, either in any section of the country or in a particular industry or movement."

This index then included "approximately 2500 names...of the various types of individuals engaged in activities of Communism, Nazism, and various types of foreign espionage." In addition, the FBI had "developed a rather extensive library of general intelligence matters, including sixty-five daily, weekly, and monthly publications, as well as many pamphlets and volumes dealing with general intelligence activities." From both investigative sources and research, the FBI from time to time prepared "charts...to show the growth and extent of certain activities."[73]

The Office of Naval Intelligence and the Military Intelligence Division were concerned with "subversive activities that undermine the loyalty and efficiency" of Army and Navy personnel or civilians involved in military construction and maintenance; with sabotage of military facilities or of "agencies contributing o the efficiency:" of the military; and with "spy activities that may result in divulgence of information to foreign countries or to persons when such divulgence is contrary to the interests of our national defense." However, MID and ONI lacked trained investigators, and they relied on the FBI "to conduct investigative activity in strictly civilian matters of a domestic character." The three agencies exchanged information of interest o one another, both in the field and at headquarters in Washington.

For the future, all three agencies agreed that other federal agencies should be excluded from intelligence work since others were "less interested in matters of general intelligence and counter-intelligence." And because "the more circumscribed this program is, the more effective it will be and the less danger there is of its becoming a matter of general public knowledge." The FBI hoped to expand its personnel so that it could assign an agent specializing in intelligence to each of its forty-five field offices and could reopen offices in Hawaii, Alaska, and Puerto Rico. Additional funds would also be used to expand FBI facilities for "specialized training in general intelligence work."[74]

Director Hoover met with the President in November 1938 and learned that he had instructed the Budget Bureau "to include in the Appropriations estimate $50,000 for Military Intelligence, $50,000 for Naval Intelligence and $150,000 for the Federal Bureau of Investigation to handle counter-espionage activities." The President also said "that had approved the plan which (Hoover) had prepared and which had been sent to him by the Attorney General," except for the revised budget figures. [75]

The Search For Japanese Spies

The Office of Naval Intelligence (ONI) suspected that the Japanese naval attaché office at the Japanese Embassy in Washington, D.C. controlled their spy operations throughout the United States. Under ONI guidance, efforts were increased to cover Japanese activities, including surveillance of Embassy military officials and suspected Japanese naval officers posing as students at major American universities. Their efforts resulted in the expulsion of Japanese assistant naval attaché, Yoshiro Kanamoto, who was caught photographing the U.S. Navy's fuel oil reserve depot at Point Loma and sketching the North Island Naval Air Station.

William D. Puleston, ONI Director, took a personal interest in the so-called language students. "The personality and movements of Japanese language officers are matters of greatest interest to this office, because experience in the past has shown that they engage in illegal activities." ONI was able to confirm the Director's concerns about this perceived threat from deciphering Japanese coded radio messages.

In reviewing a Japanese message, a cryptoanalyst, Miss Aggie Driscoll, had marked a section with contained the word "TO-MI-MU-RA." Not knowing what it meant, Miss Aggie, as her colleagues called her, showed the message to a Japanese language expert. The expert initially said that the word could reflect a Japanese name but Miss Aggie did not buy that explanation. The expert next suggested that the part of the word "mura" means town but also has an alternate meaning of "son." By putting the first part of the word with "son," the word becomes "Tomison or Thompson. ONI now a lead to a possible spy.

The lead led to Harry J. Thompson, a clerk in the Navy, who was contacting his ex-shipmates on behalf of the Japanese. His case officer was Commander Miyazaki, who was in the United States under English language student cover. When the FBI arrested Thompson, Miyazaki suddenly left the United States for Japan. Thompson was convicted under the Espionage Act of 1917 and sentenced to fifteen years at McNeil Island.

The radio traffic also revealed another possible American spy, codenamed Agent K. ONI investigation resulted in identifying Agent K

as John Semer Farnsworth.

Photograph of John Semer Farnsworth in the US Naval Academy Yearbook
PHOTO

John Semer Farnsworth was arrested on 14 July 1937 and charged with selling confidential papers of the U.S. Navy to an agent of the Japanese government. Farnsworth, a former Lt. Commander, was held on $10,000 bond and confined to the Washington, D.C. jail until his preliminary hearing.

The Japanese embassy depicted the charges as "astonishing" and stated that the first time they heard of Farnsworth was on the day before his arrest when someone called the embassy twice to ask for money in connection with a recent spy case. The spy case the embassy was referring to involved a former navy enlisted man, Harry T. Thompson, who was convicted and sentenced at Los Angeles, California for selling naval secrets to a Japanese agent.

FBI Director, J. Edgar Hoover, denied the arrest of Farnsworth was connected to the Thompson case. Thompson was the first man convicted of espionage since World War I. The U.S. Navy said that Farnsworth and Thompson are the only two such espionage cases in the history of the navy. Later years would see many more such cases.

Farnsworth, born 13 August 1893 in Chicago, Illinois, was appointed to the U.S. Naval Academy in 1911. The Naval Academy yearbook described Farnsworth as "daring and reckless." The writer of the account stated that if Farnsworth had resided in the days of the old navy, he "would have been famous for his desperate deeds and hairbreadth escapes." The writer closed his remarks with a quote from John Milton, "He can, I know, but doubt to think he will."

After his graduation in 1915, he was assigned to the Asiatic fleet, where in 1916 he went aboard the *S.S. Galveston*. He returned to the United States in 1917 and was given the temporary rank of lieutenant. His next assignment was in 1920 when he took flight training at Pensacola Air Station. He completed his training in 1922 and received ratings on seaplanes and airships. Farnsworth returned to Annapolis for a post-graduate course and then on to Massachusetts Institute of Technology and a college in New York to complete his post-graduate studies.

He was assigned to duty with VO Squadron 6, Aircraft Squadron, Scouting Fleet. Farnsworth, considered to be one of the most brilliant of the navy's young officer, was court-martialed in 1927. He was dismissed from the service on 12 November 1927 for conduct "tending to impair the morale of the service" and for "scandalous conduct tending to the destruction of good morale. The official explanation for the dismissal of one of the Navy's bright future stars was that Farnsworth borrowed money from enlisted men and committed perjury in disclaiming indebtedness.

Farnsworth was under surveillance for two years by Office of Naval Intelligence (ONI) and FBI officers. Surveillance began after Farnsworth visited Annapolis where he was reported to have pushed the wife of a high-ranking navy officer to allow him to read official documents. The wife reported the incident to Navy authorities. Since the case concerned a former navy officer and navy equities, ONI and the FBI jointly worked the investigation.

Farnsworth was destitute and needed money. To try to solve his problem, he began to recontact former associates to solicit documents.

The warrant for his arrest charged that "on or about May 15, 1935," Farnsworth sold to a Japanese agent a confidential Navy publication, "The Service of Information and Security." The warrant stated that Farnsworth, "did with intent and reason to believe that the same was to be used to the injury of the United States, and to the advantage of a certain foreign nation, communicate, deliver and transmit to an officer and agent of the imperial Japanese navy a certain document and writing relating to the national defense-to wit, a certain book entitled `The Service of Information and Security,' a confidential publication of the U.S. Navy.

This publication was first issued in 1916 under the title, "Scouting and Screening," but the title was changed in 1917 to the present title. The publication contains plans for battle information and tactics that were gathered from actual fleet maneuvers and tested by high-ranking naval officials.

On 17 July 1937, Farnsworth admitted to a journalist that he did show photographs of U.S. Navy aviation equipment to a Japanese agent while he was negotiating employment with the Japanese Air Force. He said that the photographs were available to anyone from the U.S. Navy's Public Relations Office. He also said that he included with the official photographs, some of his own photos taken during his naval service. He was attempting to demonstrate to the Japanese his experience and knowledge by including the photographs with his employment application.

He told the journalist that he had accidentally sent the document, mentioned in the warrant, home with his personal affects when he left the navy. He said the document, along with other personal items, was destroyed by a fire at his house. He denied passing the document to the Japanese agent.

Three days later, Farnsworth informed a newsman that he did sell two articles or monographs on naval subjects to the Japanese agent for $1,000. He said the articles were not classified. One of the articles was on a London naval conference and the other on naval aviation training.

The case was given to a grand jury. During the grand jury testimony it was revealed that Farnsworth had telephoned the Japanese embassy twice on the day before his arrest. Lt. Commander Leslie G. Genhres testified that Farnsworth took the confidential study from his desk in the Navy Department on 1 August 1934. An employee of the navy photostat plant, Mrs. Grace Jamieson, said that Farnsworth made frequent visits to the plant to copy military documents.

Based on the evidence presented, the grand jury indicted Farnsworth on two charges. The first charge was that Farnsworth actually transmitted the confidential book to an agent of Japan and the second count alleges an attempt to transmit the volume.

At the upcoming trial, Farnsworth faced a maximum penalty of 20 years, authorized under the provisions of the law making it illegal in peacetime "to disclose information affecting the nation's defense. Farnsworth said he would base his defense on an aircraft accident he had when he was an aviation student at Pensacola Naval Air Station. The Navy said it had no record of such an accident but Farnsworth's parents insisted that their son had been "irresponsible: since the accident.

In November 1936, Farnsworth's lawyer asked the court-martial commission to have the American Consul General in Tokyo take depositions from the two Japanese naval officers with whom

Farnsworth was alleged to have conspired. The two officers, Yosiyuki Itimiya and Akira Yamaki, both Lt. Commanders of the Imperial Japanese Navy, were formerly stationed at the Japanese embassy in Washington, D.C. as naval observers. Farnsworth's lawyer argued that since the two Japanese officers were no longer accredited to the United States as diplomats, they could freely testify and that their answers to defense questions were material to the case.

In December, Japan refused to authorize its naval officers to present testimony to any disposition in the Farnsworth case. The embassy noted that Japanese law could not compel its military officers to answer interrogations of foreign nations.

On 15 February 1937, Farnsworth changed his innocent plea to nolo contendere and threw himself on the mercy of the court. The prosecution had a list of fifty witnesses ready to testify against Farnsworth. The judge said he wanted to review the aspects of the case before pronouncing sentence. A few days later, Farnsworth requested to again change his plea from nolo contendere to not guilty. In his written request to the judge, he said that he made his decision without the advice of his counsel and it based on the publicity the case received. He claimed that his family suffered from the publicity and he was under the mistaken impression that his nolo contendere plea would not bring such adverse notoriety. The judge said that Farnsworth was in his rights to change his plea before sentencing and that he would hear Farnsworth's motion.

This was the first in a series of moves by Farnsworth to have his case dismissed. Farnsworth's lawyers withdrew from the case, and Farnsworth tells the judge that he will conduct his own defense. His next move was to file a writ of habeas corpus to get released from prison. He argued that the facts alleged in the indictment, under which he was convicted, did not constitute a crime. He claimed that he did not understand nolo contendere meant guilty and wanted to withdraw the plea but the court rejected it. The judge denied his writ and upheld the indictment.

Farnsworth was sentenced on 27 February 1937 to serve "not less than four years nor more than twelve years in prison."

In January 1938, Farnsworth again appealed the judge's decision in the writ of habeus corpus. He alleged that the court erred in holding a petitioner could not be released "from unlawful imprisonment" by habeas corpus proceedings; that the trial court did not have the jurisdiction in the case and that the court did not have the power to pronounce an indeterminate sentence. Farnsworth's sentence was upheld by the U.S. Fifth Circuit Court of Appeals for conspiracy to divulge military secrets to Japan. The court ruled that Farnsworth and others conspired "to communicate and transmit to a foreign government-to wit Japan- writings, code books, photographs and plans relating to the national defense with the intent that they should be used to the injury of the United States."

Special House Committee ForThe Investigation Of Un-American Activities

Martin Dies, a Texas Congressman, introduced a resolution on 21 July 1937 to create a special committee to investigate subversion in the United States. After prolonged debate the resolution passed on 26 May 1938. The committee, known as the Dies Committee after its chairman, was formed on 6 June but formal hearings did not begin until 12

August. The major target of the committee was organized labor groups, particularly the Congress of Industrial Organizations. A major tactic employed by Dies, and
one that set a pattern for how the committee functioned until after World War II, was his meeting alone and secretly with friendly witnesses who accused hundreds of individuals of supporting Communist activities. The press sensationalized these accusations but only a few of the accused were given the opportunity to defend themselves.

Because the Dies Committee was a special committee, its mandate had to be renewed by the Congress every two years. This changed in 1945 when it was replaced by the permanent standing Committee on Un-American Activities. Over the next five years the committee originated investigations into the motion picture industry, hunting for communists. Their investigation resulted in the blacklisting of producers, writers and actors by Hollywood. But the committee's greatest fame was its investigation of Alger Hiss and his eventual perjury, which fixed internal communism as a leading political issue. As a major political force, the Committee used contempt citations as a major weapon against those who refused to testify by taking the Fifth Amendment right against self-incrimination. In 1950, for example, the Committee issued 56 citations out of the 59 citations voted by the House of Representatives.

In the 1950s, Senator Joseph McCarthy began his investigations into communists in government, which overshadowed the work of the committee. Being in the background, the committee did not suffer any affect from McCarthy's downfall. The committee continued to pursue communists and other un-American activities until the beginning of 1960. For the next two decades, the committee focused on the black militants, the anti-war movement, other radical youth groups and terrorism. In 1968 the committee was renamed the Committee on Internal Security. In 1975 the committee was abolished.

Defectors

Alexander Gregory Barmine

Alexander Gregory Barmine, born 16 August 1899, in Russia, joined the Red Army as a private and rose through the ranks to become a brigadier general. He was recruited by Soviet military intelligence (GRU) from his graduating class in the Soviet General Staff Academy in 1921.

Following three years of language study at the Oriental Institute, he joined the People's Commissariat of Foreign Trade. He served as a foreign trade specialists at several diplomatic posts in Europe. In addition, Barmine reported on his contacts to the GRU.

In 1937, while assigned as Soviet Charge d'Affaires in Athens, Greece, Barmine defected. He first fled to Paris as a political refugee. Three years later he entered the United States where he became a naturalized citizen in July 1943. During World War II he joined the US Army and later served with the Office Strategic Services (OSS) from 1943 until September 1944. He was dismissed from the OSS for absenteeism.

In October 1948, Barmine began work as a consultant with the Department of State. Prior to his retirement in the spring of 1972, he served as chief of the Russian Desk of the Voice of America.

In July 1951 he testified before the Senate Committee on Un-American activities. He wrote two books, *Memoirs of a Soviet Diplomat* (published in 1938 in London_translated by Gerard Hopkins) and *One Who Survived* (published in 1945 by Putnam) as well as occasional anti-Soviet magazine articles.

Ignace Reiss

Ignace Reiss, born January 1899 in Galicia, a part of the old Austro-Hungarian Empire. His true name was apparently Poretskiy. His mother was reportedly a Russian Jewess and his father a gentile. In 1922, while in the Soviet Union, Reiss married Else Bernaut, a student. The couple had one son, Roman Bernaut. Else kept her maiden name and, at times, Reiss used this surname operationally.

From 1921 to 1931 Reiss traveled throughout Europe where he engaged in political action operations for the COMINTERN and then in espionage for the GRU. In 1931 he was recruited by the Soviet Security Service and assigned to industrial espionage directed primarily against Germany. In the Soviet Security Service he was known as "Ludwig." After Hitler's rise to power, Reiss operated from countries bordering on Germany.

In the spring of 1937, Reiss, whose family was living in the West with him, decided to break with the Soviets because of the brutal purges then under way in the Soviet Union. During this time, he established contacts with Trotskiyites in Western Europe. On 17 July 1937, Reiss wrote a letter to the Central Committee of the Communist Party of the Soviet Union and delivered it to the Soviet Commercial Mission in Paris. In this letter he condemned the frightful excesses of Stalin and the Soviet Security Service. He then fled to Switzerland where his family was located.

Turning their full attention to the liquidation of Reiss, Soviet agents tracked him down in Switzerland. On 4 September 1937 Reiss was shot and killed by Soviet assassins and his bullet-ridden body dumped on the side of a road in Chamblandes outside Lausanne, Switzerland.

Reiss' wife identified the body bearing identity papers with the name Herman Eberhardt as that of Ignace Reiss. In later years after World War II, she was at time in contact with US intelligence about Soviet Security Service operations and personnel. She also wrote *Our Own People: A Memoir of Ignace Reiss and his Friends* (published in London in 1969). The book is a study of their involvement in pre-World War II Soviet operations in Europe. One of Reiss' friends mentioned in the book was the defector Walter Krivitsky.

An active participant in the Soviet operation against Reiss was Roland Abbiate, born 15 August 1905 in London, who lived at one time in the United States during the early twenties. Abbiate disappeared after the murder. Later, during World War II, he turned up again in the United States where he served as a Soviet diplomat, Vladimir Sergeyvich Pravdin.

Anatoli Golitsyn, another Soviet defector in the 1960s, also claimed that Pravdin was active in Austria after World War II, often passing as a Frenchman.

The French Ministry of Interior study, *A Soviet Counter-espionage Network Abroad _ the Reiss Case*, published on 20 September 1951, stated "The assassination of Ignace Reiss on 4 September 1937 at Chamblandes near Lausanne, Switzerland, is an excellent example of the observation, surveillance and liquidation of a `deserter' from the Soviet secret service."

Walter G. Krivitsky

Walter G. Krivitsky, born 28 June 1899 in Podwoloczyska, Russia, was a Soviet military intelligence officer who defected to the West prior to World War II. Krivitsky, whose true name was Samuel Ginsburg, spent nearly twenty years in Soviet intelligence.

At the age of thirteen, Krivitsky became active in the Russian working class movement and five years later, in 1917, he joined the Bolshevik Party. Shortly after the revolution, he entered the Red Army and was assigned to military intelligence.

In 1920, he was sent to Danzig, with orders to prevent the landing of French munitions being shipped to the Polish army. He was also instructed to organize strikes against arms shipments in other European cities. In 1922 Krivitsky, along with other Soviet officers, was dispatched to Berlin to mobilize elements of unrest in the Ruhr; to create the German Communist Party's intelligence service; and to form the nucleus of the future German Red Army.

By 1926, Krivitsky was chief for Central Europe in Soviet Military Intelligence. After several years in Moscow he was posted to The Hague in 1935 as Chief of Military Intelligence for Western Europe.

During this assignment, he provided Moscow with information about secret negotiations then taking place between Japan and Germany. In 1936, Krivitsky was instructed to create a system to purchase and transport arms to the Red forces fighting in the Spanish Civil War.

In September 1937, one of Krivitsky's closest colleagues and friends, Ignace Reiss, was murdered after having broken with the Soviets. Krivitsky feared that he too was doomed to be purged. In later years he claimed that his friend's death, coupled with Stalin's purges of the Old Bolshevik Guard, many of whom were his friends and colleagues, were key factors influencing his own decision to sever his connection with the Soviet government and the Communist Party of the Soviet Union in October 1937.

Krivitsky with his family were given asylum by the French government in October 1937. During the next year, while living in France and guarded by the French police, the Soviets tried unsuccessfully to assassinate him. In November 1938, Krivitsky, who planned to write a book, arrived in the United States for an extended visit. The following year he testified before the House Committee on Un-American Activities and was interviewed by British authorities.

Traveling from Canada, Krivitsky re-entered the United States in October 1940 in order to settle in New York under the name Walter Poref. On 10 February 1941 he was found shot to death in a hotel room in Washington, D.C. where he was in transit to New York. Questions still remain whether his death was a suicide or a Soviet liquidation.

Krivitsky's book *I Was Stalin's Agent*, was published in London in 1940. In it, he warned of high-level penetrations in Western governments.

Aleksandr Orlov

Aleksandr Orlov, whose true name was Leon Lazarevich Feldbin, was born on 21 August 1985 in Bobruisk, Russia. He was drafted into the Russian army and stationed in the Urals in 1916. The next year he joined the Bolshevik Party and graduated as a second lieutenant from the Third Moscow Military School.

By September 1920 he was with the 12th Red Army on the Polish front where he was in charge of guerrilla activity and counterintelligence. The successes of his work on the Polish front brought him to the attention of Feliks Dzerzhinskiy, chief of the Cheka, the Soviet State Security Service at the time. A year later, during a brief assignment to Archangel, Orlov was married.

With his wife, Orlov returned to Moscow in 1921 to become assistant prosecutor to the Soviet Supreme Court. While in this position, he worked on the formation of the Soviet criminal code and, at Dzerzhinskiy's request, investigated Soviet citizens accused of economic crimes. Soon thereafter Dzerzhinskiy brought Orlov into the Cheka as deputy chief of the Economic Directorate. He served in this position until 1925 when he became brigade commander of the border guards in Armenia. The following year Orlov was reassigned to the Foreign Department in a newly created headquarters unit that was to oversee and control Soviet foreign trade. Shortly thereafter, under the alias Leon Nikolayev, Orlov was transferred to the Paris representation as chief of Soviet intelligence operations in France.

From 1928 until 1931 he served at the Soviet Trade Delegation in Berlin where he again was concerned with economic intelligence. As deputy chief of the headquarters economic control component from 1933 to early 1936, Orlov traveled frequently to Europe, directing illegals in operations against Germany. While still assigned in Moscow, he served a year as deputy chief of the Department of Railways and Sea Transport in the Soviet State Security Service.

In 1936 Orlov was sent to Spain as Soviet liaison representative to the Republican Government for matters of intelligence, counterintelligence, and guerrilla warfare. Throughout Orlov's stay in Spain, tales mounted of secret trials, summary executions, and widespread terror in the Soviet Union.

In July 1938, Orlov was abruptly ordered to Paris. While in transit, he stopped to see his family, which was living in France not far from the Spanish border. Orlov discussed with his wife his growing suspicions and his moral revulsion, and then decided to break with Stalin and the Soviet Union. After first enlisting the aid of the Canadians, the Orlovs entered the United States on 13 August 1938. Eighteen years later they were granted permanent residence.

After Orlov's defection, he provided much information to US intelligence on pre-World War II personnel and operations of the Soviet State Security Service. With the publication of his book, *The Secret History of Stalin's Crimes* in 1953, the true history of the Soviet Union from 1934 to 1938 was revealed for the first time. In 1955 and again in 1957, Orlov appeared before the Senate Subcommittee on Internal Security. His second book, *The Handbook of Intelligence and Guerrilla Warfare*, was published in 1963.

In April 1973 Orlov died in the United States.

CONTINUE CHAPTER 4

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FBI Intelligence AuthorityAnd Subversion

There is no evidence that either the Congress in 1916 or Attorney General Stone in 1924 intended the provision of the appropriations statue to authorize the establishment of a permanent domestic intelligence structure. Yet Director Hoover advised the Attorney General and the President in 1938 that the statute was "sufficiently broad to cover any expansion of the present intelligence and counter-espionage work which it may be deemed necessary to carry on."[76] Because of their reluctance to seek new legislation in order to keep the program secret, Attorney General Cummings and President Roosevelt did not question the FBI Director's interpretation. Nevertheless, the President's approval of Director Hoover's 1938 plan for joint FBI-military domestic intelligence was a substantial exercise of independent presidential power.

The precise nature of FBI authority to investigate "subversion" became confusing in 1938-1939. Despite the references in Director Hoover's 1938 memorandum to "subversion," Attorney General Cummings cited only the President's interest in the "so-called espionage situation."[77] Cummings' successor, Attorney General Frank Murphy, appears to have abandoned the term "subversive activities."[78] Moreover, when Director Hoover provided Attorney General Murphy a copy of his 1938 plan, he described it (without mentioning "subversion") as a program "intended to ascertain the identity of persons engaged in espionage, counter-espionage, and sabotage of a nature not within the specific provision of prevailing statues."[79]

Moreover, a shift away from the authority of the appropriations provision, which was linked to the State Department's request, became necessary in 1939 when the FBI resisted an attempt by the State Department to coordinate domestic intelligence investigations. Director Hoover urged Attorney General Frank Murphy in March 1939 to discuss the situation with the President and persuade him to "take appropriate action with reference to other governmental agencies, including the State Department, which are attempting to literally chisel into this type of work. . . ." The Director acknowledged that the FBI required "the specific authorization of the State Department" where the subject of an investigation "enjoys any diplomatic status," but he knew of "no instance in connection with the handling of the espionage work in which the State Department has had any occasion to be in any manner or degree dissatisfied with or apprehensive of the action taken by Bureau agents."[80]

Director Hoover was also concerned that the State Department would allow other Federal investigative agencies, including the Secret Service

and other Treasury Department units, to conduct domestic intelligence investigations.[81] The FBI cited the following example in communications to the Attorney General in 1939:

> *On the West coast recently a representative of the Alcohol Tax Unit of the Treasury Department endeavored to induce a Corps Area Intelligence Officer of the War Department to utilize the services of that agency in the handling of all investigations involving espionage, counter-espionage, and sabotage. . . .*
>
> *A case was recently brought to the Bureau's attention in which a complaint involving potential espionage in a middle western State was referred through routine channels of a Treasury Department investigative agency and displayed in such a manner before reference ultimately in Washington to the office of Military Intelligence and then to the Federal Bureau of Investigation, that a period of some six weeks elapsed. . . .*[82]
>
> *During a recent investigation . . . an attorney and Commander of the American Legion Post . . . disclosed that a Committee of that Post of the American Legion is conducting an investigation relating to un-American activities on behalf of the Operator in Charge of the Secret Service, New York City.*[83]

Consequently, at the FBI Director's request, the Justice Department asked the Secret Service, the Bureau of Internal Revenue, the Narcotics Bureau, the Customs Service, the Coast Guard, and the Post Office Department to instruct their personnel that information "relating to espionage and subversive activities" should be promptly forwarded to the FBI.[84]

The Justice Department letter did not solve the problem, mainly because of the State Department's continued intervention. Director Hoover advised Attorney General Frank Murphy "that the Treasury Department and the State Department were reluctant to concede jurisdiction" to the FBI and that a conference had been held in the office of an Assistant Secretary of State "at which time subtle protests against the handling of cases of this type in the Justice Department were uttered." Hoover protested this "continual bickering" among Departments, especially "in view of the serious world conditions which are hourly growing more alarming."[85]

Two months later the problem remained unresolved. Assistant Secretary of State George S. Messersmith took on the role of "coordinator" of a committee composed of representatives of the War, Navy, Treasury, Post Office, and Justice Departments. The FBI Director learned that under the proposed procedures, any agency receiving information would refer it to the State Department which, after analysis, would transit the data to that agency which it believed should conduct the substantive investigation. FBI and Justice Department officials prepared a memorandum for possible presentation to the President, pointing out the disadvantages of this procedure:

The inter-departmental committee by its operations of necessity causes delay, which may be fatal to a successful investigation. It also results in a duplication of investigative effort . . . because of the lack of knowledge of one agency that another agency is working upon the same investigation. The State Department coordinator is not in a position to evaluate properly the respective investigative ability of the

representatives of particular departments in a manner comparable to that which the men actually in charge of an investigative agency may evaluate the proper merit of his own men.[86]

Endorsing this view, Attorney General Murphy wrote the President to urge abandonment of this interdepartmental committee and "a concentration of investigation of all espionage, counterespionage, and sabotage matters" in the FBI, the G-2 section of the War Department, and the Office of Naval Intelligence. The directors of these agencies would "function as a committee for the purpose of coordinating the activities of their subordinates." To buttress his recommendation, the Attorney General pointed out that the FBI and military intelligence:

> *". . .have not only gathered a tremendous reservoir of information concerning foreign agencies operating in the United States, but have also perfected methods of investigation and have developed channels for the exchange of information, which are both efficient and so mobile and elastic as to permit prompt expansion in the event of an emergency."*

Murphy stressed that the FBI was "a highly skilled investigative force supported by the resources of an exceedingly efficient, well equipped, and adequately manned technical laboratory and identification division." This identification data related "to more than ten million persons, including a very large number of individuals of foreign extraction." The Attorney General added, "As a result of an exchange of data between the Departments of Justice, War and Navy, comprehensive indices have been prepared."[87]

President Roosevelt agreed to the Attorney General's proposal and sent a confidential directive drafted by FBI and Justice Department officials to the heads of the relevant departments. This June 1939 directive was the closet thing to a formal charter for the FBI and military domestic intelligence: It read as follows:

> *It is my desire that the investigation of all espionage, counterespionage, and sabotage maters be controlled and handled by the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Division of the War Department, and the Office of Naval Intelligence in the Navy Department. The Directors of these three agencies are to function as a committee to coordinate their activities.*

No investigations should be conducted by an investigative agency of the Government into matters involving actually *or potentially* any espionage, counterespionage, or sabotage, except by the three agencies mentioned above.

I shall be glad if you will instruct the heads of all other investigative agencies than the three named, to refer immediately to the nearest office of the Federal Bureau of Investigation any data, information, or material that may come to their notice bearing directly *or indirectly* on espionage, counterespionage, or sabotage. [88](Emphasis added.)

The legal implications of this directive are clouded by its failure to use the term "subversive activities" and its references instead to *potential* espionage or sabotage and to information bearing *indirectly* on espionage or sabotage. This language may have been an effort by the Justice Department and the FBI to deal with the problem of legal authority posed by the break with the State Department. Since the FBI no longer wanted to base its domestic intelligence investigations on

State Department requests, some other way had to be fond to retain a semblance of congressional authorization. Yet the scope of the FBI's assignment made this a troublesome point. In 1936, President Roosevelt had wanted intelligence about Communist and Fascist activities generally, not just data bearing on potential espionage or sabotage; and the 1938 plan provided for the FBI to investigative "activities of either a subversive or a so-called intelligence type."[89] There is no indication that the President's June 1939 directive had the intent or effect of limiting domestic intelligence to the investigation of violations of law.

Consistent with the FBI Director's earlier desires, these arrangements were kept secret until September 1939 when war broke out in Europe. At that time Director Hoover decided that secrecy created more problems that it solved, especially with regard to the activities of local law enforcement. He learned that the New York City Police Department had "created a special sabotage squad of fifty detectives . . . and that this squad will be augmented in the rather near future to comprise 150 men." There had been "considerable publicity" with the result that private citizens were likely to transmit information concerning sabotage "to the New York City Police Department rather than the FBI." Calling this development to the attention of the Attorney General, the Director strongly urged that the President "issue a statement or request addressed to all police officials in the United States: asking them to turn over to the FBI "any information obtained pertaining to espionage, counterespionage, sabotage, and neutrality regulations."[90]

A document to this effect was immediately drafted in the Attorney General's office and dispatched by messenger to the White House with a note from the Attorney General suggesting that it be issued in the form of "a public statement."[91] In recording his discussions that day with the Attorney General's assistant, Alexander Holtzoff, FBI official E. A. Tamm referred to the statement as "an Executive Order." Tamm also talked with the Attorney General regarding "the order":

Mr. Murphy stated that when he was preparing this he tried to make it as strong as possible. He requested that I relay this to Mr. Hoover as soon as possible and stated he knew the Director would be very glad to hear this. Mr. Murphy stated he prepared this one on the basis of the memorandum, which the Director forwarded to him.[92]

The President's statement (or order or Executive Order) read as follows:

> *The Attorney General has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations.*
>
> *This task must be conducted in a comprehensive and effective manner on a national basis, and all information must be carefully sifted out and correlated in order to avoid confusion and irresponsibility.*
>
> *To this end I request all police officers, sheriffs, and other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality laws.*[93]

The statement was widely reported in the press, along with the following remarks by Attorney General Murphy at a news conference held the same day:

Foreign agents and those engaged in espionage will no longer find this country a happy hunting ground for their activities. There will be no repetition of the confusion and laxity and indifference of twenty years ago.

We have opened many new FBI offices throughout the land. Our men are well prepared and well trained. At the same time, if you want to this work done in a reasonable and responsible way it must not turn into a witch-hunt. We must do no wrong to any man.

Your government asks you to cooperate with it. You can turn in any information to the nearest local representative of the Federal Bureau of Investigation.[94]

Three weeks later Murphy reiterated that the government would "not act on the basis of hysteria." He added, "Twenty years ago inhuman and cruel things were done in the name of Justice; sometimes vigilantes and others took over the work. We do not want such things done today, for the work has now been localized in the FBI."[95]

Two days after issuing the FBI statement, President Roosevelt proclaimed a national emergency "in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peacetime authorizations." The proclamation added, "Specific direction and authorizations will be given from time to time for carrying out these two purposes."[96]

Thereupon, he issued an Executive Order directing the Attorney General to "increase the personnel of the Federal Bureau of Investigation, Department of Justice, in such number, not exceeding 150, as he shall find necessary for the proper performance of the additional duties imposed upon the Department of Justice in connection with the national emergency."[97] President Roosevelt told a press conference that the purpose of this order expanding the government's investigative personnel was to protect the country against "some of the things that happened" before World War I:

> *There was sabotage; there was a great deal of propaganda by both belligerents, and a good many definite plans laid in this country by foreign governments to try to sway American public opinion.*
>
> *. . . It is to guard against that, and against the spread by any foreign nation of propaganda in this country, which would tend to be subversive—I believe that is the world—of our form of government.*[98]

President Roosevelt never formally authorized the FBI or military intelligence to conduct domestic intelligence investigations of "subversive activities," except for his oral instruction in 1936 and 1938. His written directives were limited to investigations of espionage, sabotage, and violations of the neutrality regulations. Nevertheless, the President clearly knew of and approved informally the broad investigations of "subversive activities" carried out by the FBI.

President Roosevelt did use the term "subversive activities" in a directive to Attorney General Robert Jackson on wiretapping in 1940.

This directive referred to the activities of other nations "engaged in the organization of propaganda of so-called `fifth columns'" and in "preparation for sabotage." The Attorney General was directed to authorize wiretapping "of persons suspected of subversive activities against the Government of the United States, including suspected spies." The President also instructed that such wiretaps be limited "insofar as possible to aliens."[99]

With respect to investigations generally, however, the confusion as to precisely what President Roosevelt authorized is indicated by Attorney General Francis Biddle's description of FBI jurisdiction in 1942 and by a new Presidential statement in 1943. Biddle issued a lengthy order defining the duties of the various parts of the Justice Department in September 1942. The pertinent section relating to the FBI stated that it had a duty to "investigative" criminal offenses against the United States and to act as a "clearing house" for the handling of "espionage, sabotage, and other subversive matters."[100] This latter "clearing-house" function was characterized as a duty to "carry out" the President's directive of September 6, 1939.

Four months prior, President Roosevelt renewed his public appeal for "police cooperation" and added a request that "patriotic organizations" cooperate with the FBI. This statement describes his September 1939 order as granting "investigative" authority to the FBI and not simply a "clearing-house" function. However, the President defined that authority as limited to
"espionage, sabotage, and violations of the neutrality regulations" without any mention of "subversion."[101]

The statement was consistent with Attorney General Biddle's internal directive later in 1943 that the Justice Department's "proper function" was "investigating the activities of persons who may have violated the law."[102]

A similar problem is involved with the authority for "counterespionage" operations by the FBI and military intelligence. President Roosevelt's confidential order of June 1939 explicitly authorized the FBI and military intelligence to handle counterespionage matters, and the 1938 plan used the terms "counter-espionage" and "counter-intelligence." However, none of the President's public directives formally authorized counterespionage measures going beyond investigation; and the Justice Department's regulations made no reference to this responsibility.

Presidential Directive

> Directive of the President of the United States
> *June 26, 1939:*
>
> *"It is my desire that the investigation of all espionage, counterespionage, and sabotage matters be controlled and handled by the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Division of the War Department, and the Office of Naval Intelligence of the Navy Department. The directors of these three agencies are to function as a committee to coordinate their activities.*
>
> *"No investigations should be conducted by any investigating agency of the Government into matters involving actually or potentially any espionage, counterespionage, or sabotage, except by the three agencies mentioned above.*

"I shall be glad if you will instruct the heads of all other investigative agencies that the three named, to refer immediately to the nearest office of the Federal Bureau of Investigation any data, information, or material that may come to their notice bearing directly or indirectly on espionage, counterespionage, or sabotage."

Letters To/From ONI

H.G. Dohrman to Ellis

369 South Pacific Avenue
Pittsburgh, Penna.
April seventh 1934

My dear Captain Ellis:-

Have been much disquieted lately by the news constantly trickling in revealing the very widespread scope of existent radical activities.

My own impression is that the calling of the strike at the works of the New York Shipbuilding and Drydock Co., was a tactical error, for thereby it focused the attention of the nation upon the danger to the nation of the interruption of our belated shipbuilding program. Some master mind among the radicals must have been asleep for they well know that strikes called in a half-dozen or more plants fabricating essential elements of naval construction will as effectually block progress towards the completion of the ships, as will a single prominent strike.

Deem it unfortunate that it was publicly noted that the modernization of two ships of the battleship squadron was advisedly postponed.

I write with the full knowledge of the fact that no emergency requires the return to active duty as such officers as myself and that therefore no compensation is either asked or expected.

For something over one year, while attached to the Bureau of Ordnance, worked under the late Commander A.L. Norton, on a very extensive program of anti-radical work, directed towards uncovering such movements, issuing advance warnings of all those likely to interrupt the continuous flow of navy material, or to be destructive to life and property.

My understanding, through my old time friend the late Vice-Admiral Niblack, was to the effect that Intelligence was kept advised of our movements as made or proposed. My number was "7 _ 6".

We were able at that time to command, without expense, the services of the intelligence divisions of several of our greatest corporations, of men prominent alike in civil life and the clergy.

It is not purpose to convey to you the impression that the excellence of that service, and numerous commendatory letters and verbal statements, indicated that it was distinctly serviceable, can be repeated.

Wide and continued travel was necessary and much personal, as well as departmental, expense was incurred. Like almost every other man in business have suffered reverses that prohibit personal expenditures of that nature; however, my desire to be of service to the Navy is as ardent as it has been these forty-odd years.

The basis of that war time interchange of information was based on the inviolability of all such information, which was received, digested and the important portions forwarded where needed. Such Navy information as it was not incompatible with the public interests to reveal was passed along and information from private conversations between Captain Norton and myself and sources were never mentioned.

This afternoon, in the course of a two hour conversation with the executive head of the greatest of these private intelligence organizations, he expressed a willingness to renew in somewhat the same form the old relations. As a matter of fact this man and myself have almost weekly conversations and exchange information upon such subjects, for I still keep in touch with several of the best of our former men. One in particular visits constantly every place of consequence on the Mississippi and all of its tributaries, covering the entire Middle West, inclusive of the extreme northern and southern portions thereof. I am confident that he will gladly report conditions exactly as he finds them, and I may say that such reports as he may make can be absolutely relied upon. Have known him well for thirty-five years, he is professionally highly competent and his judgment sound.

If the idea appeals to you believe I can secure for you the cooperation of at least three of the nation's greatest industrial intelligence organizations, whose services will not cost the Bureau a penny. My own duty would be to act in the capacity of a screen, removing all non-essential information before forwarding the result to you.

I shall be glad to contribute as much time as possible and postage, unless it is in the end the latter should become burdensome, for these days we have to carefully scrutinize even such relatively small items as postage.

In the manner above suggested it will be feasible to cover, in a fairly thorough manner, radical activities promising future potential harm to the Navy, over the most prominent of the centers devoted to the fabrication of steel and to the kindred industries that often are found in steel districts.

In any event am offering the above for your thought; if the idea does not seem either sound or practicable to you, do not hesitate for a moment to say so.

It may be proper to add that in, to me, a highly expensive adventure into the soft coal industry, as president of an operating company kept the Tri-State Operators so fully

advised of every movement of the military strikers, that violence and loss of life in our district was almost negligible throughout the strike period of 1922 and 1923.

I fully understand that it is often impossible for a Bureau Chief to do officially what he would like to do personally, even though no cost be attached to the Bureau. I know that much even if we didn't have a General McCord in that day.

Believe me to be with warmest regards and best wishes.

Cordially,

H. G. Dohrman

Ellis to Dohrman

Op-16-B-2
Apr 12, 1934

My dear Dohrman:

I am very grateful indeed to receive your extremely interesting letter of April 7th in regard to radical activities in the shipbuilding and steel industries.

Naturally this office is very much interested in receiving information along the lines you suggest and I assure you that your generous and patriotic offer to devote your time and effort without compensation to securing such information is greatly appreciated.

If you can arrange to keep in touch with the private intelligence organizations which you mention and secure a flow of information regarding the current activities of radical groups, I shall be very glad to provide for the matter of postage.

Thanking you for your communication and with assurance of my personal regards.

Very sincerely,

/s/ Hayne Ellis
Rear Admiral, U.S.N.,
Director of Naval Intelligence

Dohrman to Ellis

April twentieth 1934

My dear Admiral

Thank you for your cordial letter of the 18th, I sincerely hope that your ten days leave will prove to be both pleasant and beneficial.

Am now able to definitely say that we will have the hearty cooperation of the following:-

The Aluminum Company of America,
The Carnegie Steel Corporation,
The Jone and Laughlin Steel Corporation, and
The National Steel Corporation

The first and fourth at present time have no special intelligence service of their own, but do have excellent police organizations together with an unofficial but usually effective inside organization.

These concerns have plants in almost every important manufacturing district of the nation and information will be received from all of them.

Other sources previously mentioned, and some only considered but not yet mentioned, will materially add to the area covered and the efficiency of the service. When all arrangements have been completed, you will be duly advised.

If a list can be procured from C&R Ordnance and Aeronautics giving only the plants holding Navy contracts, the material under fabrication being impossible to obtain elsewhere, we will do our best to advise all such plants in advance of visits from agitators, etc. Plants making material that can be secured from numerous other plants of like type need not be included in such lists. The material being fabricated or the amounts of the several contracts are immaterial: our sole aim will be to insure, if possible, the uninterrupted flow of Navy material.

So far all former members of our old wartime organization who have been approached and had the situation explained to them, have agreed to go along with us.

With sincere good wishes,

Cordially,

/s/ H.G. Dohrman

Dohrman to Ellis

April twenty-seventh, 1934

My dear Admiral:-

Supplementing my informal report of progress made as of the twentieth, am glad to be able to advise you that negotiations have been closed with the following:

New York Central Ry. Lines
The Pennsylvania Railroad
The Westinghouse Electric & Mfg. Co., and,
D.W. Sowers.

The latter is the executive head of a very efficient Buffalo (N.Y.) organization, maintained at private expense and not for profit, whose business it has been for approximately twenty years to combat radicalism. I know by experience in cooperating with it in the past how very efficient it has been. Mr. Sowers is president of a large manufacturing

concern there that bears his name., and he had promised us cordial and prompt cooperation. His card files contain the names of some 4,000 actual and semi-radicals.

When our intelligence clearing house once gets going in good shape, we hope that it will be of value to you.

You will note that we gave covered, with the exception of the New England, Southern and far Western states, the heart of the nation's manufacturing, and through one of my old men, to whom previous reference has been made, a considerable portion of the South will likewise be covered.

As you will appreciate, it is something of a task to coordinate these varied sources of information, and to put the information received into shape for instant dissemination.

The time is certainly ripe for action. There were no evening papers here today, one paper had it's large windows smashed with bricks, etc. A strike of the folders.

In each case those cooperating with us have been advised, in advance, that the sources of information would not be revealed, and that each participant would receive only the information appertaining or useful to them. Some of those interested with us have excellent organizations already, others possess the nucleus. As often hapens the organization that needs it most has the poorest present service of information.

With best wishes and regards,

Cordially,

H.G. Dohrman

Dohrman to Ellis

April thirtieth 1934

My Dear Admiral:-

The enclosure[103] will illustrate the method of gleaning information adopted. You already know the institutions whose intelligence service has been placed at our disposal and with whom we now arranging inter-communicating services.

If you have two or three hundred of the green second sheets, like the enclosure, can use them to advantage. The green gives quick identification in our files.

The enclosure represents the 18 plants employing almost 17,000 men, the plants being distributed throughout the states enumerated, and all, as you have doubtless already gathered from the keyed numbers, being those of a single concern.

The other concerns are as large or larger, though their interests are not so widely scattered.

While all operations for the present are being conducted from the local Carnegie Steel offices, the probabilities are that the several concerns, later, will provide a separate office, as the work so far gives promise of assuming a considerable volume.

Conditions are not good here; four local theatres were bombed here last night due to the rivalry of two unions, one anti-AFL. A street car strike is brewing, the truck drivers and garage attendants seem likely to "go out," so there is the devil to pay generally around here.

With best wishes and regards,

Cordially,

/s/ H.G. Dohrman

Hoover to Ellis

Division of Investigation
U.S. Department of Justice
Washington, D.C.

May 21, 1934

Rear Admiral Hayne Ellis
Director, Naval Intelligence
Navy Department
Washington, D.C.

Dear Sir:

I am in receipt of information from the Pittsburgh Office of this Division to the effect that it has been learned from a reliable source there that one Horatio Garrott Dohrman is active in that vicinity in soliciting funds and organizing a unit for the alleged purpose of investigating communistic and other subversive activities. It is reported that Dohrman has represented himself as a former Lieutenant Commander in the Navy, in view of which it is believed that this information may be of interest to you.

Very truly yours,

/s/ J. E. Hoover
Director

CONTINUE CHAPTER 4

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Presidential Directive Of September 6, 1939

The attorney general has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of neutrality regulations.

This task must be conducted in a comprehensive and effective manner on a national basis, and all information must be carefully sifted out and correlated in order to avoid confusion and irresponsibility.

To this end I request all police officers, sheriffs, and all other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality law.

Police Cooperation

On September 6, 1939, I issued a directive providing that the Federal Bureau of Investigation of the Department of Justice should take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations, pointing out that the investigations must be conducted in a comprehensive manner, on a national basis, and all information carefully sifted out and correlated in order to avoid confusion and irresponsibility. I then requested all police officers, sheriffs, and other law enforcement officers in the United States, promptly to turn over to the nearest representatives of the Federal Bureau of Investigation any such information.

I am again calling the attention of all enforcement officers to the request that they report all such information promptly to the nearest field representative of the Federal Bureau of Investigation, which is charged with the responsibility of correlating this material and referring matters which are under the jurisdiction of any other Federal agency with responsibilities in this field to the appropriate agency.

I suggest that all patriotic organizations and individuals likewise report all such information relating to espionage and related matters to the Federal Bureau of Investigation in the same manner.

I am confident that all law enforcement officers, who are now rendering such invaluable assistance toward the success of the internal safety of our country, will cooperate in this matter.

(Signed) Franklin D. Roosevelt

The Corps of Intelligence Police From 1917 to WWII

ONI Message

Attorney General Harlan Stone's Reforms

Special Committee to Investigate Un-American Activities

The FBI Intelligence Program, 1936-38

The Search for Japanese Spies

Special House Committee for the Investigation of Un-American Activities

Defectors

FBI Intelligence Authority and Subversion

Letters To/From ONI

Presidential Directive of September 6, 1939

The Scope of FBI Domestic Intelligence

Counterintelligence Between the Wars Bibliography

Counterintelligence Between the Wars Chronology

Counterintelligence Between the Wars End Notes

The Scope Of FBI Domestic Intelligence

A central feature of the FBI domestic intelligence program authorized by President Roosevelt was its broad investigative scope. The breadth of intelligence gathering most clearly demonstrates why the program could not have been based on any reasonable interpretation of the power to investigative violations of law. The investigations were built upon a theory of "subversive infiltration" which remained an essential part of domestic intelligence thereafter. This theory persisted over the decades in the same way the Roosevelt directives continued in effect as the basis for legal authority. Moreover, there was a direct link between the policy of investigating "subversive" influence and the reliance on inherent executive power. The purpose of such investigations was not to assist in the enforcement of criminal laws, but rather to supply the President and other executive officials with information believed to be of value for making decisions and developing governmental policies. The "pure intelligence" function was precisely what President Roosevelt meant when he asked for "a broad picture" of the impact of Communism and Fascism on American life.

A second purpose for broad domestic intelligence investigations was to compile an extensive body of information for use in the event of an emergency or actual war. This information would supply the basis for taking preventive measures against groups or individuals disposed to interfere with the national defense effort. If such interference might take the form of sabotage or other illegal disruptions of defense production and military discipline the collection of preventive intelligence was related to law enforcement. But the relationship was often remote and highly speculative, based on political affiliations and group membership rather than any tangible evidence of preparation to commit criminal acts. As the likelihood of American involvement in the war moved closer, preventive intelligence investigations focused on whether individuals should be placed on a Custodial Detention List for possible arrest in case of war. This program was developed joint by the FBI and a special Justice Department unit in 1940-1941.

These two objectives—"pure intelligence" and preventive intelligence—were closely related to one another. Investigations designed to produce information about subversive infiltration also identified individuals thought potentially dangerous to the country's security. Likewise, investigations of persons alleged to be security threats contributed to the overall domestic intelligence picture.

Internal FBI instructions described the scope of surveillance in detail. On September 2, 1939, all FBI field offices were ordered to review their files and secure information from "reliable contacts" in order to prepare reports on "persons of German, Italian, and Communist sympathies," as well as other persons "whose interest may be directed primarily to the interest of some other nation than the United States." Such information included "a list of subscribers" and officers of all German and Italian language newspapers in the United States, language newspapers published by the Communist Party or "its affiliated organizations," and both foreign and English language newspapers "of pronounced or notorious Nationalistic sympathies." FBI offices were also instructed to identify members of all German and Italian societies, "whether they be of a fraternal character or of some other nature," and of "any other organization, regardless of nationality, which might have produced Nationalistic tendencies."*104*

In October 1939 the FBI was investigating the Communist Party and the German American Bund, using such techniques as "the employment of informants," "research into publications," "the soliciting and

obtaining of assistance and information from political émigrés, and organizations which have for their purpose the maintenance of files of information bearing upon this type of study and inquiry," and "the attendance of mass meetings and public demonstrations." The compilation of information on other organizations and groups "expressing nationalist leanings" continued pursuant to the September 1939 instructions. In addition, the FBI was conducting "confidential inquiries" regarding "the various so-called radical and fascist organizations in the United States" for the purpose of identifying their "leading personnel, purposes and aims, and the part they are likely to play at a time of national crisis."[105]

In November 1939, the FBI began preparing a list of specific individuals "on whom information is available indicating strongly that (their) presence at liberty in this country in time of war or national emergency would constitute a menace to the public peace and safety of the United States Government." The list comprised persons "with strong Nazi tendencies" and "with strong Communist tendencies." The citizenship status of each individual was determined, and cards prepared summarizing the reasons for placing him on the list.[106]

FBI field offices were instructed to obtain information on such persons from "public and private records, confidential sources of information, newspaper morgues, public libraries, employment records, school records, et cetera." FBI agents were to keep the purpose of their inquiries "entirely confidential" and to reply to questions by stating as a cover that the investigation was being made in connection with "the Registration Act requiring agents of foreign principals to register with the State Department." FBI headquarters supervisors divided the list into two categories:[107]

Class #1. Those to be apprehended and interned immediately upon the outbreak of hostilities between the government of the United States and the Government they service, support, or owe allegiance to.

Class #2. Those who should be watched carefully at and subsequent to the outbreak of hostilities because their previous activities indicate the possibility but not the probability that they will act in a manner adverse to the best interests of the Government of the United States.[108]

This program was described as a "custodial detention" list in June 1940, and field offices were again instructed to furnish information on persons possessing "Communist, Fascist, Nazi or other nationalistic background."[109]

The primary subjects of FBI intelligence surveillance under this program in mid-1940 were active Communists (including Communist candidates for public offices, party officers and organizations, speakers at Communist rallies, writers of Communist books or articles, individuals "attending Communistic meetings where revolutionary preachings are given," Communists in strategic operations "or holding any position of potential influence" and Communist agitators who participate "in meetings or demonstrations accompanied by violence"), all members of the German-American Bund and similar organizations, Italian Fascist organizations and American Fascist groups such as "Silver Shirts, Ku Klux Klan, White Camelia, and similar organizations."[110] Director Hoover summarized these "subversive activities" in a memorandum to the Justice Department:

> *The holding of official positions in organizations such as the German-American Bund and Communist groups; the distribution of literature and propaganda favorable to a*

foreign power and opposed to the American way of life; agitators who are adherents of foreign ideologies who have for their purpose the stirring up of internal strike (sic), class hatreds and the development of activities which in time of war would be a serious handicap in a program of internal security and national defense...[111]

Director Hoover claimed publicly in 1940 that advocates of foreign "isms" had "succeeded in boring into every phase of American life, masquerading behind front organizations."[112] Intelligence about "front" groups was transmitted to the White House. For example, in 1937 the Attorney General had sent an FBI report on a proposed pilgrimage to Washington to urge passage of legislation to benefit American youth. The report stated that the American Youth Congress, which sponsored the pilgrimage, was understood to be strongly Communistic. [113]Later reports in 1937 described the Communist Party's role in plans by the Workers Alliance for nationwide demonstrations protesting the plight of the unemployed, as well as the Alliance's plans to lobby Congress in support of the federal relief systems.[114]

FBI investigations and reports (which went into Justice Department and FBI permanent files) covered entirely lawful domestic political activities. For example, one local group checked by the Bureau was called the League for Fair Play, which furnished "speakers to Rotary and Kiwanis Clubs and to schools and colleges." The FBI reported in 1941 that:

" ...the organization was formed in 1937, apparently by two Ministers and a businessman for the purpose of further fair play, tolerance, adherence to the Constitution, democracy, liberty, justice, understanding and good will among all creeds, races and classes of the United States."

A synopsis of the report stated, "No indications of Communist activities."[115] In 1944 the FBI prepared a more extensive intelligence report on an active political group, the Independent Voters of Illinois, apparently because it was the target of Communist "infiltration." The Independent Voters group was reported to have been formed:

"...for the purpose of developing neighborhood political units to help in the re-election of President Roosevelt and the election of progressive congressmen. Apparently, IVI endorsed or aided democrats for the most part, although it was stated to be "independent." It does not appear that it entered its own candidates or that it endorsed any Communists. IVI sought to help elect those candidates who would favor fighting inflation, oppose race and class discrimination, favor international cooperation, support a "full-employment program," oppose Fascism, etc."[116]

Thus, the Bureau gathered data about left-liberal groups in its search for subversive "influence." At the opposite end of the political spectrum, the activities of numerous right-wing groups like the Christian Front and Christian Mobilizers (followers of Father Coughlin), the American Destiny Party, the American Nationalist Party, and even the less extreme "America First" movement were reported by the FBI. [117]

The Bureau even looked into a Bronx, New York, child center which was "apparently dominated and run" by Communists to determine whether it was
being used as a "front" for carrying out the Communist Program.[118]

One example of the nature of continuing intelligence investigations is the FBI's reports on the NAACP. The Washington, D.C. Field Office opened the case in 1941 because of a request from the Navy Department for an investigation of protests against racial discrimination in the Navy by "fifteen colored mess attendants." FBI agents used an informant to determine the NAACP's "connections with the Communist party and other Communist controlled organizations."[119]

FBI headquarter sent a request to the Oklahoma City field Office in August 1941 for an investigation of "Communist Party domination" of the NAACP in connection with the development of "Nationalistic Tendency Charts." The field office report concluded, on the basis of an informant's reports, "that there is a strong tendency for the NAACP to steer clear of Communistic activities. Nevertheless, there is a strong movement on the part of the Communists to attempt to dominate this group through an infiltration of communistic doctrines. Consequently, the activities of the NAACP will be closely observed and scrutinized in the future.[120]

FBI informants subsequently reported on NAACP conferences at Hampton, Virginia, in the fall of 1941 at Los Angeles in the summer of 1942. These investigations were conducted "to follow the activities of the NAACP and determine further the advancement of the Communist group has made into that organization."[121] Similar reports came to headquarters from field offices in Richmond, Virginia; Springfield and Chicago, Illinois; Boston, Massachusetts; Oklahoma City, Oklahoma; Indianapolis, Indiana; Savannah, Georgia; and Louisville, Kentucky, in 1942-1943. Informants were used to report on efforts "to place before the NAACP certain policies or ideas which …may be favorable to the Communist Party."[122] An informant attended an NAACP convention in South Carolina in June 1943 and reported on his conversations with NAACP counsel Thurgood Marshall. The informant believed that Marshall was "a loyal American" and "would not permit anything radical to be done."[123]

Informants for the Oklahoma City Field Office reported on Communist efforts to "infiltrate" the NAACP and advised that the Communist Party would "be active" at a forthcoming NAACP conference.[124] On the other hand, an informant for the Chicago office reported "no evidence that there is any Communist infiltration in the Chicago branch."[125] And informants for the Detroit office advised that there were "numerous contacts by the CP members and NAACP members, some collaboration on issues which affect negroes, presence of CP members at NAACP meetings, interest of CP in NAACP, but no evidence of CP control."[126]

FBI investigation of the NAACP reflected in these and other reports to headquarters produced massive information in Bureau files about the organization, its members, their legitimate activities to oppose racial discrimination, and internal disputes with some of the chapters. One thirty-five page report contained the names of approximately 250 individuals and groups, all indexed in a table of contents.[127] The reports and their summaries contained little if any information about specific activities or planned activities in violation of federal law.

The scope of the information compiled through these investigations of alleged Communist "infiltration" is indicated by FBI estimate that by 1944 "almost 1,000,000 people knowingly or unknowingly had been drawn into Communist-Front activity."[128]

END OF CHAPTER 4

404 Not Found

- Code: NoSuchKey
- Message: The specified key does not exist.
- Key: ops/ci/docs/ci1/chap4_b.htm
- RequestId: 7W2WHC9RZBBMHVP1
- HostId: g/ypqDXngi6uujBfYwwAR/anF6523ZZdvG55UNKP08TxGfokvuv3zVhqzW4cgahOnf2bZmhC7jiAwON3PYyssZ1S/e+BiVy7

An Error Occurred While Attempting to Retrieve a Custom Error Document

- Code: NoSuchKey
- Message: The specified key does not exist.
- Key: error.html

Introduction

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German Espionage Ring Captured

In January 1943, Kurt Frederick Ludwig and eight of his associates were sentenced to terms of imprisonment ranging from five to 20 years after their convictions on charges of espionage in the United States.

The case began when British Imperial Censorship at Bermuda intercepted a letter destined for Spain. The writer of the letter signed it as "Joe K." Laboratory tests of the letter found secret writing on the reverse side that provided the identities and the cargoes of ships leaving New York harbor for Great Britain. Subsequent letters written by "Joe K." were intercepted. The return address on all the letters was determined to be fictitious.

The FBI's investigation was going nowhere until March 18, 1941, when two men attempted to cross a busy street near Times Square in New York City. One, a middle-aged man wearing horn-rimmed glasses and carrying a brown briefcase, carelessly stepped in front of a taxi and was fatally injured. His companion, unconcerned over the fate of his friend, grabbed the brown briefcase and swiftly disappeared into the crowd.

The injured man was identified as Julio Lopez Lido. His body was unclaimed for a time but the Spanish Consulate in New York finally buried him. His companion, who ran from the scene of the accident, called the hotel where the injured man was staying and asked that his room be kept intact until further notice. In the meantime the hotel management informed the local authorities, and they began a check of the mysterious circumstances surrounding the traffic accident.

Local officials discovered documents in the hotel room, which they turned over to the FBI. The Bureau was able to determine that Lido was actually Capt. Ulrich von der Osten, a Nazi army officer who had entered the United States via Japan only a month prior to his death. Capt. von der Osten was to direct the activities of a group of spies in the United States.

The FBI was also able to identify the man who ran from the accident scene as Kurt Frederick Ludwig. Ludwig continued von der Osten's work by sending information to the Third Reich. Ludwig made a practice of visiting the docks in New York Harbor and along the New Jersey coast where, from his observations, he could report information to Germany concerning the identities of ships and the nature of their cargoes. He also visited various Army posts in the New York area where he observed the strength of the armed forces, their identities, the quality and quantity of their weapons, and any other details, which he believed would be of interest and value to his superiors.

The FBI conducted surveillance on Ludwig to determine his contacts. On one occasion during May 1941, he took an extended trip to Florida accompanied by Lucy Boehmler, an 18-year-old girl of German origin, who acted as his "secretary" and, as a matter of fact, assisted him in preparing the secret messages to his superiors and in maintaining detailed records covering his observations. On the trip they passed through Army camps, aviation fields, and industrial centers engaged in manufacturing wartime material.

When he arrived in Miami, Ludwig contacted Carl Herman Schroetter who was waiting for the call, having been briefed by a Dr. Ottis when Schroetter visited Germany two years before. It was through Schroetter that Ludwig was able to report to Germany concerning the progress being made constructing the naval air base near Miami.

Another of Ludwig's associates was Rene C. Froehlich, an enlisted man in the US Army stationed at Governor's Island in New York Harbor. Froehlich picked up Ludwig's mail when the latter was out of town.

Mrs. Helen Pauline Mayer had previously assisted Ludwig in gathering information on aircraft construction from plants located on Long Island. Her husband had returned to Germany via Japan and became stranded there when Russia entered the war. Mrs. Mayer was preparing to follow her husband to Japan when the FBI arrested her.

Hans Helmut Pagel and Frederick Edward Schlosser, two youths of German origin and Nazi ideologies, assisted Ludwig in making observations of various docks and military establishments in the New York area and in mailing communications to the mail drops abroad. Karl Victor Mueller also assisted in mailing letters.

Last, but not least, Maj. Paul Borchardt of the German Army helped Ludwig prepare the secret writing messages. Borchardt served in the German Army from 1914 to 1933, when he claimed he was discharged because of his non-Aryan extraction. He entered the United States as a refugee, claiming to have escaped from a German concentration camp and aided by friends to escape the Third Reich. Borchardt held lengthy conferences with Ludwig at Borchardt's residence. At the time of his arrest, the FBI found secret writing materials in his apartment.

During August 1941, Ludwig began a cross-country trek, surveilled by the FBI. He traveled as a hunted man, forcing his car along country roads through the Midwest at speeds of 90 miles-per-hour. Using the back roads became a chore for Ludwig who, when he stopped at a cabin in Yellowstone Park, decided to destroy any incriminating evidence he had but was not successful. Proceeding to Missoula, Montana, the next day he stored his automobile, shipped his entire luggage except for the bare necessities to relatives on the East Coast, and continued his journey by bus. A search of his car revealed an expensive shortwave radio receiver.

In view of indications that Ludwig was thinking of departing the United States when he reached the West Coast, the FBI at Cle Elum, Washington, arrested him on August 23rd.

Ludwig and his associates were subsequently indicted in Federal Court in New York City on charges of conspiracy to violate the Espionage Statutes. Ludwig, Froehlich, and Borchardt were sentenced to 20 years each. Mayer, Mueller, and Pagel each received 15 years while Schlosser received a sentence of 12 years, Schroetter received 10 years, and Lucy Boehmler was sentenced to five years.

Counterintelligence Operations

In line with his accepted responsibility for providing necessary intelligence to the War Department and US Army, the Assistant Chief of Staff (ACofS) G-2 had always been called upon to perform the opposite mission of preventing our own military information from falling into improper hands. This latter function naturally included required staff supervision over all counter-measures taken to detect espionage, sabotage, or subversion aimed at any part of the military establishment. While the need for the Military Intelligence Division (MID) to explore the foreign aspects of such matters was duly recognized by higher authority, these same authorities kept insisting that military personnel should not become implicated in domestic counterintelligence unless the operations were plainly traceable either to the Army itself or to industrial plants engaged in defense production. Nevertheless, the Joint Army-Navy Board was permitted to prepare an extensive plan for censoring international communications to and from the United States in the event of war, and the departmental intelligence officials participated actively in this significant security effort.[25]

The difficult problem of how best to protect personnel of the military establishment from subversion or potential subversion likewise soon came to the fore. Derived generally from a provision contained in the so-called Hatch Act of 2 August 1939, making it illegal to employ in any government capacity persons holding membership within a "political party or organization which advocates the overthrow of our constitutional form of government," the Army had adopted a firm policy of excluding Communists and Communist sympathizers entirely from its ranks. After passage of the Selective Training and Service Act on 16 September 1940, however, this policy needed careful reexamination in light of enforced induction into the military service. Hence, during June 1941, it was announced that pending a final determination in each individual case, "persons strongly suspected of membership in the Communist Party or who appeared to be consistent followers of the Communist Party line" would not be assigned on sensitive duty or granted an officer commission.[26] At the same time, instructions were issued covering the proper processing of discharges for subversive Civil Service personnel,[27] while correspondence was initiated between the ACofS G-2 War Department General Staff (WDGS) and key G-2s in the field about the possibility of discharging subversive enlisted men under current Army regulations.[28]

With this then representing the general military security situation just prior to Pearl Harbor, the sudden opening of the war found the Counter Intelligence Branch of MID divided into six main sections designed respectively to handle matters bearing upon Domestic Intelligence, Investigations, Plant Intelligence, Safeguarding Military Information, Special Assignments, and Corps of Military Police. It was not only a separate and distinct element established directly under the ACofS G-2 but also on the same level as the corresponding Intelligence Branch.[29] On the other hand, it had recently lost several earlier functions through relinquishing its public information duties to the newly organized Bureau of Public Relations and transferring a number of operational activities to the Office of the Provost Marshal General. Effective 1 January 1942, it also witnessed the favorable consummation of a major counterintelligence project for the US Army in the development of a Counter Intelligence Corps (CIC) from the former Corps of Intelligence Police. The ACofS G-2 could thus assume direct staff control over a suitable troop means to uncover and investigate espionage, sabotage, or subversion within the military establishment.

The most pressing military security problem right after Pearl Harbor was to achieve a satisfactory coordination of effort among the principal governmental agencies involved. The declaration of martial law in Hawaii, formation of Defense Commands on both coasts of the United States, and imperative need to provide adequate protection for the Panama Canal had altered security conditions so that the current MID-ONI-FBI Delimitation Agreement was no longer strictly applicable. Gen. Lee, the Acting ACofS G-2, therefore, took immediate steps to ascertain J. Edgar Hoover's personal views regarding the effect of martial law on FBI jurisdiction within the territory of Hawaii. The FBI chief replied that he considered his agency was now relieved of entire responsibility for conducting investigations of "espionage, sabotage and all other national defense operations" therein. He had already instructed the Special Agent in Charge in Honolulu to make available to the appropriate military authorities all information, data, and material at hand, while affording them the full benefit of experience and observations gained before the war declaration. Furthermore, this same Special Agent in Charge was not to start any new investigations or carry out any additional investigative work, which might be considered as impinging upon the national defense field.[30]

Despite this indication of willing cooperation between the FBI and military intelligence officials in Hawaii, there was still a considerable amount of uncertainty and friction with reference to the exact delineation of investigative responsibilities that should hold among the numerous departmental counterintelligence groups functioning throughout the Western Hemisphere. This was especially true on the West Coast of the United States for security activities taking place in the Western Command and Alaska.[31] Finally, effective 9 February 1944, Gen. Raymond E. Lee, Adm. Theodore Starr (Ping) Wilkinson, and Hoover executed a new Delimitation Agreement to replace the previous one of 28 June 1940. Although this latest agreement retained most of the basic features of its predecessor, it also listed three different situations under which a national security plan might be called upon to operate. These were during a "Period of Martial Law," "Periods of Predominant Military Interest Not Involving Martial Law" and "Periods of Normal Conditions."[32]

Under this new agreement, where there was already martial law, as in Hawaii, the Military Commander admittedly possessed complete authority to coordinate all intelligence activities of governmental agencies and assign missions to them within the limits of their respective personnel and facilities. In areas prominent only as potential theaters of operations, however, such as the West Coast of the United States and Alaska, the Military Commander was now limited to requesting information from the three participating agencies "as he may desire and they may be able to furnish." Moreover, during periods of normal conditions, MID would continue to perform the following security missions:

1. Investigation and disposal of all cases in these categories (espionage, counterespionage, subversion, and sabotage) in the military establishment including civilian employ, military reserve, and military control.

2. The investigation of cases in these categories involving civilians in the Canal Zone, the Republic of Panama, the Philippine Islands, and the Alaskan Peninsula and islands adjacent including Kodiak Island, the Aleutian and Probilof Islands, and that part of the Alaskan Peninsula, which is separated by a line drawn from Iliamna Bay northwest to the town of old Iliamna and thence following the south shore of Lake Iliamna to the Kvichak River to Kvichak Bay.

3. Informing the FBI and ONI of any other important developments.[33]

Meanwhile, there were other important develop-ments occurring in connection with the overall military security effort. On 8 December 1941, the Secretary of War ordered into effect certain portions of the existing Army-Navy Board plan for censoring international communications, and, shortly thereafter, the President requested Hoover to assume temporary charge of all national censorship operations.[34] The approved plan called for the Army to exercise censorship control over postal and landline communications under a civilian Director of Censorship but the War Department was far from ready to accomplish either of these difficult tasks except on a very small scale. Although MID had recently taken several useful steps in preparing for possible wartime censorship, its censorship section still consisted of only two officers. Nevertheless, a Basic Field Manual 30-25 (Counterintelligence), which presented detailed instructions for the initiation and conduct of military censorship, was in troop hands,[35] and a modified form of military censorship was operating successfully for the American units stationed at bases leased from the British in March 1941.

The Army commenced a token showing of postal censorship at a number of selected post offices across the nation on 13 December 1941. Shortly afterwards, upon passage of the First War Powers Act, the President created an Office of Censorship and appointed Byron Price to be its Director. The same Executive Order also formed a Censorship Policy Board, composed of the Postmaster General (Chairman), Vice President, Secretary of the Treasury, Attorney General, Secretary of War, Secretary of the Navy, and the Directors of the Office of Government Reports and the Office of Facts and Figures, to advise Price on policy matters and provide for necessary coordination and integration of censorship activities among all interested agencies of the US Government.[36] Several Army officers, especially trained in censorship work, were then assigned to the Office of Censorship for full-time duty, including Col. (later Maj. Gen.) W. Preston Corderman, who was promptly designated by Price as Chief Postal Censor. MID, therefore, soon became deeply embroiled in all phases of both the national and military censorship efforts.

MID responsibilities relative to visa and passport control operations were likewise expanding at a rapid rate. This important security progress, based upon a Presidential Proclamation dated 14 November 1941, was being administered by the Department of State and required War Department cooperation mainly in the form of detailing military representatives to serve on a wide variety of working committees. Theoretically most of the operational functions concerning this program had already been transferred from MID to the Office of the Provost Marshal General (PMG) but, because of shortages in personnel and funds available for such purpose, orders were not issued to implement the directed changes until 5 December 1941. Even then it was estimated that the PMG offices of the corps areas would not be ready to perform any travel control investigations for more than three months.[37] Thus, MID Military Intelligence Service (MIS) not only continued to process all travel control requests submitted to the War Department for clearance but also participated fully in the numerous interagency committees connected therewith.

The PMG was similarly occupied at this same time in taking over several other domestic investigative functions from MID, such as those pertaining to applications for civilian employment within the military establishment or in industrial facilities working on classified projects for the War Department. Since MID was the only departmental agency authorized to contact the FBI regarding Army security matters, it also

remained actively involved. Besides, the ACofS G-2 insisted on gaining complete control of counterintelligence investigations showing any evidence of subversion or disloyalty and still retaining the sole function of clearing all applicants for Army commissions. With the CIC growing steadily and at CIC section of the Counter Intelligence Group actually performing at CIC Headquarters, MID was now able to direct the accomplishment of security investigations of every type, even those of a most sensitive nature.

The War Department and Army reorganization of 9 March 1942, which created the MIS and formed Headquarters Army Ground Forces (AGF), Army Air Forces (AAF), and Services of Supply, Army Supply Forces (SOS (ASF)), served to complicate the counterintelligence picture in many different ways. It soon became clearly apparent that the entire program stood in need of a thorough reexamination, especially from the standpoint of command responsibility and coordination procedures. A new basis War Department directive, therefore, on the subject of "Counterintelligence Activities," was prepared and issued to the major commands during June 1942. This directive not only announced that the MIS "will supervise all counterintelligence activities of the War Department" but also cautioned field commanders they would be held responsible for "counterintelligence coverage within their commands" to include taking the following measure:

Establishment of a Counter Subversive system; transmission of information emanating from this source; preliminary investigation of complaints or suspicion of subversive activities; safeguarding of information which, if released, would be detrimental to the war effort; and reference of cases arising within these categories to Counter Intelligence Corps representatives for investigation.[38]

Under these new conditions the departmental intelligence authorities could continue to claim a high degree of direct control over counterintelligence activities at certain fixed stations within the zone of interior, such as schools, training commands, supply establishments, etc., but this was no longer true for the more flexible ground tactical or air commands. Commanders of the latter elements were thus instructed to forward prompt security reports to MIS simultaneously through both the intelligence and command channels of communications. Likewise, with reference to the extent of counterintelligence operations that should be carried out by the Headquarters of AGF, AAF, SOS (ASF), and major overseas commands, the War Department directive declared, as follows:

> d. The Commanding Generals of the Ground Forces, Air Forces and Services of Supply may establish and maintain a counterintelligence staff organization for the purpose of a liaison between their respective headquarters and the War Department Military Intelligence Service, and for such staff counterintelligence field inspections and other special operations as the Commanding Generals of the Ground Forces, Air Forces and Services of Supply may direct.
>
> e. Beyond the territorial limits of the United States commanders of Theaters of Operation, Base Commands, Defense Commands, Departments and units of any type not under the control of the foregoing commanders are responsible for counterintelligence security coverage within their units, and will prescribe methods of operations. They will keep the Military Intelligence Service, War Department, fully informed of conditions arising within their commands.[39]

In June 1942, the MIS Counterintelligence Group consisted of four main subgroups representing Administration, Domestic Intelligence, Safeguarding Military Information and Operations, with each of these subgroups divided into several functional branches or sections. According to the newly imposed concept, although the ACofS G-2 remained charged with "policies concerning" military security matters, he was not supposed to exercise any direct supervision over the Counterintelligence Group of MIS. This proved to be a most impracticable arrangement because the principal officers of that group were not only members of policymaking security committees but also acted regularly as departmental liaison and coordinating authorities with other counterintelligence agencies of the government. Hence, Gen. George Veazey Strong simply ignored the existing instructions and chose to maintain a close personal relationship with all key MIS officers occupied in security matters. Officially, however, an additional echelon of command had now been placed between the ACofS G-2 and his Counterintelligence Group in the person of the Chief, MIS.

Besides accomplishing customary administrative tasks for the Group Chief and functioning as an office of record, the Administrative Branch of the Counterintelligence Group had been given a number of special assignments not normal to operations of the other three branches. Personnel of this branch were thus often utilized by the Group Chief to assist in the preparation of counterintelligence summaries or estimates.[40]

There were also several different sections or branches loosely grouped together under the broad designation of Domestic Intelligence for performing the following assigned tasks:

1. Subversive Agents Section_to maintain a card index file on subversive agents and thereby keep MIS abreast of the latest developments within that particular field over which FBI had primary jurisdiction.

2. Research and Summary Section_to act as the official intermediary between MIS and other governmental agencies in determining the amount or kind of security information that should be furnished to each.

3. Counterintelligence Corps Section_to execute special security missions for the combat arms of the Army.

4. Visa and Passport Branch_to provide information from MIS files for guiding the State Department in the issuance of visas, passports, exit permits, and other related travel instruments.

5. Investigative Review Section_to study reports of security investigations and submit recommen-dations regarding the final disposition of subversive or potentially subversive individuals under War Department control.

6. Evaluation Branch_to present, either periodically or upon specific request, summaries and estimates of the counterintelligence situation, including such matters as fifth-column activities and racial anta-gonism within the United States or its possessions.

7. Plant Intelligence Branch_to prepare studies on counterintelligence matters in connection with American war industry and additionally, to process alien personnel security questionnaires and pass upon requests for permission to visit important war production plants.[41]

Likewise, four main subordinate branches were currently assembled under the general heading of Safeguarding Military Information, as follows:

1. Censorship Branch_to prevent the passage of any military information of value to the enemy and evaluate intercepted information for appropriate dissemination.

2. Safeguarding Military Information Branch_to establish policies and procedures designed to prohibit the enemy from obtaining information about our own forces.

3. Security Branch_to supervise the security of military information through physical means and educate all personnel in the importance of this special aspect of information protection.

4. Communications Branch_to handle matters bearing upon clandestine radio stations, interception measures, radio countermeasures, technical facilities for monitoring, development of security devices, Aircraft Warning Service, and identification or recognition methods.[42]

As its name implies, the Operations (later Investigation) Branch of the Counterintelligence Group was primarily concerned with the actual conduct of security investigations. It not only executed, directed, and coordinated all investigations of such type falling under the jurisdiction of MIS but also received reports of similar investigations performed in the field by Corps Area and Department counterintelligence personnel. During the first seven months of 1942, due to the rapid Army expansion and consequent tremendous increase in the military security progress, the workload of this branch doubled in total size. On 30 July 1942, therefore, the Group Chief found it necessary to submit an urgent plea to the Chief, MIS, for 100 additional clerks and stenographers. In justifying this extraordinary request, he called attention to the following investigative chores that were now facing his Operations Branch:

> a. High priority request to clear 300 officers, enlisted men and civilian employees for duty in OPD.
>
> b. Chief Signal Officer forwarding approximately 1000 names per week for clearance to attend Radar Schools.
>
> c. Army Air Force forwarding at least 1000 names per week for clearance to receive training on classified equipment, such as the bombsight.
>
> d. AGO forwarding the names of all newly appointed officers, graduates of Officer's Training Schools and others at a rate of approximately 12,000 per month. With 25,000 names of newly commissioned officers still awaiting clearance, the branch is accumulating an average of five new cases for every one it completes.[43]

By early 1943, it had become manifest that the MID (MIS) counterintelligence effort was in prompt need of a major overhaul and readjustment. The matter remained extremely complicated, however, because of the continuing indefinite status of MIS in relation to MID, as well as persistent pressures from higher authority for the departmental agency to relinquish all domestic intelligence activities and confine its counterintelligence functions strictly to policy supervision. This type of pressure had already taken the form of a detailed survey made by Bureau of the Budget management personnel covering MIS operations with particular reference to domestic intelligence and safeguarding military information.[44] The study had resulted in a number of conclusions and recommendations pointing toward the desirability of combining certain operational counterintelligence duties within MIS and transferring several others to outside agencies.

The Chief of the Counterintelligence Group, MIS, not only registered a substantial exception to most of these Bureau of the Budget recommendations but also noted that they seemed to be "based almost entirely on consideration of procedures and economy and overlooked the principles and techniques of intelligence."[45] Notwithstanding, on 26 November 1942, the Deputy Chief of Staff forwarded a memorandum to the ACofS G-2 and PMG instructing them jointly as follows:

1. PMG to discontinue the use of MIS files in making future loyalty checks and deal directly with the FBI. Similarly, PMG is now authorized to receive any investigative reports from FBI that might assist in discovering plant subversives.

2. MIS to rely entirely on FBI summaries, special reports and personal contacts to satisfy that portion of the counterintelligence function previously obtained from individual FBI investigative reports.

3. MIS to discontinue the receipt and filing of all FBI investigative reports unless they fall under the following classification:

> a. Reports of subversive activities outside the United States.
>
> b. Reports of subversive activities implicating a member of the military forces, a person just entering the military forces or an employee of the War Department.

4. Plant Intelligence Branch of the Counter-intelligence Group to be abolished.

5. Present relationships between G-2 and FBI to remain unchanged, except for the direct PMG-FBI communication as described.[46]

In compliance with this terse directive, Gen. Strong ordered immediate abolishment of the Plant Intelligence Branch and assigned its residual research functions to the Evaluation Branch. Since the ramifications of the rest of the directive were so far reaching and even threatened to compromise the terms of the current MID-ONI-FBI Delimitation's Agreement, which was originally based on an Executive Order, he felt further constrained to inform the Deputy Chief of Staff along the following lines:

…With reference to paragraph 3 of your directive, it is to be noted that an exact and literal compliance will include discontinuance and filing of all FBI investigative reports now received from FBI on the following subjects:

> a. Espionage.
>
> b. Counter Espionage.
>
> c. Counter Intelligence.
>
> d. Sabotage.
>
> e. The activities of registered foreign agents and non-registered foreign agents.
>
> f. Unethical conduct of military attaches or other accredited foreign personnel.
>
> g. Subversive activities occurring on military reservations in which military personnel are not implicated.

h. Subversive activities involving destruction of War Department property by sabotage or other means.

i. Subversive activities resulting in interference with transportation of raw materials or the production and distribution of war material.

j. Subversive acts committed by civilians outside the military establishment that may affect adversely members of the military establishment.

k. Activities of individuals suspected of propaganda influencing military personnel under military control.

l. Investigative reports of a similar nature pertaining to subversive activities within the United States but not implicating members of the Army or employees of the War Department.[47]

While Gen. Strong may have been inclined to overstate his case in this particular protest, it does seem plainly apparent that the departmental administrative authorities had not thought the matter out to a proper conclusion before issuing their 26 November 1942 directive. That they were really more interested in saving personnel spaces than in giving careful consideration to the difficult functional problems of the ACofS G-2 also becomes evident in view of the following inadequate reply he received from them on 2 December:

…2. This directive will not be interpreted to authorize the continuation of present practices, which involve the scrutinizing, and filing of a vast number of FBI individual investigative reports.

…3. Questions on the procedure to be followed in transferring the files can be answered by referring to the contents of the MIS study prepared by the Bureau of the Budget and forwarded to G-2 under date of October 17, 1942.[48]

The irony is that at the very time the Deputy Chief of Staff's Office was trying so determinedly to reduce MID (MIS) domestic counterintelligence activities, the agency was gathering added responsibilities within the same field from other sources. For example, during May 1942, the Deputy Chief of Staff, acting for the Secretary of War, authorized the ACofS G-2 to form a Special Information Branch in MIS to monitor telephone conversations taking place at all War Department buildings. This not only called for the installation of a considerable amount of special switchboard equipment but also required a force of 10 officers, 53 enlisted women, and one civilian in order to perform the monitor duty. With a total of 12,000 lines made available to them for surveillance, these personnel were soon averaging about 3,000 such missions per day and submitting as many as 4,550 reports for a single month of activity.[49]

Other instances of this marked trend toward MID (MIS) acquiring further counterintelligence responsibilities were:

1. In May 1942, there were four interdepartmental primary committees and five review committees operating under the Visa Division of the State Department, with MID (MIS) represented on each. Since plans were being made to require all American seamen traveling to and from foreign ports to hold valid passports, the Passport Division of the Department of State appointed a new interdepart-mental committee for the purpose of processing such applications. This meant the assignment of one more MID (MIS) officer on travel control duty. Likewise, when a

Maritime Labor Committee composed of the Secretary of State, Attorney General, and War Shipping Administrator became gravely disturbed over the alien seamen situation, especially in regard to their immigration status, jumping ship, deportation, etc.,[50] it led to the creation of another inter-departmental committee charged with "considering problems incident to the entry into the United States of all aliens and citizens brought by neutral or chartered vessels." Lemuel Schofield was designated by the Attorney General to function as chairman and coordinator for this committee, with Lt. Col. G.D. Dorroh, Chief of the Visa and Passport Branch of the Counterintelligence Branch, and MIS named by the Secretary of War to represent the War Department on it.[51]

2. Effective 2 June 1942, because of the ever-increasing demands for trained censorship officers, the ACofS G-2 was granted permission to establish a Censorship School at Fort Washington, Maryland, under the direction of the Counterintelligence Group, MIS. It was then estimated that a minimum of fifteen additional officers would be needed for operating this new facility.[52]

3. During August 1942, when the US and Japanese Governments entered into an exchange agreement to repatriate certain interned nationals, it became necessary for MID (MIS) to join with the State Department, ONI, and FBI in screening all personnel slates pertaining thereto.[53]

4. On 13 November 1942, the function of deter-mining what war production information should be released to various governmental or non-govern-mental agencies, as well as maintaining uniform security standards for information of that nature, was transferred from the Bureau of Public Relations (BPR) to MIS. A "Committee for Protection of Information" had been performing this counterintelligence task in the BPR since 11 July 1942.[54]

It must not be presumed from the continuing drive by higher authority to reduce the MID (MIS) domestic security effort that the Counterintelligence Group was engaged solely in operational-type activities. As a matter of fact, one of the most difficult features of the entire affair lay in attempting to separate its so-called general staff functions from those that were considered to be operational. For example, the Evaluation Branch of the Counterintelligence Group was a true research unit and directly involved in the production of military intelligence both for departmental and Army use. Having been charged with maintaining "a comprehensive picture of the total subversive situation prevailing in the United States and territories wherein American troops are stationed," it not only prepared studies on subversive elements but also disseminated finished intelligence bearing upon that subject in the form of numerous reports, bulletins, and summaries. To assist in accomplishing this mission, the branch established close liaison with corresponding units in "ONI, FBI, Office of National Censorship, Department of Justice, Internal Revenue and Department of State" and constantly sought to acquire an intimate knowledge of the following "subversive or potentially subversive groups":

1. Nazi	8. White Russian
2. Communist	9. Vichy France
3. Fascist	10. Korean
4. Japanese	11. Bulgarian
5. Falange	12. Syrian
6. Hungarian	13. Domestic Fascist
7. Ukranian	14. Negro[55]

With MID (MIS) already in the process of being gradually divested of its domestic intelligence function, there was a natural and parallel expansion of ASF operations within the same field.[56] When ASF (SOS) was first created in March 1942, the ACofS G-2 still retained direct control over military intelligence activities throughout the US Army, so there appeared little need for an intelligence unit at Headquarters, ASF, except for a small group capable of handling local security matters. By April 1943, however, it was obvious that some sort of a central G-2 agency would be required to satisfy ASF responsibilities in connection with PMG, Service Command, and National Guard Bureau domestic intelligence activities, as well as to take positive steps in meeting the growing demand for better coordination of the technical intelligence effort. Effective 20 April 1943, therefore, the Commanding General announced the establishment of a Security and Intelligence Division in Headquarters, ASF, and designated Col. James M. Roamer to be its director. Shortly thereafter, the name of this new staff unit was shortened to the Intelligence Division, and it became organized into a Technical Intelligence Branch, Counter Intelligence Branch, and Security Control Group.[57]

Even though the Director of Intelligence, ASF, was now being held responsible by his own commander for "military intelligence in the Army Service Forces," MID (MIS) continued to exercise a considerable degree of direct staff supervision over intelligence operations within the service commands, as well as the CIC personnel assigned there. Col. Leslie R. Forney, the newly designated Chief of the Counterintelligence Group, MIS,[58] however, had embarked upon a program aimed at curtailing several activities which he felt were either a duplication or might better be decentralized to some other agency of the military establishment. For example, arrangements were soon completed to transfer a highly trained group of CIC officers and enlisted men to the Manhattan Project without reserving any MID (MIS) control over them, and, early in July 1943, all operational security functions that would normally be executed by a service command for the Washington, D.C. area were shifted from MIS to Headquarters, Military District of Washington.[59]

The politically involved question of controlling subversive or potentially subversive personnel, notably Communist Party members and consistent followers of the Communist Party line, kept plaguing the department security officials.[60] A fixed policy in this regard had been announced on 19 May 1942, which not only emphasized the practice of assigning suspect enlisted men to elements other than the Army Air Forces, Signal Corps, Chemical Warfare Service, Armored Force, Tank Destroyer Command, or Airborne Command but also formed special units within the service commands for transferring "potentially more dangerous individuals" and giving them duties "with no opportunity of effective subversion."[61] Likewise, in bending every possible effort to keep disloyal personnel from holding commissions as officers, the following instructions were issued:

> *When careful and complete investigation has established that a commissioned officer, whether on active duty or not, is so lacking in loyalty, character, integrity or discretion that for him to continue to hold a commission in the Army of the United States is considered a detriment to the National war effort, recommendation for his discharge will be forwarded immediately to the War Department.*[62]

The list of elements to which potential subversives could not be assigned was shortly extended to include the Amphibious Corps, Ports of Embarkation, Staging Areas, Officer Candidate Schools, and any unit or organization alerted for foreign service or service in Alaska. The problem of preventing Communists from gaining admittance to the Officer Candidate Schools, however, continued to pose serious difficulties because under the current system commissions were being granted at these schools automatically to all graduates and without any prior reference to MID (MIS) for a security check.[63] Moreover, with the Party line having undergone a convenient switch to provide for full cooperation with the Allied war effort right after the German invasion of Russia, more and more Communists and fellow travelers were seeking to qualify for entrance into such schools. As a matter of fact, strict application of the adopted policy of segregating potential subversives had already been softened somewhat, even for noncommissioned officers, in an avowed attempt to conserve manpower.[64]

Outside pressures were now rapidly building up in all directions with reference to this sensitive subject. It was argued, for example, that the segregation policy had merely tended to relieve Communists from the hazards of combat duty and even encouraged the dissemination of Communist doctrine throughout the country.[65] Although the Chief of Counterintelligence Group, MIS, still held that every effort should be made to minimize the number of Communists receiving commissions, he believed officers of such type who were already commissioned should "no longer be discharged except in aggravated cases."[66] On the other hand, early in April 1943, the ACofS G-2 forwarded a SECRET directive through intelligence channels to the major commands reiterating among other things that persons proved to be, or suspected of being, Communists or adherents to the Communist Party line would not be permitted to attend or to remain in Officer Candidate School.[67]

Despite the fact that the recipients of this new letter were cautioned to exercise extreme care in preserving its security and greatest discretion in carrying out its provisions, the Communist Party launched an immediate and violent propaganda campaign against Army counterintelligence procedures. Spearheaded by the Veterans of the Abraham Lincoln Brigade organization, this campaign took the form of heavy attacks in the so-called liberal press along with a flood of critical letters addressed to the White House, Cabinet, Congress, and high officials of the War Department.[68] Accordingly, some 40 cases concerning individuals of alleged subversive connections who had either been removed from Officer Candidate Schools or failed to receive a commission upon graduation, were resubmitted to the Secretary of War's Personnel Board for the stated purpose of determining whether or not any injustice had occurred. These cases were also subject to final review by the Office of the Deputy Chief of Staff, acting in consultation with the Assistant Secretary of War. While the Personnel Board, under the chairmanship of former Chief of Staff Gen. Malin Craig, sustained all but one of these earlier actions, the final reviewing authority confirmed only 25 of them.[69] In registering an emphatic dissent from a recent request for reconsideration forwarded to his Board by the Office of the Assistant Secretary of War, which recommended that three Communists should be granted Army commissions, Gen. Craig seems to have summed up the entire matter in most expressive terms, as follows:

This is one of a number of cases of individuals who have been denied commissions because of Communistic ideas, affiliations, or leanings. For twenty years or more the policy of the War Depart-ment, in time of peace, has been to prevent men of this character serving in the Armed Forces. Since the war they have been allowed to fight for the country

through induction or enlistment. While they should be allowed to fight for the country that is not, of itself, any reason why they should be commissioned. It is a well-known fact that men of this type cannot be trusted in many such respects, in spite of what they may profess at any particular time. They will deny Communistic affiliations when it suits their purpose, or even refrain from such affiliations when it suits their purpose or the orders of their leaders, thus advancing the general cause. This unreliability, if nothing else, is sufficient cause for excluding them from commissions in the officers' corps of the Army. It is further unwise to introduce into the Armed Forces as commissioned officers, men who are tainted with political ideas which are abhorrent to the vast majority of the citizens of the United States, whose whole-hearted allegiance to the United States is at least questionable, and whose methods are such as to resort to insidious and undercover operations to gain their ends.[70]

With the military security effort now coming under increased criticism from all sides, the Deputy Chief of Staff, on 16 July 1943, directed the Inspector General, Maj. Gen. Virgil L. Peterson, to conduct a thorough investigation of the situation and make appropriate recommendations on:

The existing organization, scope of activities, and operating procedures of the Directors of Intelligence of the Service Commands and their offices, including military personnel allocated by the Service Commands for such duty, counter intelligence corps police attached to the Service Commands by G-2, civilian employees allotted by the Service Commands, and civilian employees made available by allocation of funds by G-2; the relationship between the Military Intelligence Division, War Department General Staff (Counterintelligence Branch) and the officers of the Directors of Intelligence of the Service Commands.[71]

Additional oral instructions were likewise given him on 11 August and 7 September 1943, for extending his investigation so as to cover:

The investigative functions of the Provost Marshal General at Service Commands and the possible duplication and overlapping of the investigative functions with those made by the intelligence personnel allotted to the Service Commands; the C/S System; and the correlation of intelligence of the Service Commands, those of the Army Air Force units and installations and Army Ground Force, and the Military Intelligence Division, G-2, WDGS.[72]

In making this directed counterintelligence study, Gen. Peterson concentrated upon examining the Investigation and Review, Situation, and CIC Branches of MID (MIS) in order to ascertain their strength, organization, and command relationships with security personnel stationed at the service commands.[73] He found that the Investigation and Review Branch currently consisted of 29 non-CIC officers and 30 civilians. Similarly, the CIC Branch, now located at Baltimore but still furnishing a number of key personnel for the CIC Advanced Training School in Chicago, was composed of 64 CIC officers and 31 civilians. There were also 368 officers, 2,598 enlisted men, and 770 civilians engaged in intelligence activities within the service commands, the majority of them being carried as War Department overhead. In Peterson's opinion, MID (MIS) was exercising a close control over most of these personnel in the performance of their assigned military security duties.[74]

The Inspector General remained especially critical of the fact that such centralized direction of the counterintelligence effort within the zone of interior was in direct violation of basis command principles for the US Army. He also felt that the countersubversive detection system as called

for under TM 30-205 infringed upon these same command principles, so the existing organization should be turned over to the individual commanders for use at their own discretion. Furthermore, he considered that both the PMG and CIC were conducting many unnecessary and unproductive security investigations and including too much nonfactual data under their final investigative reports. Derived from these several conclusions, therefore, he recommended a number of fundamental changes in counterintelligence procedures for the zone of interior, which were all promptly approved by the Deputy Chief of Staff without any prior reference to the ACofS G-2.[75]

On 14 December 1943, new War Department orders on basic counterintelligence functions within the zone of interior were issued, as follows:

1. The ACofS G-2, WDGS, will continue to exercise general staff supervision over counterintelligence policies and activities throughout the military establishment.

2. Subject to the above and such other exceptions as may be made by appropriate WD authority, all functions and activities of the CIC within the zone of interior will become the responsibility of the Commanding General, ASF.

3. Investigative functions hitherto executed separately by the CIC and PMG will be consolidated into a single staff agency under each service command.

4. All CIC personnel attached or stationed in service commands but performing ASF activities, other than those selected by the ACofS G-2, WDGS, for advanced training or overseas duty, will be transferred from the CIC and assigned to the service command.

5. Civilian personnel presently assigned to MID (MIS) but located in service commands and performing ASF activities, will be transferred to the service command.

6. Military and civilian personnel of the Counterintelligence Group, MID (MIS), as mutually agreed upon between the ACofS G-2 and CG, ASF, will be transferred to the ASF.[76]

Under the new counterintelligence situation, CIC personnel could now be utilized, with certain specific exceptions, only in theaters of operations. Notwithstanding, the ACofS was still held responsible for coordinating the procurement and shipment of CIC units for CIC duty and the administration of CIC specialized training to be conducted at Camp Ritchie, Maryland.[77] His means for accomplishing these retained functions had been effectively removed, however, through the complete abolishment of CIC Headquarters, which was in reality the CIC Section of the MIS Counterintelligence Branch and CIC Staging Area at Fort Holabird, Baltimore, Maryland.[78] To make matters worse, the existing military security system was badly upset not only by the sudden decision of TM 30-205 countersubversive instructions but also under an utterly impractical provision of the approved IG study directing that, within available time and manpower limits, "all reports and attached memoranda of investigation made by the Counter-intelligence Corps be reviewed, pertinent, verified information be extracted, and the original and copies be recalled by the War Department and destroyed."[79]

The departmental intelligence agency was also soon shorn of its traditional military censorship functions. Despite the fact that censorship operations were providing it with a sizable amount of useful information,

the agency remained actively involved in the procurement, training, and assignment of censorship officers for the US Army. By May 1943, it had become feasible to establish an "Officer Pool for Censorship Personnel" and thus give the total censorship program a sorely needed degree of flexibility. Nevertheless, effective 21 March 1944, higher authority ordered the transfer of this officer pool to ASF, as well as the related function of handling censorship supplies. For the time being, MID (MIS) was still permitted to receive information directly obtainable from censorship sources for assistance in producing intelligence but, on 25 July 1944, even this responsibility was shifted to ASF, along with all duties pertaining to the procurement, training, assignment, and supply of CIC personnel.

Prior to the imposed MID reorganization during the summer of 1944, therefore, which sought to form a truly separate MIS under a new ACofS G-2 (Gen. Bissell), the departmental intelligence agency had already lost most of its military security functions. With MID limited solely to the execution of general staff type duties, the theory was that the ACofS G-2 could now perform his basic counterintelligence mission acting through a single security specialist within the G-2 Policy Staff. Hence, effective 3 June 1944, the Counterintelligence Group, MIS, was abolished and Col. Forney, plus two officer assistants and two clerks, became Group III (Security) Policy Staff, MID.[80] For a brief period after this, there was a small Security Branch, MIS, placed under the Supervisor of Source Control to accomplish certain representation and liaison tasks;[81] but, on 24 July 1944, when the final transfer of all counterintelligence functions to ASF was announced, the ACofS G-2 decided to move this group back into MID. Major considerations calling for such action at that particular time were then given, as follows:

> a. Uncertainty as to the permanence of the decentralization that had been effected.
>
> b. Need of an agency to handle unusual and important security matters which could not be handled at a lower level.
>
> c. Need for an agency to perform a small number of security functions that had not been decentralized or transferred to other MIS branches on or before 24 July 1944.[82]

Thus, even though Gen. Bissell had himself served on the War Department committee charged with reorganizing MID (MIS), it did not take him long as ACofS G-2 to realize that some sort of a counterintelligence unit would be essential to the proper functioning of the departmental intelligence agency regardless of views expressed by higher authority. While the new Security Branch, MID, never included more than three officers and always worked in close conjunction with the G-2 Policy Staff, it promptly inherited a number of more or less operational security tasks along the following lines:

> a. Assisting the ACofS G-2 in security matters of great delicacy, such as; investigating serious leaks of highly classified information, supervising from a security standpoint the movements of very important persons, handling the initial security aspects of Japanese balloon incidents, interviewing the captured German agents (Gimpel and Colepaugh), and maintaining liaison with the FBI relative to secret intelligence operations.
>
> b. Screening reports of security violations discovered by the MID (MIS) telephone monitoring service and forwarding

them to appropriate action agencies, normally Joint Security Control.

c. Establishing and enforcing a revitalized internal security system within MID (MIS) itself.

d. Determining whether or not War Department approval should be granted to requests for using technical methods of surveillance in certain investigative cases, as required by official orders. These methods might include the interception of mail while under military control or the use of mechanical overhearing devices at military reservations.

e. Serving as G-2 members on the OWI Security Advisory Board and the Secretary of War's Review Board, with the first named board having been formed to advise federal agencies other than the War and Navy Departments about security problems and the latter to review appeals submitted by War Department civilian employees discharged under Public Law 808, 77th Congress, for reasons of national security.

f. Processing miscellaneous counter-intelligence matters, for example, individual loyalty cases referred to the ACofS G-2, clearing requests from the Census Bureau for authority to conduct surveys in areas of military interest and answering questions concerning the release of military information through the BPR.[83]

The need for having a small group of counterintelli-gence specialists readily available in MID was well illustrated by the sudden demand to dispose of so-called Japanese balloon incidents from the military security standpoint. In an effort to bolster homefront morale following the Doolittle air raid on Tokyo, the Japanese authorities had hit upon the idea of floating free balloons laden with high explosive and incendiary bombs against American territory. The original plan was to launch these balloons from submarines stationed offshore but, when this proved to be impracticable, they were released from Japan itself. Some 9,000 balloons were eventually launched, with only a small percentage of them ever reaching the North American continent. They were first reported during November 1944 and naturally caused a considerable amount of speculation within intelligence circles as to their exact purpose. One popular theory was that they might be germ carriers in an opening of bacteriological warfare but another was they were being used to introduce Japanese agents into this country.[84]

Following a hasty series of interdepartmental consultations, it was decided that the first step in combating these Japanese missiles should be to request a voluntary censorship of all public news media. This would serve to deny the Japanese any accurate evaluation of their balloon capabilities and minimize whatever propaganda value might accrue to them from the project. The Western Defense Command was then given the mission of taking appropriate defensive measures and collecting information on all located balloons. The FBI also carried out extensive investigations, while various scientific agencies of the government joined in examining the balloons to determine their technical characteristics. During December 1944, Maj. Ray V. Jones and 2nd Lt. Charles H. Allison of the Scientific Branch, MIS, were ordered to devote their entire effort toward reporting on the balloon situation, and it was not long before a total of seven officers and two clerks were fully occupied in this same type of work.[85]

There were several narrow escapes from publicity leaks, occasioned mainly by items appearing in small local newspapers, but on the whole the voluntary censorship policy turned out to be notably successful. The news gradually did get around, however, so more positive countermeasures were indicated. A "word of mouth" campaign was adopted, based upon British methods recently devised to educate the public about the V-1 bomb without furnishing the Germans any specific information pertaining to landing areas or bomb damage. This supplementary system remained sufficient until six members of a single family were killed while tampering with an unexploded bomb they had stumbled across in the Pacific Northwest, an event which forced the War Department to release a carefully guarded statement on the subject. Finally, when the Japanese discontinued launching their balloons in April 1945, the matter was slowly allowed to fade from the national scene, with no serious security breach having ever occurred.[86]

Gen. Bissell replaced Gen. Strong as the ACofS G-2 on 21 February 1944, just in time to become actively involved in the mounting dispute over the status of Communists and fellow travelers within the US Army, especially whether or not they ought to hold officer commissions. Accordingly, two months later, he addressed a memorandum to the Deputy Chief of Staff which not only recommended continuance of the policy to exclude these personnel from sensitive duty assignment and attendance at Officer Candidate Schools but also asked for the discharge under existing Army regulations of officers "who are proven to be members of the Communist Party or to have consistently followed the party line or otherwise indicated they have submitted themselves to the discipline of the Party."[87]

Nothing came of this initial attempt to classify Communists and fellow travelers specifically as disaffected personnel but embarrassing questions in the matter kept pouring into MID from other military security agencies.[88] It was thus deemed advisable to submit a more detailed memorandum on the subject to the Chief of Staff in the hope of securing more suitable authority for controlling them. This new memorandum, as originally drafted, took note of the fact that a decision was made on 11 May 1944 by the Assistant Secretary of War in rejecting the removal of a veteran of the Abraham Lincoln Brigade from Officer Candidate School directly contradicted an 8 March 1944 decision in a practically parallel case.[89] Since MID had recently found that 81 officers, five WAC officers, 1,181 enlisted men, and 49 enlisted women were "so thoroughly imbued with the principles of Communism as to constitute a danger to security," it appeared necessary to clarify their future military status. The belief was that enlisted men of such character should be retained in the service and given combat duty but the officers eliminated. It was recognized, however, that the latter step might not be expedient at this particular time.[90]

Before signing this proposed communication to the Chief of Staff, Gen. Bissell chose to discuss it personally with McCloy. As a result, Col. Forney received further instructions to prepare a detailed staff study on Communists in the Army, which would seek a definite answer to the problem but recommend what was right rather than expedient. When this had been duly accomplished to Gen. Bissell's satisfaction, the study was sent to McCloy for added comment prior to its consideration by the Chief of Staff. The Assistant Secretary of War then wrote a lengthy memorandum for that purpose but, on 10 June 1944, returned all the papers to the ACofS G-2 expressing a desire to talk over the matter again after Gen. Bissell had read his contemplated remarks. Shortly thereafter, the ACofS G-2 conferred with Col. Forney about the study and made the following points:

a. The staff study was accurate and the action recommended was justified.

b. It was inexpedient to raise the question at the present time due to the possibility of offending Russia and thus bringing about action on the part of that country unfavorable to the war effort.

c. It was inexpedient to risk publicity on this question in an election year.

d. There could be no retraction officially of the War Department's long standing attitude toward communism.

e. That some means had to be found to settle the question in the field that would not embarrass the War Department.[91]

In view of these conflicting factors as mentioned by the ACofS G-2, Col. Forney suggested that the staff study should be quietly dropped and informal steps taken to prevent at least for the time being any Communist cases arising in the field which might embarrass the War Department.[92] With Gen. Bissell approving this course of action, Col. Forney then proceeded to contact the principal intelligence officers of the three major commands and orally explained the newly adopted policy to them. Although this informal system did work out fairly well for a few months, by the latter part of November 1944, it was plainly apparent that the lower echelons were again becoming restive at the lack of support being provided by the War Department in their Communist security cases.[93] On 23 November 1944, therefore, Gen. Bissell decided to reopen the question with McCloy and to recommend the issuance of official orders for maintaining a "desired status in this matter."[94]

McCloy agreed that it was now practicable to publish formal instructions to the Army on the subject of Communists but he remained dissatisfied with some of the wording contained in the letter submitted by the ACofS G-2 to accomplish this purpose. He wished to assure that the basic consideration for taking any security action was not the propriety of the individual's opinions but his loyalty to the United States, including a willingness to accept combat duty.[95] Hence, despite Gen. Bissell's forceful argument that the War Department should conform to a decision of the Attorney General and regard Communism per se as constituting disaffection,[96] the instructions which were finally issued to the Army on 30 December 1944, consisted mainly of the following statement written word for word by McCloy himself:

The basic consideration is not the propriety of the individual's opinions, but his loyalty to the United States. Membership in, or strict adherence to the doctrines of, the Communist Party organization is evidence that the individual is subject to influences that may tend to divide his loyalty. However, many good soldiers are subject to conflicting influences. Such influences must be appraised in the light of the individual's entire record. No action will be taken under the reference letter that is predicated on membership is or adherence to the doctrines of the Communist Party unless there is a specific finding that the individual involved has a loyalty to the Communist Party as an organization which overrides his loyalty to the United States. No such finding should be based on the mere fact that the individual's views on various social questions have been the same as the views that the Communist Party may have advanced. Except in clear cases, no action should be taken against persons who are being trained for combat assignments and have

demonstrated a high degree of ability to serve the United States in that manner, including a willingness to accept combat duty.[97]

The order specifying this more liberal War Department attitude toward Communists and fellow travelers in the US Army was classified SECRET but it soon leaked to the press. During the national uproar which followed, the entire matter came under close scrutiny by a House Committee on Military Affairs authorized to study progress of the war effort. On 22 February 1945, Maj. Gen. James A. Ulio, the Adjutant General, acknowledged existence of the new policy in a letter addressed to Representative George A. Dondero of Michigan. He claimed, however, that known or suspected Communist personnel had not proved to be any source of difficulty and were loyally supporting the war effort, so there seemed little justification for not using their services to the utmost of individual capacities.[98] Both the Assistant Secretary of War and ACofS G-2 subsequently appeared before this same Congressional Committee in defending the position taken by the War Department. Although a preliminary report of the Committee as published early in July 1945 was extremely critical of that position, no important change occurred in it for the rest of the wartime period.[99]

Thus, at the war's end, the ACofS G-2 not only had been deliberately divested of all his operational counterintelligence functions but also was no longer able to control the basis terms of Army security policies. Moreover, because the departmental military intelligence agency was unfavorably organized to collect, evaluate, and disseminate domestic intelligence information, he could not properly execute his inherent mission of keeping the Chief of Staff fully informed on Army security matters. With it becoming increasingly clear to most of the departmental intelligence authorities that no effective dividing line could now be drawn between their foreign and domestic counterintelligence responsibilities, this imposed handicap held especially serious implications for the future.

Nevertheless, it must be granted that a definite need had been shown early in the war for decentralizing the departmental counterintelligence effort within the zone of interior and permitting other staff groups or field agencies to undertake as many operational security tasks as possible. Neither could there be any convincing argument advanced against the generally accepted thesis that each individual commander should remain free to provide for the military security of his own command. The national security clearance program had rapidly developed into such a cumbersome and complicated process that the departmental intelligence officials could never hope to keep up with it under a system of centralized control. They were soon bogged down, therefore, in a bewildering array of individual security clearance procedures to the extent that they could seldom find time for performing counterintelligence duties of a more fundamental nature.

The principal trouble lay not so much in recognizing that a difficult functional problem did exist but more in the various courses of action which were adopted by higher authority to meet it. Since outside influences and personnel economy considerations were often allowed to carry an overriding weight in reaching major decisions on military security matters, it became practically impossible to develop an effectual system for protecting the Army from harmful subversion. Besides, back of the enforced curtailment of departmental counterintelligence operations as dictated by many self-appointed experts holding no detailed intelligence background, lurked the readily perceptible outline of a Communist inspired drive aimed at eliminating all MID (MIS) activity within the domestic intelligence field regardless of consequences. The combined result was a departmental agency

inadequately equipped to fulfill its essential counterintelligence responsibilities during most of World War II. With well-organized subversive elements representing both an actual and potential danger to ultimate military success, this was certainly not the proper time to reduce MID (MIS) capabilities for exposing or blocking them, yet that is exactly what did take place.

FBI Wartime Operations

A review of FBI intelligence work during World War II would not be complete without brief mention of several other activities. In 1940, President Roosevelt authorized the FBI with the approval of the Attorney General to conduct electronic surveillance of "persons suspected of subversive activities against the Government of the United States, including suspected spies."[100] The Federal Communications Commission denied the FBI access before the war to international communications on the grounds that such intercepts violated the Federal Communications Act of 1934.[101] However, military intelligence had secretly formed a Signals Intelligence Service to intercept international radio communi-cations, and Naval intelligence arranged with RCA to get copies of Japanese cable traffic to and from Hawaii, although other cable companies used by the Japanese refused to violate the statute against interception before Pearl Harbor.[102] Moreover, the FBI developed "champering" or surreptitious mail opening techniques, and the practice of surreptitious entry was used by the FBI in black bag operations.[103]

Several basic internal memoranda and agreements spelled out the policies governing the relationships between FBI and military intelligence in this period. The military concentrated more heavily on what it perceived as potential threats to the Armed Forces, while the FBI developed a wider and more sophisticated approach to the gathering of intelligence about "subversive activities" generally. An example of the Army's policy was an intelligence plan approved in 1936 for the Sixth Corps Area, which covered Illinois, Michigan, and Wisconsin. It called for the collection and indexing of the names of several thousand groups, ranging from the American Civilian Liberties Union to pacifist student groups alleged to be Communist-dominated. Sources of information were to be the Justice Department, the Treasury Department, the Post Office Department, local state police, and private intelligence bureaus employed by businessmen to keep track of organized labor.[104] The joint FBI-military intelligence plan prepared in 1938 stated that the Office of Naval Intelligence and the Military Intelligence Division (G-2) were concerned with "subversive activities that undermine the loyalty and efficiency" of the Army and Navy personnel or civilians involved in military construction and maintenance. Since ONI and MID lacked trained investigators, they relied before the war on the FBI "to conduct investigative activity in strictly civilian matters of a domestic character." The three agencies exchanged information of interest to one another, both in the field and at headquarters in Washington.[105]

The FBI, ONI, and MID entered into a Delimitation Agreement in June 1940 pursuant to the authority of President Roosevelt's 1939 directives. As revised in February 1942, the Agreement covered "investigation of all activities coming under the categories of espionage, counterespionage, subversion, and sabotage." It provided that the FBI would be responsible for all investigations "involving civilians in the United States" and for keeping ONI and MID informed on "important developments…including the names of individuals definitely known to be connected with subversive activities."[106] As a result of this Agreement and prior cooperation, military intelligence could compile

extensive files on civilians from the information disseminated to it by the FBI. For example, in May 1939 the MID transmitted a request from the Ninth Corps Area on the West Coast for the names and locations of "alien and disloyal American sabotage and espionage organizations" planning to take advantage of wartime hardships to overthrow the Government, "citizens opposed to our participation in war and conducting antiwar pro-paganda," and potential enemy nationals who should be interned in case of an "international emergency."[107]

Moreover, despite the FBI-military agreement, the Counter Intelligence Corps of the Army (CIC) gradually undertook wider investigation of civilian "subversive activity" as part of a preventive security program, which used voluntary informants and investigators to collection information.[108]

The FBI developed a substantial foreign intelligence operation in Latin America during the war. On June 24, 1940, President Roosevelt issued a directive assigning foreign intelligence responsibilities in the Western Hemisphere to a Special Intelligence Service (SIS) of the FBI. SIS furnished the State Department, the military, and other governmental agencies with intelligence regarding "financial, economic, political, and subversive activities detrimental to the security of the United States." SIS assisted several Latin American countries "in training police and organizing antiespionage and antisabotage defenses." When another foreign intelligence agency, the Office of Strategic Services (OSS), was established in 1941, it sought to enter the Latin American field until President Roosevelt made clear that jurisdiction belonged to SIS.[109]

There was constant friction throughout the war between the FBI and the OSS. Despite the President's order, OSS operatives went to Latin America. Within the United States, OSS officers are reported to have secretly entered the Spanish Embassy in Washington to photograph documents. The FBI Director apparently learned of the operation, but instead of registering a protest he waited until OSS returned a second time and then had FBI cars outside turn on their sirens. When OSS protested to the White House, the President's aides reportedly ordered the embassy project turned over to the FBI.[110] A similar incident occurred in 1945 when OSS security officers illegally entered the offices of *Amerasia* magazine in search of confidential Government documents.[111] This illegal entry made it impossible for the Justice Department to prosecute vigorously on the basis of the subsequent FBI investigation, for fear of exposing the "taint," which started the inquiry.

Director Hoover's most serious conflict with OSS involved a weighing of the respective needs of foreign intelligence and internal security. In 1944, the head of OSS, William Donovan, negotiated an agreement with the Soviet Union for an exchange of missions between OSS and the NKVD (the Soviet intelligence and secret police organization). Both the American military representative in Moscow and Ambassador W. Averell Harriman hoped the exchange would improve Soviet-American relations.[112] When Hoover learned of the plan, he warned Presidential aide Harry Hopkins of the potential danger of espionage if the NKVD were "officially authorized to operate in the United States where quite obviously it will be able to function without any appropriate restraint upon its activities." The Director also advised Attorney General Biddle that secret NKVD agents were already "attempting to obtain highly confidential information concerning War Department secrets." Thus, the exchange of intelligence missions was blocked.[113] The FBI was also greatly concerned about the OSS policy of employing American Communists to work with the anti-Nazi underground in Europe,

although OSS did dismiss some persons suspected of having links with Soviet intelligence.[114]

The FBI was not withdrawn from the foreign intelligence field until 1946. At the end of the war President Truman abolished the Office of Strategic Services and dispersed its functions to the War and State Departments. The FBI proposed expanding its wartime Western Hemisphere intelligence systems to a worldwide basis, with the Army and Navy handling matters of importance to the military. Instead, the President formed a National Intelligence Authority with representatives of the State, War, and Navy Departments to direct the foreign intelligence activities of a Central Intelligence Group. The Central Intelligence Group was authorized to conduct all foreign espionage and counterespionage operations in June 1946. Director Hoover immediately terminated the operations of the FBI's Special Intelligence Service, and in some countries SIS officers destroyed their files rather than transfer them to the new agency.[115]

CONTINUE CHAPTER 1

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CHAPTER 1 CONTINUED

The Counter Intelligence Corps During World War II

As a result of the Delimitations Agreement of 1939, the counterintelligence system was centralized under three agencies. The task assigned to the US Army covered both the Military Establishment and a large percentage of the munitions industry. The primary counterintelligence effort was the organization of a security system, which would prevent access of hostile agents to our facilities.

Countless security surveys were made. Safeguards were developed, and identification systems were established. Thousands of personnel investigations were conducted, and, as these proceeded, steps were taken to place persons whose loyalty was in question on work where they could not injure our war effort.

There were individual cases of sabotage and these, of course, became the immediate subject of intensive investigation. A few saboteurs and spies were captured and convicted. Even in cases where investigation failed to uncover the perpetrator, exhaustive investigation resulted in the development of better security measures.

A special effort was made to safeguard military information. Counter Intelligence Corps personnel operated the security system for the headquarters that planned the North African campaign. In many cases where the Counter Intelligence Corps found improper safeguarding of military information, strategic plans were changed or revoked.

The outbreak of World War II called for an immediate increase in the authorized strength of the Corps of Intelligence Police. The total strength of the Corps was set at 1,026 noncommissioned officers, and all its members then in the Enlisted Reserve Corps were ordered to active duty "with the least practical delay." The War Department then set out to produce a well-staffed and well-trained organization for this branch of intelligence work.

On 13 December 1941, a letter from the office of the Adjutant General officially changed the name of the Corps of Intelligence Police to the Counter Intelligence Corps, to be effective 1 January 1942. This was a change in name only. However, many organizational changes were made during the first two years of existence of the Counter Intelligence Corps on the basis of lessons learned from field experience.

At the outset of the war, there were many Military Intelligence Division officers supervising the Corps of Intelligence Police who were not experienced in their duties. The War Department early recognized this deficiency, and constructive steps were taken immediately. All officers selected for duty with the Counter Intelligence Corps had to be cleared

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The Postwar Expansion of FBI Domestic Intelligence

The Federal Loyalty-Security Program

FBI-Military Intelligence Jurisdictional Agreement

by the Assistant Chief of Staff, G-2, before serving with the Corps. Furthermore, commanders of all Corps Areas, Departments (except the Philippine and Hawaiian Departments), and Base Defense Commands were directed to submit without delay to the Assistant Chief of Staff, G-2, a roster of all commissioned personnel on duty with the Corps of Intelligence Police.

In order to provide the most proficient and experienced counterintelligence commissioned personnel to supervise the activities of the Counter Intelligence Corps, it was recommended that "a complement of commissioned officers be specifically authorized for the Counter Intelligence Corps." It was also deemed advisable to increase the commissioned strength of the Corps to 543 in field and company grades and to bring the total non-commissioned strength to 4,431.

A tentative plan of organization for Counter Intelligence Corps detachments to serve with tactical and headquarters units down to and including divisions was also drawn up. In outline, the detachments were to be composed in the following manner:

Division	1 Officer 5 Enlisted men
Army Corps	2 Officers 11 Enlisted men
Field Army	6 Officers 49 Enlisted men
Air Forces	5 Officers 17 Enlisted men
Defense Command	4 Officers 28 Enlisted men

In addition, Counter Intelligence Corps Head-quarters, the Training School, the Washington Field Office, and the Replacement Pool were authorized officer and enlisted vacancies.

At this time, each service command was given a temporary and permanent allotment by the Adjutant General. The temporary allotment was to cover procurement when an overseas detachment was to be activated, the men therein to be transferred from the service commands. When men were transferred from the service commands for this purpose, the temporary allotment for the new detachment was reduced by the Adjutant General and the new detachment simultaneously set up.

In October 1942, the system of temporary allotments to the service commands was discontinued, and all such allotments were transferred to the War Department Reserve Pool. This Reserve Pool was then apportioned among the service commands for procurement purposes. When a tactical detachment was activated, an allotment was provided from the service commands as before, and the apportionment of the War Department Reserve Pool decreased by the grades of the men transferred.

It was anticipated early in 1942 that the constant loss of men in service commands, because of the demands of overseas units, would seriously hamper operations. Consequently, on 14 May, the corps areas (service commands) were directed by Military Intelligence Section to submit a list of special agents considered "key personnel" with a brief explanation of the positions these men held. Because of a tendency on the part of the corps areas to include a large number of men on such listings, it soon became necessary to limit "key personnel" in the corps areas to 10 percent of the total personnel in each command.

German Agents with their radio equipment captured by the Army Counter Intelligence Corps in France during the second World War.
PHOTO

In April 1943, it was determined that since all Counter Intelligence Corps personnel were chargeable to War Department overhead, they should be assigned to the War Department and attached to the various service commands for administrative purposes. Consequently, the allotments to the service commands were rescinded, and two months later the allotments to the theaters of operations were rescinded. In September 1943, TM 30-215, "Counter Intelligence Corps," set forth a T/O (table of organization) basis for assignment of personnel to the theaters of operations. The balance of the Counter Intelligence Corps personnel was to be assigned to Army Ground Forces, Army Service Forces, and other utilizing units.

The increase in personnel made it necessary to expand the Counter Intelligence Corps administrative machinery to meet the new demands. In December 1942, the office of the Chief, Counter Intelligence Corps, was divided into six sections: Supply, Operations, Fiscal, Plans and Training, Personnel, and Army Air Forces Liaison.

The procurement and training of Counter Intelligence Corps personnel for overseas duty became the primary mission of the office of the Chief, Counter Intelligence Corps. Demands for assignment of Counter Intelligence Corps detachments, both to units scheduled for immediate departure to overseas duty and for units already in combat in the theaters of operations, were steadily increasing. To meet these demands and to facilitate training, the War Department, on 29 October, 1942, instructed all Bases, Departments, and Service Commands (except the Ninth) to establish preliminary Counter Intelligence Corps training schools in their respective commands.

CIC trainees in a class to learn to identify Japanese insignia rank in 1942.
PHOTO

During the years 1942-1943, agents of the Counter Intelligence Corps made thousands of loyalty investigations on military personnel and civilians assigned to duties requiring access to classified material. The transfer of certain investigative functions from the Military Intelligence Division to the Provost Marshal General in October, 1941, did not relieve the Corps of the duty of investigating personnel already in military service who were working with classified material. Typical examples of such personnel were cryptographers; certain Signal Corps personnel in other types of work; Military Intelligence personnel (civilian and military); and, of course, as a large part of the last mentioned category, potential Counter Intelligence Corps personnel.

The forms used and the extent of the investigations varied in accordance with War Department and Service Command policy. Investigations of prospective Counter Intelligence Corps personnel were always exhaustive.

Loyalty investigations, which involved no suspicion of disloyalty, consisted of an examination of personal history, education, employment, and associations. Each subject of a personnel investigation was required to complete a Personal History Statement. In each personnel investigation, a check was made of the local police, the Federal Bureau of Investigation, the Office of Naval Intelligence, and the Military Intelligence Division Files. Copies of each memorandum report were sent to the Service Commands interested, the Military Intelligence Division, and the Federal Bureau of Investigation.

Investigations of military personnel suspected of disaffection, espionage, treason, sedition, sabotage, or of violations of AR 380-5, "Safeguarding Military Information," were reported on War Department Form CIR 1 (Counter Intelligence Report No. 1). This form contained a summarization by the investigating agent, a detailed outline of the subject's personal background, and a recommendation for disposition of the subject in accordance with the purpose of the investigation.

The Service Command Counter Intelligence Corps detachments were divided into several field offices, each having investigative responsibility for a certain geographic area of the Service Command. In certain less populated areas, single representatives were used and designated as resident agents. In metropolitan field offices with many agents, the personnel operated in separate sections and squads under the direction of special agents of proved experience and ability. These sections performed specific types of investigations. Agents became specialists in one type of investigation, developed local contacts of value in their particular field, and accumulated a general knowledge of organizations and individuals in the area considered subversive or of questionable loyalty.

CIC arrested thousands of Nazis after the allied occupation of Germany. In this photo, German leaders are being tried at Nuremberg.
PHOTO

Exclusive of background investigations, the largest volume of investigations consisted of disaffection cases. Disaffection has been defined as a state of mind indicating a lack of affection for the US Government. Such cases usually concerned persons with German, Italian, or Japanese backgrounds.

In the field of suspected sabotage and espionage, the Counter Intelligence Corps performed investigations, which often employed the use of technical investigative equipment. The Counter Intelligence Corps mission in the zone of the interior was not as dramatic as that of federal agencies, which apprehended espionage agents. The efforts of the Counter Intelligence Corps, however, denied access to vital industrial plants and to highly secret military installations to many persons whose loyalty to the United States was dubious. What damage these persons might have wrought on the war effort is only a matter of conjecture.

In the fall of 1943, the Inspector General conducted an extensive examination of Counter Intelligence Corps activities in the Service Commands. The resultant recommendations brought about a reorganization of the Corps both in its activity in the Service Commands, and in foreign theaters. Of special import was the suggestion that Counter Intelligence Corps personnel "…be specifically procured and trained for utilization in theaters of operation; that they be so utilized that Counter Intelligence Corps activities within the Zone of Interior be performed by the Security Intelligence Corps of the Provost Marshal Gen.'s Department."

In an attempt to make the administration of the Counter Intelligence corps more definitive, the Deputy Chief of Staff, on 25 November, 1943, directed that certain recommendations made by the Inspector General be carried out. These included the following:

(1) Two changes in basic policy:

> (a) The Counter Intelligence Corps was to be utilized, with certain limited exceptions, in theaters of operations.

(b) Personnel of the Corps were to be released from War Department overhead assignments, distributed on a T/O basis, with G-2 exercising no command function over the Corps.

(2) Three specific continuing responsibilities relative to the Counter Intelligence Corps charged to the Assistant Chief of Staff, G-2, War Department:

(a) The establishment of policies and over-all supervision of counterintelligence activities.

(b) Coordination of the procurement and shipment of Counter Intelligence Corps units.

(c) The administration of specialized training prior to assignment of Counter Intelligence Corps personnel to theaters of operations.

(3) Certain specific actions relative to the Counter Intelligence Corps:

(a) The Counter Intelligence Corps Headquarters in Baltimore, Maryland and the Counter Intelligence Corps Staging Area were to be eliminated.

(b) G-2, War Department, in collaboration with the three major commands, and G-3, War Department, were to submit for approval a plan for procurement of Counter Intelligence Corps personnel.

(c) Counter Intelligence Corps units were to be organized on a T/O basis included in troop quotas.

(d) Command channels were to be used and command responsibility emphasized.

(e) Shipment of Counter Intelligence Corps personnel overseas was to be in accordance with approved requests of theater commanders.

(f) Basic training of counterintelligence personnel was to be provided by Army Service Forces.

(g) Counter Intelligence Corps specialized training was to be given by Military Intelligence Division at Camp Ritchie, Maryland.

(h) Counter Intelligence Corps personnel in permanent detachments of Service Commands were to be transferred for assignment to those Service Commands by 31 December 1943.

Since the future Counter Intelligence Corps mission would be entirely overseas, it was necessary to administer the program of the Counter Intelligence Corps and train and procure the personnel especially for that purpose. The largest source of personnel, the Service Command detachments, was no longer available, thereby necessitating a new method of procurement. The office of the Chief, Counter Intelligence Corps, in Baltimore Maryland, was discontinued, and the Counter Intelligence Section of the Counter Intelligence Group, Military Intelligence Service, handled all administration. The staff of this office was much smaller than it had been in the office of the Chief, Counter Intelligence Corps.

CIC photographed captured spies for identification purposes.
PHOTO

After a period of training and reorganization, the Counter Intelligence Corps was sent to the combat zones. It was here that the real value and meaning of the Corps became known to combat commanders. The record and achievements of Counter Intelligence Corps personnel brought added prestige to the Corps and to the Armed Forces of the United States.

On 14 December 1943, War Department Circular No. 324 transferred the counterintelligence functions within the zone of the interior to the Provost Marshal General. The investigative functions hitherto performed by the Counter Intelligence Corps and those of the Provost Marshal General were consolidated, and it was directed that these functions be performed by a single staff agency under each Service Command. This agency was later designated the Security and Intelligence Division.

Since the Counter Intelligence Corps was no longer to be the organization conducting investigations of espionage and sabotage cases of the Military Intelligence Division in the continental United States, it was necessary that the responsibility for discharging these functions be placed with the Commanding General, Army Service Forces, and designated areas. The assignment of Counter Intelligence Corps personnel to the Service Commands, where they became part of the newly formed Security and Intelligence Division under the jurisdiction of the Provost Marshal General, was also provided in War Department Circular 324. The assignment of personnel from War Department overhead to the using commands with instructions to activate under T/O&E 30-500 was an entirely new concept for the Counter Intelligence Corps, and great administrative difficulties attended this change of activity.

On 22 May 1944 an organization within the Military Intelligence Section replaced the office formerly known as the Counter Intelligence Corps branch of the Military Intelligence Section with the title of the Counter Intelligence Corps Section. A G2, War Department Policy Staff was created. This staff was responsible for policy decisions on intelligence functions, including the Counter Intelligence Corps. No important alterations in policy or duties accompanied this redesignation. However, since the function of the Counter Intelligence Corps Section was considered to be of an administrative and operational nature rather than a true staff function, on 1 August 1944 the Section was transferred from the control of the General Staff, War Department, to the Army Service Forces.

By this time the Counter Intelligence Corps had operated successfully overseas in every combat area and had obtained a troop basis of 4,308. These were allocated in the following manner:

Theaters of Operation, Base Commands, and other overseas installations	3,000
Army Ground Forces in United States	485
Army Air Forces in United States and Air Transport Command	823
TOTAL	**4,308**

The overseas allotments increased as additional Army Ground Forces units were trained and shipped to combat. Counter Intelligence Corps detachments were assigned to their respective units and became an integral part of divisions, corps, armies, overseas administrative

commands, theater headquarters, and of the A-2 Sections of the Air Force commands and installations.

On 1 December 1944 the Counter Intelligence Corps became a separate branch of the Intelligence Division of the Army Service Forces. Under the Army Service Forces the policy of assigning all Counter Intelligence Corps detachments to using units was continued. The only Counter Intelligence Corps detachments working within the zone of the interior were those units specifically allowed to do so by the War Department.

The administrative difficulties that were met in the early days of the Counter Intelligence Corps were paralleled by an equally difficult task of procuring desired personnel. On 21 October 1942 the power to initiate Counter Intelligence Corps personnel investigations was placed within the Service Commands. The commands were also empowered to assign and transfer personnel as Counter Intelligence Corps agents in the grade of corporal, and as Counter Intelligence Corps clerks in the grade of private first class. Control over the assignment and transfer of Counter Intelligence Corps special agents, the promotion of personnel from the rank of agent to special agent, and all matters concerning the assignment or transfer of commissioned personnel remained with the Assistant Chief of Staff, G-2, War Department.

A backlog of investigations to be conducted on prospective Counter Intelligence Corps personnel developed during this period. Until June 1943, Counter Intelligence Corps agents and clerks had been recruited by the theater commanders in overseas areas on the same basis as in the Service Commands. However, on 26 June, the allotments to theaters were discontinued. TM 30-215, "Counter Intelligence Corps," published 22 September 1943, limited the responsibility for procurement and assignment of officers and special agents to the Assistant Chief of Staff, G-2, War Department, and of agents and clerks to the Director of Intelligence in the Service Commands within the zone of the interior. All Counter Intelligence Corps personnel procured in theaters of operations were to be approved by the Assistant Chief of Staff, G-2, War Department.

As an aid in spotting potential Counter Intelligence Corps personnel, the classification "301 Investigator" was introduced into the Army classification system early in 1942. The names of all men under this classification were referred to the office of the Chief, Counter Intelligence Corps, for review and selection of prospective personnel. Men who were given the classification of "312 Stenographers" were also brought to the attention of this office so that from this group suitable clerks might be procured. When the procurement of Counter Intelligence Corps personnel was decentralized to the Service Commands in October, 1942, the names of men in the 301 and 213 classification were reported directly to the Service Commands by the reception centers. During 1942 and 1943, the office of the Adjutant General furnished the office of the Chief, Counter Intelligence Corps, extracts from qualification cards on all linguists inducted into the Army.

The largest percentage of Counter Intelligence Corps agents was obtained from personnel already in the Army. At the reception centers newly inducted personnel with basic Counter Intelligence Corps qualifications were interviewed by Counter Intelligence Corps agents to determine their suitability for assignment to Counter Intelligence Corps duty. Civilian and government organizations, which employed investigators, were requested to submit information concerning former investigators in their employ who had been inducted into the military service. In the early days of the organization of the Counter Intelligence Corps, men occasionally applied for admission to the Corps prior to their induction into the Army. If application was approved, they were

immediately "tabbed" and shortly thereafter transferred to the Counter Intelligence Corps. This method was not widely used because it resulted in personnel being transferred into the Corps without basic military training. Lack of basic training later proved to be a handicap to those agents when they were assigned to tactical detachments.

To meet the demands for qualified men, recommen-dations were accepted from Army post intelligence officers, Counter Intelligence Corps personnel, and any other military personnel who knew of men with basic Counter Intelligence Corps qualifications. All commanding officers throughout the Army were encouraged to submit names of men with the basic qualifications for Counter Intelligence Corps duty.

In the early recruitment, emphasis was placed on investigative or legal experience. Later, men with adequate education, good character, and loyalty were accepted even though they had neither legal nor investigative experience. Some linguists were procured, but this qualification was not an exclusive one. Men were drawn from all types of civilian occupations, and the Counter Intelligence Corps became an organization that included representatives of virtually every profession and nationality. In spite of the fact that most of these men worked as corporals or sergeants, the organization obtained outstanding men. The lure of the word "intelligence" and the prospect of working in civilian clothes was tempting bait; but, if the men of the Corps had not been carefully selected, their records in the war would have been less impressive. Counter Intelligence Corps men have always relied upon their own initiative. This has been borne out by the nature of their work in the United States and, to an even greater extent, by the record they have made in overseas operations.

For the most part, men selected for the Counter Intelligence Corps were well suited for their tasks, but one major weakness in the recruiting program was very noticeable; not enough emphasis was given to procuring and training linguists. The problem of obtaining men fluent in French, German, Italian, Japanese, and other foreign languages was made more difficult because of War Department policy, which directed that no persons of close foreign background would be assigned to or retained in the Counter Intelligence Corps. Many naturalized Americans, both in and out of the Army, were fluent in several languages, but the Counter Intelligence Corps was unable to use this source of language personnel because of this strict policy. When the war in Europe came to an end, the Army was faced with the overwhelming task of procuring a large number of men fluent in foreign languages. These necessities brought a quick reversal of policy, and, thereafter, close foreign relations alone ceased to be considered sufficient to disqualify a man for the Corps.

The rank of the agent was at best a partial secret within the Army. Counter Intelligence Corps men were instructed to conceal their actual rank by using the term "agent" or "special agent." Concealment of rank in the zone of the interior was not too great a problem since agents worked in civilian clothes. The average civilian respected Counter Intelligence Corps credentials and was not concerned with the actual rank of the bearer.

When his mission was changed from the zone of the interior to foreign theaters of operations, the Counter Intelligence Corps agent, in some cases, wore the military uniform indicting his status. This factor was a disadvantage in dealing with officers of the US Army and officers of the Allied Forces. The low rank of the leaders of some detachments often had a hampering effect, especially in their relationships with allied services in the theaters and with coordinate agencies of the United States. In many theaters this difficulty of rank was overcome by the

adoption of a uniform similar to that of war correspondence which showed no rank.

Duquesne Spy Ring

On January 2, 1942, 33 members of a Nazi spy ring headed by Frederick Joubert Duquesne were sentenced to serve a total of over 300 years in prison. The FBI brought them to justice after a lengthy espionage investigation. William Sebold, who had been recruited as a spy for Germany, was a major factor in the FBI's successful resolution of this case through his work as a double agent for the United States.

A native of Germany, William Sebold served in the German Army during World War I. After leaving Germany in 1921, he worked in industrial and aircraft plants throughout the United States and South America. On February 10, 1936, he became a naturalized citizen of the United States.

Sebold returned to Germany in February 1939, to visit his mother in Mulheim. Upon his arrival in Hamburg, Germany, he was approached by a member of the Gestapo who said that Sebold would be contacted in the near future. Sebold proceeded to Mulheim where he obtained employment.

In September 1939, a Dr. Gassner visited Sebold in Mulheim and interrogated him regarding military planes and equipment in the United States. He also asked Sebold to return to the United States as an espionage agent for Germany. Subsequent visits by Dr. Gassner and a "Dr. Renken," later identified as Maj. Nickolas Ritter of the German Secret Service, persuaded Sebold to cooperate with the Reich because he feared reprisals against family members still living in Germany.

Since Sebold's passport had been stolen shortly after his first visit from Dr. Gassner, Sebold went to the American Consulate in Cologne, Germany, to obtain a new one. While doing so, Sebold secretly told personnel of the American Consulate about his future role as a German agent and expressed his wish to cooperate with the FBI upon his return to America.

Sebold reported to Hamburg, Germany, where he was instructed in such areas as preparing codes messages and microphotographs. Upon completion of training, he was given five microphotographs containing instructions for preparing a code and detailing the type of information he was to transmit to Germany from the United States. Sebold was told to retain two of the microphotographs and to deliver the other three to German operatives in the United States. After receiving final instructions, including using the assumed name of "Harry Sawyer," he sailed from Genoa, Italy, and arrived in New York City on February 8, 1940.

The FBI previously had been advised of Sebold's expected arrival, his mission, and his intentions to assist them in identifying German agents in the United States. Under the guidance of Special Agents, Sebold established residence in New York City as Harry Sawyer. Also, an office was established for him as a consultant diesel engineer, to be used as a cover in establishing contacts with members of the spy ring. In selecting this office for Sebold, FBI Agents ensured that they could observe any meetings taking place there.

In May 1940, a shortwave radio transmitting station operated by FBI agents on Long Island established contact with the German shortwave

station abroad. This radio station served as a main channel of communications between German spies in New York City and their superiors in Germany for 16 months. During this time, the FBI's radio station transmitted over 300 messages to Germany and received 200 messages from Germany.

The successful prosecution of the 33 German agents in New York demonstrates Sebold's success as a counterespionage agent against Nazi spies in the United States. Of those arrested on charges of espionage, 19 pleaded guilty. The 14 men who entered pleas of not guilty were brought to trial in Federal District Court, Brooklyn, New York, on September 3, 1941, and they were all found guilty by a jury on December 13, 1941.

The activities of each of these convicted spies and Sebold's role in uncovering their espionage activities for the Reich follow.

Frederick Joubert Duquesne

Born in Cape Colony, South Africa, on September 21, 1877, Frederick Joubert Duquesne emigrated from Hamilton, Bermuda, to the United States in 1902 and became a naturalized United States citizen on December 4, 1913. Duquesne was implicated in fraudulent insurance claims, including one that resulted from a fire aboard the British steamship *Tennyson* that caused the vessel to sink on February 18, 1916. When he was arrested on November 17, 1917, he had in his possession a large file of news clippings concerning bomb explosions on ships, as well as a letter from the Assistant German Vice Consul at Managua, Nicaragua. The letter indicated that "Capt. Duquesne" was "one who has rendered considerable service to the German cause."

When Sebold returned to the United States in February 1940, Duquesne was operating a business known as the "Air Terminals Company" in New York City. After establishing his first contact with Duquesne by letter, Sebold met with him in Duquesne's office. During their initial meeting, Duquesne, who was extremely concerned about the possibility of electronic surveillance devices being present in his office, gave Sebold a note stating that they should talk elsewhere. After relocating to an Automat, the two men exchanged information about members of the German espionage system with whom they had been in contact.

Duquesne provided Sebold with information for transmittal to Germany during subsequent meetings, and the meeting which occurred in Sebold's office was filmed by FBI Agents. Duquesne, who was vehemently anti-British, submitted information dealing with national defense in America, the sailing of ships to British ports, and technology. He also regularly received money from Germany in payment for his services.

On one occasion, Duquesne provided Sebold with photographs and specifications of a new type of bomb being produced in the United States. He claimed that he secured that material by secretly entering the Dupont plant in Wilmington, Delaware. Duquesne also explained how fires could be started in industrial plants. Much of the information Duquesne obtained was the result of his correspondence with industrial concerns. Representing himself as a student, he requested data concerning their products and manufacturing conditions.

Duquesne was brought to trial and was convicted. He was sentenced to serve 18 years in prison on espionage charges, as well as a 2-year concurrent sentence and payment of a $2,000 fine for violation of the Registration Act.

Paul Bante

A native of Germany, Paul Bante served in the German Army during World War I. He came to the United States in 1930 and became a naturalized United States citizen in 1938.

Bante, formerly a member of the German-American Bund, claimed that Germany put him in contact with one of their operatives, Paul Fehse, because of Bante's previous association with a Dr. Ignatz T. Griebl. Before fleeing to Germany to escape prosecution, Dr. Griebl had been implicated in a Nazi spy ring with Guenther Gustave Rumrich, who was tried on espionage charges in 1938.

Bante assisted Paul Fehse in obtaining information about ships bound for Britain with war materials and supplies. Bante claimed that as a member of the Gestapo, his function was to create discontent among union workers, stating that every strike would assist Germany.

Sebold met Bante at the Little Casino Restaurant, which was frequented by several members of this spy ring. During one such meeting, Bante advised that he was preparing a fuse bomb, and he sub-sequently delivered dynamite and detonation caps to Sebold.

After entering a guilty plea to violation of the Registration Act, Bante was sentenced to 18 months imprisonment and was fined $1,000.

Max Blank

Max Blank came to the United States from Germany in 1928. Although he never became a US citizen, Blank had been employed in New York City at a German library and at a book store, which catered to German trade.

Paul Fehse, a major figure in this case, informed Germany that Blank, who was acquainted with several members of the spy ring, could secure some valuable information but lacked the funds to do so. Later Fehse and Blank met with Sebold in his office. They told Sebold that Blank could obtain details about rubberized self-sealing airplane gasoline tanks, as well as a new braking device for airplanes, from a friend who worked in a shipyard. However, he needed money to get the information.

Blank plead guilty to violation of the Registration Act. He received a sentence of 18 months' imprison-ment and a $1,000 fine.

Alfred E. Brokhoff

Alfred E. Brokhoff, a native of Germany, came to the United States in 1923 and became a naturalized citizen in 1929. He was a mechanic for the US Lines in New York City for 17 years prior to his arrest. Because of his employment on the docks, he knew almost all of the other agents in this group who were working as seamen on various ships.

Brokhoff helped Fehse secure information about the sailing dates and cargoes of vessels destined for England. He also assisted Fehse in transmitting this information to Germany. Also, another German agent, George V. Leo Waalen, reported that he had received information from Brokhoff for transmittal to Germany.

Upon conviction, Brokhoff was sentenced to serve a five-year prison term for violation of the espionage statutes and to serve a two-year concurrent sentence for violation of the Registration Act.

Heinrich Clausing

In September 1934, German-born Heinrich Clausing came to the Unite States, where he became a naturalized citizen in 1938. Having served on various ships sailing from New York Harbor since his arrival in the

country, he was employed as a cook on the SS *Argentine* at the time of his arrest.

Loosely associated with Franz Stigler, one of the principal contact men for the spy ring, Clausing operated as a courier. He transported micro-photographs and other material from the United States to South American ports, from which the information was sent to Germany via Italian airlines. He also established a mail drop in South America for expeditious transmittal of information to Germany by mail.

Clausing was convicted and was sentenced to serve eight years for violation of espionage statutes. He also received a two-year concurrent sentence for violation of the Registration Act.

Conradin Otto Dold

Conradin Otto Dold came to the United States from Germany in 1926. He became a US citizen in 1934 under the Seamen's Act. Prior to his arrest, he was Chief Steward aboard the SS *Siboney* of the American Export Lines.

Dold was related to people holding high positions in Germany and was closely associated with other members of the espionage group who worked on ships sailing from New York Harbor. As a courier, Dold carried information from Nazi agents in the Untied States to contacts in neutral ports abroad for transmittal to Germany.

Dold was sentenced to serve ten years in prison on espionage charges and received a two-year concurrent sentence and a fine of $1,000 for violation of the Registration Act.

Rudolf Ebeling

After leaving Germany for the United States in 1925, Rudolf Ebeling became an American citizen in

1933. He was employed as a foreman in the Shipping Department of Harper and Brothers in New York City when he was arrested.

Ebeling obtained information regarding ship sailings and cargoes, which he provided to Paul Fehse for transmittal to Germany. He also furnished such information to Leo Waalen, who delivered the material to Sebold for transmittal.

Upon conviction, Ebeling was sentenced to five years in prison on espionage charges. He also received a two-year concurrent sentence and a $1,000 fine for violating the Registration Act.

Richard Eichenlaub

Richard Eichenlaub, who came to the United States in 1930 and became a citizen in 1936, operated the Little Casino Restaurant in the Yorkville Section of New York City. This restaurant was a rendezvous for many members of this spy ring, and Eichenlaub introduced several new members into the group.

Eichenlaub reported to the German Gestapo and often obtained information from his customers who were engaged in national defense production. Through Eichenlaub, dynamite was delivered to Sebold from Bante.

Having entered a plea of guilty for violation of the Registration Act, Eichenlaub was sentenced to pay a fine of $1,000 and to serve 18 months in prison.

Heinrich Carl Eilers

A native of Germany, Heinrich Carl Eilers came to the United States in

1923 and became a citizen in 1932. From 1933 until his arrest, he served as a steward on ships sailing from New York City.

Eilers made a trip from New York to Washington, D.C. to obtain information for Germany from the Civil Aeronautics Authority. His mission, however, was unsuccessful.

At the time of his arrest in New York City by Customs authorities in June 1940, he had in his possession 20 letters addressed to people throughout Europe. He also had books relating to magnesium and aluminum alloys, which had been sent to him by Edmund Carl Heine, one of the principal espionage agents in this group.

Upon conviction, Eilers received a five-year prison sentence on espionage charges and a concurrent sentence of two years' imprisonment and a $1,000 fine under the Registration Act.

Paul Fehse

In 1934, Paul Fehse left Germany for the United States, where he became a citizen in 1938. Since his arrival in this country, he had been employed as a cook aboard ships sailing from New York Harbor.

Fehse was one of the directing forces in this espionage group. He arranged meetings, directed members' activities, correlated information that had been developed, and arranged for its transmittal to Germany, chiefly through Sebold. Fehse, who was trained for espionage work in Hamburg, Germany, claimed he headed the Marine Division of the German espionage system in the United States.

Having become quite apprehensive and nervous, Fehse made plans to leave the country. He obtained a position on the SS *Siboney*, which was scheduled to sail from Hoboken, New Jersey, for Lisbon, Portugal, on March 29, 1941. He planned to desert ship in Lisbon and return to Germany.

However, before he could leave the United States, FBI agents arrested Fehse. Upon arrest, he admitted sending letters to Italy for transmittal to Germany, as well as reporting the movement of British ships.

On April 1, 1941, Fehse was sentenced on a plea of guilty to serve one year and one day in prison for violation of the Registration Act. He subsequently pleaded guilty to espionage and received a prison sentence of 15 years.

Edmund Carl Heine

A native of Germany, Edmund Carl Heine came to the United States in 1914 and became a naturalized citizen in 1920. Until 1938, he held various positions in the foreign sales and service departments of Ford Motor Company and Chrysler Motor Corporation. His employment took him to the West Indies, South America, Spain, and Berlin, Germany. Heine was closely associated with Dr. Hans Luther, former German Ambassador in Washington, D.C. and Prince Louis Ferdinand of Berlin.

Heine sent letters from Detroit, Michigan, to Lilly Stein, one of the German spies Sebold was instructed to contact. The letters contained detailed technical data regarding the military, aircraft construction, and various industries. He also wrote to aircraft companies to obtain information about their produc-tion, number of employees, and the time required to construct military planes.

After obtaining technical books relating to magnesium and aluminum alloys, Heine sent the materials to Heinrich Eilers. To ensure safe delivery of the books to Germany in case they did not reach Eilers,

Heine indicated the return address on the package as the address of Lilly Stein.

Upon conviction of violating the Registration Act, Heine received a $5,000 fine and a two-year prison sentence.

Felix Jahnke

In 1924, Felix Jahnke left Germany for the United States, where he became a naturalized citizen in 1930. Jahnke had attended military school in Germany and had served in the German Army as a radio operator.

Jahnke and Alex Wheeler-Hill secured the services of Josef Klein, a radio technician, in building a portable radio set for Jahnke's apartment in the Bronx. Jahnke used this radio to transmit messages, which were intercepted by the FBI, to Germany. He also visited the docks in New York Harbor to obtain information about any vessels bound for England.

After pleading guilty to violation of the Registration Act, Jahnke was sentenced to serve 20 months in prison and to pay a $1,000 fine.

Gustav Wilhelm Kaercher

Gustav Wilhelm Kaercher came to the United States in 1923, becoming a citizen in 1931. He served in the German Army during World War I and was a former leader of the German Bund in New York. During visits to Germany, he was seen to have worn a German Army officer's uniform. At the time of his arrest, he was engaged in designing power plants for American Gas and Electric Company in New York City.

Kaercher was arrested with Paul Scholtz, who had just handed Kaercher a table of call letters and frequencies for transmitting information to Germany by radio.

As a result of his guilty plea to charges of violating the Registration Act, Kaercher received a $2,000 fine and a prison sentence of 22 months.

Josef Klein

A native of Germany, Josef Klein came to the United States in 1925; he did not become a citizen. Klein, a photographer and lithographer, had been interested in the building and operation of shortwave radio transmitters.

Klein constructed a portable shortwave radio transmitting and receiving set for Felix Jahnke and Axel Wheeler-Hill. When he built the radio set, Klein knew it would be used for transmitting messages to Germany.

Upon conviction, Klein received a sentence of five years' imprisonment on espionage charges and a concurrent sentence of two years' imprisonment under the Registration Act.

Hartwig Richard Kleiss

Born in Germany, Hartwig Richard Kleiss came to this country in 1925 and became a naturalized citizen six years later. Following his arrival in the United States, he was employed as a cook on various ships.

Kleiss obtained information for Germany, including blueprints of the SS *America* that showed the locations of newly installed gun emplacements. He included information about how guns would be brought into position for firing. Kleiss also obtained details on the construction and performance of new patrol torpedo boats being developed by the US Navy, which he submitted to Sebold for transmittal to Germany.

Kleiss had originally chosen to stand trial. However, after cross-examination, he changed his plea to guilty on charge of espionage and received an eight-year prison sentence.

Herman W. Lang

Herman W. Lang came to the United States from Germany in 1927 and became a citizen in 1939. He was one of four people Sebold had been told to contact in the United States.

Until his arrest, a company manufacturing highly confidential materials essential to the national defense of the United States had employed Lang. During a visit to Germany in 1938, Lang conferred with German military authorities and reconstructed plans of the Norden bomb sight from memory.

Upon conviction, Lang received a sentence of 18 years in prison on espionage charges and a 2-year concurrent sentence under the Registration Act.

Evelyn Clayton Lewis

A native of Arkansas, Evelyn Clayton Lewis had been living with Frederick Joubert Duquesne in New York City. Miss Lewis had expressed her anti-British and anti-Semitic feelings during her relationships with Duquesne. She was aware of his espionage activities and condoned them. While she was not active in obtaining information for Germany, she helped Duquesne prepare material for transmittal abroad.

Upon a guilty plea, Miss Lewis was sentenced to serve one year and one day in prison for violation of the Registration Act.

Rene Emanuel Mezenen

Rene Emanuel Mezenen, a Frenchman, claimed US citizenship through the naturalization of his father. Prior to his arrest, he was employed as a steward in the transatlantic clipper service.

The German Intelligence Service in Lisbon, Portugal, asked Mezenen to act as a courier, transmitting information between the United States and Portugal on his regular trips on the clipper. He accepted this offer for financial gain. In the course of flights across the Atlantic, Mezenen also reported his observance of convoys sailing for England. He also became involved in smuggling platinum from the United States to Portugal.

Following a plea of guilty, Mezenen received an eight-year prison term for espionage and two concurrent years for registration violations.

Carl Reuper

Having come to the United States from Germany in 1929, Carl Reuper became a citizen in 1936. Prior to his arrest, he served as an inspector for the Westinghouse Electric Company in Newark, New Jersey.

Reuper obtained photographs for Germany relating to national defense materials and construction, which he obtained from his employment. He arranged radio contact with Germany through the station established by Felix Jahnke. On one occasion, he conferred with Sebold regarding Sebold's facilities for communicating with German authorities.

Upon conviction, Reuper was sentenced to 16 years' imprisonment on espionage charges and 2 years' concurrent sentence under the Registration Act.

Evertt Minster Roeder

Born in the Bronx, New York, Roeder was a draftsman and designer of confidential material for the US Army and Navy.

Sebold had delivered micro-photograph instructions to Roeder, as ordered by German authorities. Roeder and Sebold met in public places and proceeded to spots where they could talk privately.

In 1936, Roeder had visited Germany and was requested by German authorities to act as an espionage agent. Primarily due to monetary rewards he would receive, Roeder agreed.

Roeder entered a guilty plea to the charge of espionage and was sentenced to 16 years in prison.

Paul Alfred W. Scholz

A German native, Paul Scholz came to the United States in 1926 but never attained citizenship. He had been employed in German book stores in New York City, where he disseminated Nazi propaganda.

Scholz had arranged for Josef Klein to construct the radio set used by Felix Jahnke and Axel Wheeler-Hill. At the time of is arrest, Scholz had just given Gustav Wilhelm Kaercher a list of radio call letters and frequencies. He also encouraged members of this spy ring to secure data for Germany and arranged contacts between various German agents.

Upon conviction, Scholz was sentenced to 16 years' imprisonment for espionage with 2 years' concurrent sentence under the Registration Act.

George Gottlob Schuh

George Schuh, a native of Germany, came to the United States in 1923. He became a citizen in 1939 and was employed as a carpenter.

As a German agent, he sent information directly to the Gestapo in Hamburg, Germany, from this country. Schuh had provided Alfred Brokhoff information that Winston Churchill had arrived in the United States on the HMS *George V.* He also furnished information to Germany concerning the movement of ships carrying materials and supplies to Britain.

Having pleaded guilty to violation of the Registration Act, Schuh received a sentence of 18 months in prison and a $1,000 fine.

Erwin Wilhelm Siegler

Erwin Siegler came to the United States from Germany in 1929 and attained citizenship in 1936. He had served as chief butcher on the SS *America* until it was taken over by the US Navy.

A courier, Siegler brought microphotography instructions to Sebold from German authorities on one occasion. He also had brought $2,900 from German contacts abroad to pay Lilly Stein, Duquesne, and Roeder for their services and to buy a bomb sight. He served the espionage group as an organizer and contact man, and he also obtained information about the movement of ships and military defense preparations at the Panama Canal.

Subsequent to his conviction, Siegler was sentenced to 10 years' imprisonment on espionage charges and a concurrent 2-year term for violation of the Registration Act.

Oscar Richard Stabler

Born in Germany, Oscar Stabler came to this country in 1923 and became a citizen in 1933. He had been employed primarily as a barber aboard transoceanic ships.

In December 1940, British authorities in Bermuda found a map of Gibraltar in his possession. He was detained for a short period before being released.

A close associate of Conradin Otto Dold, Stabler served as a courier, transmitting information between German agents in the United States and contacts abroad.

Stabler was convicted and sentenced to serve five years in prison for espionage and a two-year concurrent term under the Registration Act.

Heinrich Stade

Heinrich Stade came to the United States from Germany in 1922 and became a citizen in 1929. Stade had arranged for Paul Bante's contact with Sebold and had transmitted data to Germany regarding points of rendezvous for convoys carrying supplies to England.

Following a guilty plea to violation of the Registration Act, Stade was fined $1,000 and received a 15-month prison sentence.

Lilly Barbara Carola Stein

Born in Vienna, Austria, Lilly Stein met Hugo Sebold, the espionage instructor who had trained William Sebold (the two men were not related) in Hamburg, Germany. She enrolled in this school and was sent to the United States in 1939.

Lilly Stein was one of the people to whom Sebold had been instructed to deliver microphoto-graph instructions upon his arrival in this country. She frequently met with Sebold to give him information for transmittal to Germany, and her address was used as a return address by other agents in mailing data for Germany.

Miss Stein pleaded guilty and received sentences of 10 years' and 2 concurrent years' imprisonment for violations of espionage and restriction statutes, respectively.

Franz Joseph Stigler

In 1931, Franz Stigler left Germany for the United States, where he became a citizen in 1939. He had been employed as a crew member aboard United States ships until discharge from the SS *America* when the US Navy converted that ship into the USS *West Point.*

His constant companion was Erwin Siegler, and they operated as couriers in transmitting information between US and German agents abroad. Stigler sought to recruit amateur radio operators in the United States as channels of communication to German radio stations. He had also observed and reported defense preparations in the Canal Zone and had met with other German agents to advise them in their espionage pursuits.

Upon conviction, Stigler was sentenced to serve 16 years in prison on espionage charges with 2 concurrent years for registration violations.

Erich Strunck

A seaman aboard ships of the United States Lines since his arrival in this country, Erich Strunck came to the United States from Germany in 1927. He became a naturalized citizen in 1935.

As a courier, Strunck carried messages between German agents in the United States and Europe. He requested authority to steal the diplomatic bag of a British officer traveling aboard his ship and to dispose of the officer by pushing him overboard. Sebold convinced him that it would be too risky to do so.

Strunck was convicted and sentenced to serve 10 years in prison on espionage charges. He also was sentenced to serve a two-year concurrent term under the Registration Act.

Leo Waalen

Waalen was born in Danzig while that city was under German domination. He entered the United States by "jumping ship" in about 1935. He was a painter for a small boat company, which was constructing small craft for the US Navy.

Waalen gathered information about ships sailing for England. He also obtained a confidential booklet issued by the FBI, which contained precautions to the taken by industrial plans to safeguard national defense materials from sabotage. Waalen also secured government contracts listing specifications for materials and equipment, as well as detailed sea charters of the US Atlantic coastline.

Following his conviction, Waalen was sentenced to 12 years in prison for espionage and a concurrent 2-year term for violation of the Registration Act.

Adolf Henry August Walischewski

A German native, Walischewski had been a seaman since maturity. He became a naturalized citizen in 1935. He became connected with the German espionage system through Paul Fehse. His duties were confined to those of courier, carrying data from agents in the United States to contacts abroad.

Upon conviction, Walischewski received a five-year prison sentence on espionage charges, as well as a two-year concurrent sentence under the Registration Act.

Else Weustenfeld

Else Weustenfeld arrived in the United States from Germany in 1927 and became a citizen 10 years later. From 1935 until her arrest, she was a secretary for a law firm representing the German Consulate in New York City.

Miss Weustenfeld was thoroughly acquainted with the German espionage system and delivered funds to Duquesne, which she had received, from Lilly Stein, her close friend.

She lived in New York City with Hans W. Ritter, a principal in the German espionage system. Her brother, Nickolas Ritter, was the "Dr. Renken" who had enlisted Sebold as a German agent. In 1940, Weustenfeld visited Hans Ritter in Mexico, where he was serving as a paymaster for the German Intelligence Service.

After pleading guilty, Else Weustenfeld was sentenced to five years' imprisonment on charge of espionage and two concurrent years on charge of registration violations.

Axel Wheeler-Hill

Axel Wheeler-Hill came to the United States in 1923 from his native land of Russia. He was naturalized as a citizen in 1929 and was employed as a truck driver.

Wheeler-Hill obtained information for Germany regarding ships sailing to Britain from New York Harbor. With Felix Jahnke, he enlisted the aid of Paul Scholz in building a radio set for sending codes messages to Germany.

Following conviction, Wheeler-Hill was sentenced to serve 15 years in prison for espionage and 2 concurrent years under the Registration Act.

Bertram Wolfgang Zenzinger

Born in Germany, Zenzinger came to the United States in 1940 as a naturalized citizen of the Union of South Africa. His reported reason for

coming to this country was to study mechanical dentistry in Los Angeles, California.

In July 1940, Zenzinger received a pencil for preparing invisible messages for Germany in the mail from Siegler. He sent several letters to Germany through a mail drop in Sweden outlining details of national defense materials.

FBI agents arrested Zenzinger on April 16, 1941. Pleading guilty, he received 18 months in prison for violation of the Registration Act and 8 years' imprisonment for espionage.

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George John Dasch

The first sign of the German High Command's intention to engage in sabotage activities in the United States was disclosed by the apprehension of eight trained German saboteurs by Special Agents of the Federal Bureau of Investigation within two weeks after they had landed in the country from German submarines. These eight saboteurs had been thoroughly trained by the High Command of the German Army in the most modern methods of destruction and had been sent to this country for the specific purpose of interfering with the US war effort with particular emphasis being placed on interrupting production at aluminum and magnesium plants.

One group of these saboteurs landed on the beach at Amagansett, Long Island, on the night of June 13, 1942. The second group of four men was landed on a beach a few miles below Jacksonville, Florida, on June 17, 1942. After their landings, these men dispersed to various parts of the United States but they were all in federal custody by June 27, 1942. The saboteurs were Ernest Peter Burger, age 36, George John Dasch, age 39, Herbert Hans Haupt, age 22, Edward John Kerling, age 34, Richard Quirin, age 34, Hermann Otto Neubauer, age 32, Werner Thiel, age 35, and Heinrich Harm Heinch, age 35. All of these men had been born in Germany and at one time or another had spent a portion of their lives in the United States, during which time they learned the English language and became acquainted with American customs. All of these men with the exception of Burger had returned to Germany since the outbreak of the present conflict. Burger had returned to Germany in 1933, after living in the United States for a period of six years.

Recruitment of Saboteurs

The German saboteurs who were sent to the United States were recruited for this work by one Lt. Walter Kappe who was attached to Abwehr 2 (Intelligence-2) of the German High Command and in charge of German sabotage in the United States. In addition to his connection with the German Army, Kappe was also an official in the Ausland Institute at Stuttgart, Germany; prior to the war, this organization was engaged in organizing Germans abroad into the Nazi Party and had the function of obtaining through Germans living in foreign countries various types of military, economic, political, and similar information. Kappe had lived in the United States from 1925 to 1937, during which time he took part in the organizing of the first Nazi organization in this country at Chicago known as Teutonia. He later was one of the principal organizers and an officer in the Friends of New Germany, which subsequently became the German-American Bund. In the latter organization, Kappe was press agent and in charge of propaganda and was editor of official Bund paper in the United States. Fritz Kuhn ousted him from the German-American Bund as a result of some inner-

circle rivalries, after which time Kappe returned to Germany where he was placed in charge of the American section of the Ausland Institute at Stuttgart, Germany.

It is known that periodic meetings were held in Berlin and in other cities throughout Germany of those Germans who had formerly lived in the United States. These groups were known by the name Comradeship U.S.A. Walter Kappe was one of the officials in charge of these meetings, which, it is believed, were held for the purpose of keeping up the morale of these Germans because they were accustomed to a higher standard of living in the United States than that which they had in Germany at that time. Kappe recruited several of the saboteurs from these groups. The Ausland organization also maintained a list of all Germans who returned to that country from the United States and was advised on all current arrivals. As a result of this information, Kappe was also able to keep in touch with all returning Germans and consider them for sabotage activities.

Another source of recruits for sabotage missions to the United States is the Germany Army. In three instances, Kappe was able to arrange the transfer of Germans who had been in the United States from the German Army into the sabotage organization. No information has been received to indicate that any of the saboteurs were coerced in any way to engage in sabotage activities in this country. It is known, however, that the German High Command thoroughly investigated the background of the individuals proposed for sabotage training, and it is interesting note that the German Government placed a high value on an individual who had belonged to the German-American Bund or a similar organization while residing in the United States. It was stated that this indicated to the German Government the definite German sympathies of the individuals involved. The inducement to these recruits to engage in sabotage activities was the fact that they would be fulfilling their duty to their country. They also were promised good positions in Germany and other rewards upon their return to that country after their mission had been completed. Each saboteur signed a contract with the German Government whereby they were to receive to their credit certain sums each month.

Sabotage Training

The saboteurs were trained for this mission in a school specifically used for the training of sabotage agents by the German High Command. This training school was located on what had formerly been a private estate belonging to a Jewish family on Quentz Lake, Bradenburg, near Berlin, Germany. The buildings on this estate had been remodeled to accommodate the instructors and students and one building was equipped as a laboratory. Accommo-dations were available at this school for approxi-mately sixteen to twenty students, and it is known that this school had been used to train German sabotage agents for some time. The saboteurs received three weeks of intensive sabotage training and were instructed in the manufacture and use of explosives, incendiary material and various forms of mechanical, chemical, and electrical delayed timing devices. This training was both theoretical and practical. Considerable time was spent by the instructors with the saboteurs in developing complete background histories which they were expected to use in the United States. They were encouraged to converse together in the English language and to read American newspapers and magazines in order that no suspicion would be directed to them in the event they were interrogated while in this country. The following is an outline of the subjects in which the saboteurs received training:

general chemistry

Easily ignited incendiaries

Methods of igniting the above type of incendiary

Incendiaries difficult to ignite

Methods of igniting these incendiaries

Explosives, detonators and primers

Mechanical, chemical and electrical timing devices

Study on concealing identity in the United States,

adoption of appropriate background, personal history, etc.

Practical sabotage training

(After preparing incendiaries or explosives, the saboteurs were obliged to use them under realistic conditions)

Secret Writing

After the completion of the training school, the saboteurs were taken on a three-day tour of aluminum and magnesium plants, railroad shops, canals and river locks, and other facilities for additional instructions as to the most vital spots to be sabotaged, as well as to learn the vulnerability of these facilities to various types of sabotage.

Lt. Walter Kappe was in charge of this school. Two professors who were attached to the Technical Section of Abwehr 2, however, gave the technical training. The saboteurs were not permitted to make any permanent notes, which they could bring with them to the United States. All of their instructions had to be memorized. While at the school, maps of the United States were exhibited to them showing the important railroads and the places where sabotage would be most likely to cause a serious interruption in the transportation of raw material. They were also shown maps on which were located the principal aluminum and magnesium plants, as well as the locations of other important war industries. Similar maps outlining the important canals and waterways and the location of the important locks were also called to the attention of the saboteurs.

Sabotage Equipment

Each group of saboteurs brought with them to the United States four waterproof cases containing a large quantity of high explosives, bombs which were disguised to look like large pieces of coal, a considerable number and type of fuses, detonators and primers, as well as mechanical and chemical timing devices. One of the groups was also supplied with a considerable quantity of abrasive material for use in destroying railroad engines and other machinery. It was estimated that the explosives and other equipment furnished these men when utilized in connection with their training in preparing additional explosives and incendiary material would last the saboteurs two years. It is noted that no incendiary material of any kind was brought to the United States. It was expected that the saboteurs would be able to purchase in this country the necessary ingredients to prepare their own incendiary material.

The saboteurs were supplied with large sums of money in American currency that was to be used by them for their expenses in carrying out their work of destruction. The Technical Section of Abwehr 2 placed most of this money in secret compartments of small bags and pieces of

luggage. Smaller amounts were given to each saboteur in money belts. The leader of each group was furnished with the sum of $50,000 as a general fund. Each saboteur was given $4,000 in his money belt and in addition, approximately $400 in small bills for immediate use after his or her landing in the United States. The sum of $5,000 was also given to the group leader for each man in his group. This sum was to be turned over to the individual saboteurs as required. Practically all of this money was in $50 bills, none of which was counterfeit. At the time the saboteurs were apprehended by the FBI, $174,588.62 of their funds was seized.

Equipment buried by the German saboteurs who landed in Florida on June 17, 1942.
PHOTO

In connection with the money furnished to the saboteurs, it is interesting to note that the German High Command made two errors. They included in the sum of money furnished to the individual saboteurs American gold notes that were no longer in circulation in the United States. They also were furnished some bills on which Japanese letters had been placed or other foreign markings, which would have aroused suspicion if they had been tendered in this country.

In addition to the above equipment and money, the saboteurs wee also furnished with forged Selective Service cards and Social Security cards made out in the names of the aliases they expected to use. Those saboteurs who did not possess American made clothing were furnished clothing by the German High Command from a storehouse where the Germans had accumulated a large stock of clothing manufactured in various countries foreign to Germany.

Submarine Landings

As previously stated, the saboteurs were brought to this country on two German submarines. These submarines departed during the early evening of May 26, and May 28, 1942, from a submarine base at Lorient, France. This method of travel was selected by the German High Command, who first considered sending these saboteurs to the United States in a sailing vessel. The saboteurs themselves had no choice as to their method of entry into this country, but the places of landing were selected in areas familiar to the leaders of the two groups. The landings by the saboteurs were made at night after the submarine had approached as close to the shore as possible. In one instance, one of the submarines actually touched bottom in approaching the shore. The landings were made from the submarines in small collapsible rubber boats. Sailors from the submarines accompanied the saboteurs to the shore and after the landing, returned to the submarines with the boats.

The saboteurs who landed in Long Island were fully attired in German Marine uniforms. The uniforms were worn in order that these men would be considered prisoners of war and not as spies in the event their landing was discovered and they were prisoners. Immediately upon landing, they changed into the civilian clothes that they had brought with them and buried the uniforms on the beach with the other sabotage equipment they had brought with them. The men landing in Florida wore bathing suits and the only military equipment they wore was a German soldier's cap. The cap was worn for the same reason that the saboteurs in Long Island wore the entire uniform.

There had been no previous arrangements made by the German High Command with anyone in the United States to assist in the landing of these saboteurs, and, in view of the magnitude of the undertaking and the extensive training and preparations for this sabotage mission, it is believed that the Germans would have had someone assisting these

landings if they had any sabotage organization whatsoever in the United States at the time.

The German saboteurs had been instructed by Lt. Walter Kappe, who appears to have been in complete charge in the recruitment, training, and preparation of this sabotage mission, not to commit any acts of sabotage until they had fully reestablished themselves in this country. They were advised, however, that there would be no objection if these men committed minor acts of sabotage such as placing explosives in locker boxes in department stores and railroads stations in order to affect the morale of the American people.

In accordance with their instructions, immediately upon landing in the United States the saboteurs buried the boxes of explosives and other equipment that they brought to this country with them. Small trench-type shovels were brought with them from the submarine to assist them in burying their equipment in the sand. All of this equipment was recovered, either prior to or subsequent to their apprehension.

A Coast Guardsman who was on patrol discovered the group of saboteurs who landed on the beach at Amagansett, Long Island, immediately after their landing. The Coast Guardsman at the time was unarmed, as were the saboteurs. The leader of the group of saboteurs attempted to bribe the Coast Guardsman to forget what he had seen and pressed upon him the sum of $260. After indicating that he would accept the bribe, the Coast Guardsman returned to his station and spread the alarm, realizing that something unusual had occurred as he had heard one of the saboteurs speak in a foreign language, which he could not understand. Members of the Coast Guard station returned to the beach where the saboteurs had landed, but they had disappeared. The submarine could still be heard off shore at the time the Coast Guardsmen returned to the beach. The saboteurs in the meantime had left the beach and proceeded to the nearby railroad station where they caught the first westbound train for New York City.

One of the team members, George Dasch, telephoned the New York office of the FBI. Dasch told the FBI agent that he had important information for J. Edgar Hoover and that he, Dasch, was going to Washington to talk with Hoover. The next day Dasch took the train to Washington, spent the night at a local hotel, and the following morning walked into FBI Headquarters. Dasch provided the details of the saboteurs' training, their targets and turned over the substantial US currency provided by the German High Command to support their work in the United States. Based on Dasch's information, the FBI was able to arrest all the saboteurs in a few days.

Special Agents of the Federal Bureau of Investigation arrested two of the saboteurs, Heinrich Harm Heinck and Richard Quirin, in New York on June 20, 1942. Ernest Peter Burger was arrested on the same day, and, on June 22, George John Dasch, the leader of the group was also arrested in New York City.

The second group of saboteurs landed in Florida without anyone observing them. Shortly after landing, they changed into their civilian clothes and thereafter made their way to Jacksonville, Florida, where they remained for a short time, after which they dispersed to various parts of the United States. Two of the group, Herbert Hans Haupt and Hermann Otto Neubauer, proceeded to Cincinnati and then to Chicago. Edward John Kerling, the leader of this group together with Werner Thiel, proceeded to New York City from Jacksonville via Cincinnati. Kerling and Thiel were arrested on June 24, 1942, in New York. Haupt and Neubauer were apprehended on June 27, 1942, in Chicago.

Sabotage Objectives in the United States
The importance of the aluminum and magnesium industries, the so-called "light-metal" industry, to our war effort was emphasized to the saboteurs, and these industries were the primary objectives of the two groups of saboteurs. The saboteurs had received special training with respect to the destruction of this type of plant. The saboteurs were informed that if the production of aluminum and magnesium could be interrupted, it would have a serious effect on the number of military aircraft produced by the United States, which would have a definite effect upon the outcome of the war.

In addition to the aluminum and magnesium industries, certain other objectives were suggested to the saboteurs. A list of the objectives of the saboteurs is set forth hereinafter, but it is pointed out that this list was not expected to be all-inclusive, and the leaders of the two sabotage groups were instructed to use their discretion as to the places where their acts of sabotage should be committed, always keeping in mind, however, that they should endeavor to commit sabotage at such vital places as would seriously retard the production of transportation of war materials:

Aluminum Company of America, Alcoa, Tennessee

Aluminum Company of America, Massena, New York

Aluminum Company of America, East St. Louis, Illinois

Cryolite Plant (Philadelphia Salt Company, Philadelphia, Pennsylvania)

Chesapeake and Ohio Railroad (vulnerable spots along right-of-way such as bridges and tunnels)

Pennsylvania Railroad Depot, Newark, New Jersey

The Hell Gate Bridge, New York City

Locks on the Ohio River between Cincinnati and St. Louis

Horseshoe Curve, Pennsylvania Railroad, Altoona, Pennsylvania

Miscellaneous placing of bombs in locker rooms of railroad stations and in department stores

Prosecution
After the capture of both groups of saboteurs, the German Government made an effort via Swiss diplomatic channels to have the saboteurs treated as prisoners of war, which meant that they would be imprisoned until the end of the war, under the Hague Convention of 1907. The United States replied that the captured individuals were not soldiers but spies and could be executed without a trial. President Franklin D. Roosevelt ordered that the captured Nazis be tried by a secret military tribunal which would issue its findings without any appeal.

Pursuant to an Executive Order of the President of the United States, the eight saboteurs were tried before a Military Commission composed of seven United States Army Officers appointed by the President. Trial was held in the Department of Justice Building, Washington, D.C. from July 8, 1942, until August 4, 1942. The saboteurs were prosecuted by the Honorable Francis Biddle, the Attorney General of the United States and by Maj. Gen. Myron C. Cramer, the Judge Advocate General of the War Department. During the trial, a petition of Habeas Corpus seeking trial by jury before a civilian court was denied.

On August 8, 1942, the President as indicted hereinafter confirmed the conviction and sentences of each of the saboteurs:

Edward John Kerling	death
Heinrich Harm Heinck	death
Richard Quirin	death
Werner Thiel	death
Hermann Otto Neubauer	death
Herbert Hans Haupt	death
Ernest Peter Burger	Life Imprisonment
George John Dasch	30 years imprisonment

All the individuals sentenced to death in the electric chair were executed at noon the next day. The executed men were buried in unmarked graves on a government reservation in Washington, D.C. In 1948, President Truman commuted the prison terms of George John Dasch and Ernest Peter Burger. On April 26, 1948, George Dasch and Ernest Peter Burger were flown to the American sector of occupied Germany and turned over to American military representatives, who freed them him on parole to return to their native land.

There is attached hereto a brief biographic sketch of the German saboteurs.

Re: George John Dasch
George John Dasch was the leader of the group of German saboteurs who landed from a submarine at Amagansett, Long Island, on the morning of June 13, 1942. Dasch was subsequently apprehended by Special Agents of the Federal Bureau of Investigation, tried before a Military Commission in Washington, D.C., and upon his conviction was sentenced to thirty years' imprisonment.

Dasch is a German citizen, having been born on February 7, 1903, in Speyer-on-the-Rhine in Germany. Dasch entered a convent to study for the priesthood when thirteen years of age and in 1917, at the age of fourteen, enlisted in the German Army, serving in Northern France for eleven months. Dasch illegally entered the United States on October 4, 1922, as a stowaway on an American ship. He returned to Germany in October 1923, in order to legally enter the United States, returning to the United States on the same vessel upon which he sailed to Hamburg. Between 1923 and 1941, Dasch returned to Germany on two short visits.

Dasch enlisted as a private in the US Army and served slightly more than one year, at which time he purchased himself out of the Army and received an honorable discharge.

On September 18, 1930, Dasch married Rose Marie Guille, a native American. While Dasch was in the United States he was engaged in various occupations but for the most part he worked as a waiter in various hotels and restaurants in the New York area. Dasch filed a declaration of intention to become a citizen but never applied for his final citizenship papers.

On March 22, 1941, Dasch left New York City to return to Germany by way of Japan. The expenses of his trip were by paid by the German Consulate in New York City. He arrived in Berlin on May 13, 1941. He was eventually employed by the German Foreign Office as a monitor of foreign-language broadcasts. While serving in this capacity, Lt. Walter

Kappe of Abwehr 2 recruited him, and he returned to the United States as a member of a group of German sabotage agents.

Kappe first approached Dasch for this mission in November or December 1941. His employment with the radio listening stations was terminated on February 27, 1942. Dasch entered the sabotage school at Quentz Lake on April 10, 1942.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for George John Dasch.

Re: Ernest Peter Burger

Ernest Peter Burger was a member of the group of German saboteurs who were landed by submarine near Amagansett, Long Island, on the early morning of June 13, 1942. Burger was subsequently taken into custody by Agents of the Federal Bureau of Investigation, tried before a military commission in Washington, D.C., and sentenced to life imprisonment after his conviction.

Burger was born on September 1, 1906, at Augsburg, Bavaria, Germany. He received an elementary and technical education. Upon completing his technical training in 1926, he worked as a machinist for one year. Burger arrived in the United States on February 26, 1927, on an immigrant quota visa. While in this country Burger worked in various machine shops in Milwaukee, Wisconsin, and Detroit, Michigan, and became a naturalized citizen on February 14, 1933, at Milwaukee, Wisconsin.

Burger left the United States on a visit to Germany on July 27, 1929, and returned to this country on October 27, 1929. Burger returned to Germany in the summer of 1933 where he remained until 1942, when he came to this country aboard a German submarine on a sabotage mission.

Burger became a member of the National Socialist Party in Germany in 1923 at Augsburg. There was some indication that his first trip to the United States was as a result of his activities with this political party, which was not then in power in Germany. Upon returning to Germany in 1933, Burger was readmitted to the Party and because of his previous membership, obtained employment with the Party in the political division of the Reichsleitungen, in which position he engaged in propaganda and journalism for internal consumption.

At the time of Hitler's blood purge within the Nazi Party, including the execution of Ernest Roehm, Burger was attached to Roehm's staff. Although Burger escaped the purge, the Gestapo arrested him in March 1940 for his criticism of certain Party politics and activities. He then spent seventeen months in a concentration camp. After Burger's release from the concentration camp, he was drafted into the German Army as a private. He then sought a different assignment and by reason of his friendship with certain old Nazi Party members, became acquainted with Lt. Walter Kappe of Abwehr 2 who subsequently recruited him for service as a saboteur in the United States.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Ernest Peter Burger.

Re: Heinrich Harm Heinck

Heinrich Harm Heinck was a member of the group of German saboteurs who were landed by submarine near Amagansett, Long Island, on the morning of June 13, 1942. Heinck was subsequently taken into custody by Agents of the Federal Bureau of Investigation, tried before a military

commission in Washington, D.C., and upon his conviction was executed.

Heinck was born on June 27, 1907, at Hamburg, Germany. Heinck was educated in the public schools in that city and served as machinist's apprentice in the machine shop of the Hamburg-American Lines. He then became employed as machinist's help and oiler on vessels of his employer and after making several trips to the United States, jumped ship at the Port of New York during the summer of 1926. Heinck resided in New York City from 1926 until March 1939, during which time he married his German-born wife.

Heinck obtained employment in various machine shops in the New York area. During 1934 and 1935, he was a member of the German-American Bund and the O.D. (Ordungs Dienst). While a member of the Bund in New York, Heinck became acquainted with Walter Kappe, who at that time was editor of the German-American Bund news publication "*Weckruf" and* "*Beobachter*." Heinck eventually left the Bund when it was ordered that only American citizens could be members of the Bund. At that time, he joined the DAB (German-American Vocational League).

Heinck returned to Germany in March 1939, after an official of the German Labor Front in New York had urged his return. Through this official, the German Consulate in New York arranged for Heinck's return to Germany at a reduced fare.

Upon his arrival in Germany, Heinck obtained a position through the German Labor Front in a branch of the Volkswagenwerk plant in Braunschweig, which is owned by the German Labor Front. During this employment, Heinck met Richard Quirin, who was employed at this plant and who later returned to the United States with Heinck as a saboteur. During Heinck's employment at this plant, he attempted to join the German Army but was rejected due to his employment as an expert tool and die maker in an essential war industry.

In January 1942, at a meeting of persons in Braunschweig who had formally lived in the United States, Heinck again met Walter Kappe, who was a speaker representing the Ausland Institute. At this meeting, Heinck and Kappe renewed their New York acquaintanceship. A short time thereafter, Heinck and Quirin were recruited by Kappe to return to the United States on a secret mission and after which, they received training at the sabotage school at Brandenberg.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Heinrich Harm Heinck.

Re: Richard Quirin

Richard Quirin was a member of the group of German saboteurs who were landed by submarine on the morning of June 13, 1942, near Amagansett, Long Island. Quirin was subsequently taken into custody by Agents of the Federal Bureau of Investigation, tried before a military commission in Washington, D.C., and upon his conviction was executed.

Quirin was born in Berlin, Germany, on April 26, 1908. He attended public schools in Germany and was thereafter employed as a machinist's help at Hanover, Germany, until 1927, when he immigrated to the United States arriving at the Port of New York on October 17, 1927.

Quirin remained in the United States until 1939, during which time he married a German-born girl and obtained employment at various places

as a machinist and during the depression worked at odd jobs. He joined the Friends of New Germany about 1933 and was a member of the O.D. (Ordungs Dienst) group. He resigned from this organization sometime in 1934 at the direction of the German Consulate. The German Consulate enrolled him at that time as a member of the NSDAP.

In 1939, after learning that the German Government was paying the passage of any mechanics desiring to return to Germany, he contacted the German Consulate in New York City. The German Consulate paid his passage back to Germany, and Quirin departed from the United States in July 1939. Prior to leaving the United States, Quirin purchased Rueckwanderer marks with the money he had saved while he was in the United States.

Upon his arrival in Germany, he was met by a representative of the German Labor Front who questioned him concerning his trade and where he desired to work. He was thereafter assigned to work at the Volkswagenwerk at Braunschweig, Germany. While employed at this plant, Quirin became acquainted with Heinrich Harm Heinck.

In February 1942, Walter Kappe spoke to a meeting of persons living in Braunschweig who had previously resided in the United States. Heinck, thereafter, received a letter asking both him and Quirin to go on a trip to America to engage in some work for the German Government. This they agreed to and so advised Kappe. A short time later, they were instructed to proceed directly to Quentz Lake, Brandenberg, where they met Walter Kappe and other members of the group who went through the sabotage school with them.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Richard Quirin.

Re: Werner Thiel
Werner Thiel was a member of the group of German saboteurs who were landed by submarine near Ponte Vedra Beach, Florida on the early morning of June 17, 1942. Thiel was subsequently taken into custody by Agents of the Federal Bureau of Investigation, tried before a military commission in Washington, D.C., and executed upon his conviction.

Thiel was born on March 29, 1907, at Dortmund, Germany, where he was educated, receiving the equivalent of a high school education. Thiel was employed by German railroads as an apprentice machinist and as a machinist in a bicycle factory.

Thiel arrived in the United States from Germany on April 26, 1927, on a German immigrant quota visa. On April 30, 1927, Thiel filed a declaration of intention to become a citizen but made no further effort in this regard. Thiel remained in the United States until 1941, being employed at various occupations, principally at his trade as a machinist in the state of New York and the Middle West.

Thiel joined the Friends of New Germany in 1933 and continued as a member of this organization and the German-American Bund until 1936. He joined the NSDAP in 1939. Thiel returned to Germany on March 27, 1941, on a German passport, departing from San Francisco, California, on a Japanese liner proceeding to Germany via Japan, Manchuria, and Russia. The German Consulate in New York City financed Thiel's transportation to Germany on this trip.

Upon arrival in Germany, Thiel first visited his home and then sought employment in Berlin where he obtained a position at the Feilers Feinmechanic. In March, 1942, Thiel attended a social gathering of the Ausland group at which time he met Walter Kappe whom he had known

in Chicago, Illinois, and also George John Dasch who had returned to Germany in the same group as Thiel. Shortly thereafter, Thiel was recruited by both Kappe and Dasch to return to the United States on a mission for the German Government. The nature of the mission was not explained to Thiel until after he had arrived at the sabotage school at Brandenberg.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Werner Thiel.

Re: Hermann Otto Neubauer
Hermann Otto Neubauer was a member of the group of German saboteurs who were landed by a German submarine on the morning of June 17, 1942 near Ponte Vedra Beach, Florida. Neubauer was subsequently taken into custody by agents of the Federal Bureau of Investigation, tried before a military commission in Washington, D.C., and upon his conviction was executed.

Neubauer was born in Fuhlsbuttl, Hamburg, Germany, on February 6, 1910. He attended public school in Germany and became an apprentice cook. Thereafter, while serving as a cook on the SS *Hamburg* of the Hamburg-American Lines, he jumped his ship in New York City in July 1931, at which time he obtained employment as a cook on the SS *Leviathan* of the United States Lines. Neubauer, thereafter, entered the United States for permanent residence under an immigrant quota visa on November 23, 1931. Neubauer then remained in the United States working at his occupation as a cook in various hotels and restaurants and occasionally obtaining employment on an oceangoing vessel. Neubauer made a short visit to Germany in 1936. He married a native American on June 10, 1940.

Neubauer was a member of the German-American Bund in Chicago in 1935, but resigned because he was not a citizen of the United States. He thereafter became a member of the NSDAP in Chicago and remained a member of that organization until his return to Germany. In July 1938, Neubauer applied for and purchased one thousand dollars worth of Rueckwanderer marks.

Neubauer was a friend of Edward Kerling and joined with him and several others in purchasing the yacht *Lekala* in September 1939 in order to return to Germany and assist country in its war effort. The US Coast Guard did not permit the departure of this vessel, and the vessel was subsequently sold in the spring of 1940 at Miami, Florida. While Neubauer was in the United States, he applied for his first citizenship papers but thereafter did not make further effort to obtain his final naturalization papers.

Neubauer left New York on July 11, 1940 and returned to Germany via Lisbon, $50.00 of his passage having been paid by the German Consulate in New York City. The Germany Consulates in Lisbon and Rome paid his passage from Lisbon to Germany. Upon his return to Germany, Neubauer was drafted in the Germany Army in November 1940 and received military training at Magdburg, Germany, until May 1941, when his outfit was sent to Poland. Neubauer was seriously wounded by shrapnel three days after the declaration of war between Germany and Russia. He was hospitalized at Stuttgart, Germany, for six months.

While convalescing at an Army Medical Center near Vienna, Austria, he received a letter from Lt. Walter Kappe of the German Army inquiring if he would be willing to go on a secret assignment to a foreign country where he had once lived. He agreed to accept such an assignment and during the latter part of March, 1942, he was called to his company

office and furnished a railroad ticket to Berlin and an address, No. 6 Rankestrasse, where he was to report in civilian clothes. It was not until after he had proceeded to Lt. Kappe's office that he learned the nature of his mission to the United States and learned that his friend, Edward Kerling, was also to go on this mission.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Hermann Otto Neubauer.

Re: Herbert Hans Haupt
Herbert Hans Haupt was a member of the group of German saboteurs who were landed by a German submarine on the morning of June 17, 1942, near Ponte Vedra Beach, Florida.

Haupt was subsequently taken into custody by Agents of the Federal Bureau of Investigation, tried before a military commission in Washington, D.C., and upon his conviction was executed.

Haupt was born on December 21, 1919, at Stettin, Germany. His father, Hans Max Haupt, was a soldier in the German Army during the First World War and came to the United States in 1923. Haupt entered the United States with his mother in March 1925. Herbert Haupt derived American citizenship during the naturalization of his father who became a citizen on January 7, 1930.

Haupt was educated in the public schools of Chicago, Illinois, where his family had settled. He left high school during his third year in 1936 and obtained employment as an apprentice optician. Haupt was a member of the German-American Bund in Chicago.

On June 16, 1941, Haupt, accompanied by two friends, left Chicago for Mexico City. One of his friends was not allowed to enter Mexico, as he was

an alien. Haupt and his second friend, Wolfgang Wergin, after their arrival at Mexico City, went to the German Consulate where arrangements were made for Haupt and Wergin to return to Germany via Japan. The German Consulate furnished the expenses of this transportation and a German passport. The voyage to Japan was made in company with other Germans leaving Mexico. A short time after their arrival in Japan they went aboard a freighter, which, after evading the British blockade, arrived at Bordeaux, France.

Haupt thereafter visited relatives in Germany. He was unable to obtain employment and was eventually recruited by Lt. Walter Kappe to return to the United States on a secret mission on behalf of the German Government. He was then sent to the sabotage school at Quentz Lake where he first learned the nature of the mission he was to engage in. Wolfgang Wergin also arrived in Germany with Haupt. He obtained employment in Germany and is believed to be in that country at the present time.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Herbert Hans Haupt.

Re: Edward John Kerling
Edward John Kerling was the leader of a group of German saboteurs who landed on the coast of Florida near Jacksonville from a German submarine on June 17, 1942. Kerling was born in Wiesbaden, Germany, on June 12, 1909. He entered the United States on March 5, 1929, under an immigrant quota visa and remained in the United States until 1940. He returned to Germany on two short visits in 1933 and 1936. He returned to Germany on two short visits in 1933 and 1936. During this period Kerling married his German- born wife and worked at various

fields of employment, most of the time being spent working as a chauffeur and a domestic. Kerling was an active member of the German-American Bund and was also a member of the National Socialist Party, and he made no effort to become an American citizen.

In September, 1939, after the outbreak of the war, Kerling, with a number of his friends who were active in the Bund, purchased the yacht *Lekala* aboard which they intended to return to Germany to assist Germany in the war. This yacht excited the suspicion of the US Coast Guard, and it was stopped on two occasions. The yacht was finally sailed to Miami, Florida, where it was disposed of in the spring of 1940.

Kerling returned to Germany in June 1940, by way of Lisbon, Portugal. The German Government paid a portion of his fare to Germany. In August 1940, he obtained a position as a civilian employee of the German Army to monitor English radio broadcasts and translate the programs into German. After three months at this work, he obtained a position with the Propaganda Ministry in Berlin. In April 1942, Kerling was interviewed by Lt. Walter Kappe who inquired as to his experiences in the United States and whether he would be willing to return to the United States on a secret mission. Kerling agreed to return to the United States, although he was not informed of the nature of this mission until just before he entered sabotage school at Quentz Lake.

The files of the Federal Bureau of Investigation fail to indicate any prior criminal record for Edward John Kerling.

Plan Bodyguard

Overall Deception Policy for the War Against Germany__Intentions of This Paper
1. The intention of this paper is to formulate an overall deception policy for the war against Germany in accordance with CCS 426/1 of 6 December 1943, paragraph 9(e).

Object
2. To induce the enemy to make faulty strategic dispositions in relation to operations by the United Nations against Germany agreed upon at EUREKA.

Present Situation
3. The German General Staff will this winter be considering the strategic disposition of their forces to meet offensive operations by the United Nations in 1944. Though they will be forced to maintain the bulk of their forces on the Russian front, they already suspect that large-scale Anglo-American operations will be undertaken in Western Europe sometime in 1944. It is, however, doubtful whether they have at present sufficient information regarding the timing and scope of this threat to justify any immediate changes in their strategic dispositions.

4. At a later stage, however, preparations for "OVERLORD" and to a lesser degree for "ANVIL" will be on such a scale and of such a type that the enemy cannot fail to appreciate our intention to carry out a cross-channel operation and an amphibious operation in the Western Mediterranean.

Deception Problem
5. The problem to be solved is twofold-

a. Overall Problem

We must persuade the enemy to dispose his forces in areas where they can cause the least interference with operations "OVERLORD" and "ANVIL" and with operations on the Russian Front.

b. Tactical Problem

As soon as our preparations for "OVERLORD" and "ANVIL" clearly indicate to the enemy our intention to undertake a cross-channel operation and an amphibious operation in the Western Mediterranean, Theatre Commanders concerned must implement their tactical cover plans to deceive the enemy as to the strength, objective and timing of "OVERLORD" and "AVIL."

Choice of Areas in Which to Contain Enemy Forces

6. In View of SEXTENT decisions our overall deception policy should be to contain enemy forces in areas where they will interfere as little as possible with operations on the Russian Front and with "OVERLORD" and "ANVIL." Such areas are-

a. Northern Italy and Southern Germany

It should be possible by means of real operations and feints to contain a number of first quality divisions in this area.

"POINTBLANK" operations from Italy should also help to contain enemy fighter forces.

b. South East Europe

The JIC appreciate that the enemy will do his utmost to hold South East Europe, though limited withdrawals from the islands and Southern Greece might be undertaken. Provided that we can persuade the enemy to believe that considerable forces and landing craft are being concentrated in the Eastern Mediterranean it should be possible to contain enemy forces in the Balkans. Our chances of success would be increased if Turkey joined the Allies, but even if she refused we might still induce the enemy to fear the results of our continued infiltration. The deception plan would be assisted to a marked degree if the Russian General Staff staged an amphibious threat to the Bulgarian-Roumanian coasts across the Black Sea.

c. Scandinavia

A threatened attack against Scandinavia should also help to contain some first-quality divisions and limited naval air forces. Such a deception plan would be assisted if the Germans were induced to believe that Sweden was prepared to co-operate with the Allies and if the Russians mounted a threat against enemy occupied territory in the Arctic.

Allied Preparation for "OVERLORD" and "ANVIL"

7. a. "OVERLORD"

It will be impossible wholly to conceal the gradual build up of Allied forces and other preparations in the United Kingdom during the next few months. In addition the enemy will appreciate that considerable American forces in the USA are available for transfer to Europe.

In these circumstances our best chance of deceiving the enemy would be to indicate that Anglo-American strategy is dictated by caution and that we have no intention of undertaking the invasion of the Continent until we had assembled an overwhelming force and the necessary landing craft; these would not be available until the late Summer. To support this story we must try to indicate that the assault and follow-up forces at present available in the United Kingdom are less than they in fact are, and that during the next few months we could only re-enter the Continent against little or no opposition.

b. "ANVIL"
Preparations and the build up for "ANVIL" should no be so apparent in the early stages, therefore the tactical cover plan eventually put into operation by Allied Commander-in-Chief, Mediterranean Theatre, should suffice to cover this assault.

In the Mediterranean theatre the enemy has in the past been induced to overestimate Allied forces by 20 to 30 per cent. It would be an advantage if such exaggeration could be maintained especially in the Eastern Mediterranean.

Russian Front
8. The Russian offensive will presumably be continued during the next few months but it would be of assistance to our plans if we could lead the enemy to believe that the Russian main Summer offensive would not start before the end of June.

It would be plausible that this operations should thus precede "OVERLORD" and "ANVIL" thereby rendering the maximum assistance to these far more hazardous seaborne assaults.

Factors Against the Achievement of the Object
9. a. Preparations for "OVERLORD" during the next few months and any announcements of the appointment of prominent commanders in the United Kingdom will indicate to the enemy that our main strategy is switching from the Mediterranean to North Western Europe.

b. Statements both in the press and on the radio and the platform may continue to emphasize the likelihood of operations in 1944 from the United Kingdom against North Western Europe.

c. "POINTBLANK" operations from the United Kingdom will compel the enemy to keep strong GAF fighter forces in North Western Europe.

Factors for the Achievement of the Object
10. a. Germany's armed forces are dangerously stretched by current operations and provided we can induce her to retain surplus forces in Scandinavia, Italy and the Balkans, she will find it difficult simultaneously to provide adequate forces for Russia, France and the Low Countries.

b. Germany's defensive commitments are likely to be increased since-

i. The political and economic situation in Germany and occupied countries is deteriorating and may necessitate the maintenance of strong garrison forces in these areas.

ii. The attitude of neutrals and satellites may move further in favour of the Allies and compel Germany to dispose reserves to meet unfavourable developments.

c. The assembly of the Rosyth force in NE Scotland will reinforce the threat to Scandinavia.

Overall Deception Policy
11. The following Overall Deception Policy is based upon the considerations outlined above.

12. Allied Intentions

We should induce the enemy to believe that the following is the Allied plan for 1944.

a. "POINTBLANK" operations were seriously affecting the enemy's war potential and, if continued and increased, might well bring about his total collapse. Consequently, reinforcement of the United Kingdom and the Mediterranean by long-range American bombers has been given such a high priority that the ground forces build-up in the United Kingdom has been delayed.

b. The Allies must be prepared to take advantage of any serious German weakening or withdrawal in Western Europe and preparations to this end must be put in hand forthwith.

c. To concert in Spring an attack on Northern Norway with Russia with the immediate object of opening up a supply route to Sweden. Thereafter to enlist the active co-operation of Sweden for the establishment of air bases in Southern Sweden to supplement "POINTBLANK" with fighter bomber operations and to cover an amphibious assault on Denmark from the United Kingdom in the summer.

d. Since no large-scale cross-channel operation would be possible till late summer, the main Allied effort in the Spring of 1944 should be against the Balkans, by means of-

i. An Anglo-American assault against the Dalmatian coast.

ii. A British assault against Greece.

iii. A Russian amphibious operations against the Bulgarian-Roumanian coast.

iv. In addition Turkey will be invited to join the Allies to provide operation facilities including aerodromes to cover operations against the Aegean Islands as a prerequisite to the invasion of Greece. Her refusal would not materially modify the Allied intentions.

v. Pressure against the satellites to induce them to abandon Germany.

e. Anglo-American operations in Italy would be continued, and in order to hasten their progress, amphibious operations against the north-west and north-east coast of Italy would be carried out. Provided these were successful, 15 Army Group would later advance eastward through Istria in support of the operations mentioned in d. above.

Note: The operations in c. d. and e. above would enable us to employ our amphibious forces and retain the initiative until preparations for the final assault in the late summer were completed.

f. Though Russian operations would presumably be continued this winter it would not be possible for them to launch their summer offensive before the end of June.

g. In view of the formidable character of German coastal defenses and the present enemy strength in France and the Low Countries, possibly as many as twelve Anglo-American Divisions afloat in the initial assault and a total force of about fifty divisions would be required for a cross-channel assault. This operation would not be launched until the late summer (i.e. after the opening of the Russian summer offensive).

13. Allied strength and dispositions

We should induce the enemy to believe the following information regarding Allied strength and dispositions-

a. United Kingdom

i. Shortage of manpower has obliged the British Army in the United Kingdom to resort to cannibalization, while several of their formations are on a lower establishment, or still lack their administrative and supply units. The number of Anglo-American Divisions in the United Kingdom available for offensive operations is less that is, in fact, the case. Some United States Divisions arriving in the United Kingdom have not yet completed their training.

ii. Personnel of certain Anglo-American Divisions in the Mediterranean with long service overseas are being relieved by fresh divisions from the USA. British troops will, on relief, return to the United Kingdom where they will re-form and be utilized for training inexperienced formations.

iii. Invasion craft remains the principal bottleneck due to operations in the Pacific and the full number required for the initial assault cannot be made available from home production and the USA before summer.

b. Mediterranean

i. Anglo-American forces in the Mediterranean, especially in the Eastern Mediterranean, are greater than is, in fact, the case.

ii. French forces are taking over responsibility for the defense of North Africa, thus leaving Anglo-American forces free for offensive operations elsewhere in the Spring of 1944.

iii. Certain British Divisions and landing craft are being transferred from India to the Middle East.

iv. Fresh Divisions from the United States of America are expected to arrive in the Mediterranean.

Tactical Cover Plans

14. a. The United Kingdom

When the enemy realizes that cross-channel operations are imminent, the story indicating that no cross-channel attack will occur until late summer, will tend to lose plausibility. At this juncture the tactical cover plan prepared by Supreme Commander, Allied Expeditionary Force will come into force with a view to deceiving the enemy as to the timing, direction and weight of "OVERLORD."

b. Mediterranean

In due course the enemy will probably appreciate, especially from air reconnaissance, that an amphibious operation is being mounted in North African ports and Western Mediterranean Islands. At this stage, a tactical cover plan prepared by Allied Commander-in-Chief, Mediterranean Theatre will come into force with a view to deceiving the enemy as regards the timing, direction and weight of "Anvil."

Timing

15. The selection of a D day of all cover and deception plans mentioned above is a question to be decided by Supreme Commander, Allied Expeditionary Force. In this connection, it is recommended that the dates chosen should, in each case, be later than "OVERLORD" or "ANVIL D days, with a view to delaying the dispatch of enemy reinforcements for as long as possible.

The Supreme Commander, Allied Expeditionary Force after consultations with Commander-in-Chief, Mediterranean Theatre and the

Controlling Officer will decide the tempo of the "OVERLORD" and "ANVIL" tactical cover plans.

Means of Implementation
16. a. Physical Means

Implementation by means of movements of forces, camouflage devices, W/T deception and other activities will be carried out in accordance with detailed plans prepared by Supreme Commander, Allied Expeditionary Force and Allied Commander-in-Chief, Mediterranean Threatre.

b. Diplomatic Means

Genuine diplomatic approaches will be required to lead the enemy to believe that we intend persuading Sweden to join the Allies and assist us in operations in Scandinavia.

Even if Turkey refuses to join the Allies in the near future, the enemy should be led to believe that our continued infiltration may give the Allies important opportunities in connection with a Balkan campaign.

c. Special Means

Implementation by means of leakage and rumors in support of plans prepared by Theatre Commanders will be co-ordinated by the London Controlling Section.

d. Political Warfare

The Political Warfare plan while not departing from its main purpose, should conform to the above general policy.

e. Security

Plan "BODYGUARD" cannot succeed unless the strictest security precautions are taken to conceal the true name of "OVERLORD" and "ANVIL" preparations.

The GARBO Operation

To support "Plan Bodyguard" the British used a double-agent operation, codenamed GARBO. GARBO was Juan Pujol Garcia who convinced German intelligence that he could provide them with information on the United Kingdom. He told the Abwehr that he was on his way to London to check on a currency racket there for the Spanish security services. German intelligence bought his story and recruited him. They gave Pujol secret ink to communicate with them via an accommodation address in Madrid. In reality, Pujol did not go to London but traveled as far as Lisbon where he began to send his reports to the Germans. He had no access to any information but created much of his information from his incredible imagination and old maps and timetables from England. For ten months, between July 1941 and April 1942, he authored 40 long reports for German intelligence.

Pujol had offered his services to British intelligence in Madrid in January 1941 but was turned aside. It was not until Bletchley Park began deciphering the Enigma messages between Abwehr Headquarters in Berlin and its station in Madrid in 1942 that British intelligence decided to locate a "new German spy" in the United Kingdom that was providing outlandish British military information to the Germans. An investigation determined that this German agent was not operating in

Great Britain but British intelligence could not provide any additional information as to his identity or location.

Through a fortunate set of circumstances, the British were able to learned of Pujol's existence. MI5 learned about Pujol from its Lisbon representative who was visiting London at the time. MI5 informed MI6 about Pujol. MI6 was able to arrange contact with Pujol through the US Naval Attaché in Lisbon. After contact was made, MI6 recruited Pujol and brought him to London in April 1942. He was given the codename GARBO.

This is the story of GARBO and his network of agents, which helped set the stage for the success of the Normandy Invasion on D-day.

On 24 April 1942, GARBO reached England from Spain and began work for British intelligence under the guidance of his case officer, who was bilingual in Spanish and English, and in peacetime specialized in the collection and sale of works of art. It was to prove one of those rare partnerships between two exceptional gifted men whose inventive genius inspired and complemented one another.

GARBO was a man of phenomenal industry. For the first year of his stay in England he communicated with his control in Madrid entirely by letter; messages in secret ink with covering letters written over them, notionally carried to Portugal by the employee of an airline running a regular service between London and Lisbon (the COURIER), who posted them to Abwehr accommodation addresses in Lisbon and collected the replies from a safe deposit box in a Lisbon bank. In fact, delivery and collection was arranged by MI6. GARBO wrote altogether 315 such letters, their length averaging 2,000 words, as well as the equally garrulous covering letters that concealed them. After March 1943 he was able to supplement these by radio messages, notionally transmitted by a radio "ham" of leftwing sympathies who had built his own set and who believed that the ciphered messages he transmitted were the communications of a group of leftwing Spanish exiles with their comrades at home. A total of 1,200 messages were passed over this channel before the end of the war.

GARBO began to operate before there was a coherent deception policy for him to implement; so, for lack of anything better to do, as his case officer put it, "we tried to report in as much confusing bulk as possible and, in the absence of another objective, to increase our network of notional agents." The "confusing bulk" was highly effective in that the Madrid Stelle of the Abwehr became so glutted with information that it made no further attempt to infiltrate agents into the United Kingdom. It became entirely dependent on GARBO, regarding him as a sensitive quarrelsome genius of priceless value who had at all cost to be humored and satisfied. By the end, GARBO and his British case officer were able to treat his German case officer as a temperamental mistress might treat an elderly and besotted lover, no assertion that GARBO made would be questioned, no demand went unmet.

By 1944, GARBO and his British case officer had between them built up a notional network of some 27 agents. In the first place there were five immediate contacts, labeled J1 to J5. J1 was the courier who carried the letters to Lisbon. He was himself involved in a smuggling racket and believed that GARBO was also. J2 was a Royal Air Force (RAF) officer employed at Fighter Command Headquarters, a casual acquaintance who unwittingly occasionally let slip important information. J3 was a most useful friend, an official in the Spanish section of the Ministry of Information, where he occasionally saw interesting policy documents. J4 was another official he met at the Ministry, a man of extreme leftwing views who worked in the

censorship department. J5 was a girl secretary in the "Ministry of War" (sic) who was a little in love with GARBO and who could be relied upon for the occasional silly indiscretion.

Then there were the agents themselves. The first two had been notionally recruited even before GARBO actually arrived in England, while he was writing his hilariously inaccurate letters from Lisbon. Agent 1 was a Portuguese commercial traveler named Carvalho, based at Newport, Monmouthshire; well placed to observe traffic in the Bristol Channel and, as it turned out, to make contact with dissident Nationalist elements in south Wales. Agent 2 was a German-Swiss businessman named Gerbers, domiciled in Bootle, who reported on traffic in the Mersey. Tragically, it became necessary for Gerbers to die of cancer during the autumn of 1942 before he could observe the assembly, in the Mersey estuary, of the convoys for TORCH (the invasion of North Africa by the allied forces). But, his unfortunate widow proved willing to carry on the activities of her deceased husband. She was recruited as Agent 2(1) (though usually referred to simply as "the Widow") and became virtually GARBO's personal assistant.

Agent 3 was a Venezuelan based in Glasgow, who observed traffic on the Clyde. A man of enthusiasm and efficiency, he became second in command of the network and took it over after GARBO had been notionally "blown" in 1944. He had three subagents of his own; an NCO in the RAF (3(1)); a talkative lieutenant in the notional 49th Infantry Division (3(2)); and a useful Greek sailor who operated on the east coast of Scotland (3(3)). The first two were unconscious agents, the last a Communist who believed that he was working for the Soviet Union. This network received from the Germans the codename BENEDICT.

Agent 4 was a Gibraltese, "Fred," who originally worked as a waiter in Soho, where he put GARBO in touch with the radio operator already referred to. He was then directed by the Ministry of Labour, first to employment in a subterranean munitions deport in the Chislehurst caves, about which GARBO and his British case officer wove a rich fantasy for the benefit of the Abwehr; then to work in military canteens, where he picked up much useful information; and finally to one of the sealed military camps in the region of Southampton where he was able to observe the final concentrations for OVERLORD. Strict security precautions prevented him from leaving his camp to report on these in detail until he broke out, as will be recalled, on the very eve of the operation with the news which GARBO transmitted to his control in Madrid; just too late to be of any value.

In addition to the Radio Operator (Agent 4(1)), "Fred" recruited a guard in the Chislehurst caves (4(2)) and, much more usefully, an American sergeant who worked in London for the US Service of Supply (4(3)). This man was a particularly valuable source. Not only was he well informed about the movements and constitution of the 1st US Army Group, but he was the son of a senior American officer on Eisenhower's staff who was ferociously anti-British and passed on to his son all the gossip about high-level disagreements that came his way. The Patton deception owed much to the information he so indiscreetly communicated.

Agent 5 was the brother of the Venezuelan, Agent 3, and was eventually dispatched to Canada to observe matters there. He had a colleague, an American commercial traveler (5(1)) who filled in with information about the United States. Agent 6 was an anti-British South African whose linguistic skills gained him employment with the War Office. He

was posted to North Africa, where he collected much high-level and accurate information but since he could transmit it only by letter to GARBO, who then had to forward it to Lisbon, by the time it reached the Germans it was very out of date. He died, unfortunately, in an air crash in July 1943.

Finally there was a group of eight agents of whom the leader "Stanley" (7), was an anti-British Welsh nationalist, a seaman operating in Swansea. His network, known to the Germans as DAGOBERT, was recruited largely from Welsh dissidents like himself. It contained two rather curious characters: an Indian poet known as "Rags," who although he was recruited in Swansea lived in Brighton, where he was well placed to observe troop movements, and his mistress, Theresa Jardine, in the Women's Royal Naval Service. A little later this lady was posted to Ceylon and passed under the control of "D" Division in the Far East. (*Comment: The reader should bear in mind that none of these people actually existed*.)

By the summer of 1943, the existence of these networks was well established, and COCKADE (Diversionary operations in 1943 to pin down German Forces in the West) gave GARBO and his British case officer valuable practice in using them. A procedure was established by the London Controlling Section, which was to become the regular pattern by the time of OVERLORD. The cover story was broken down into a number of serials. Each serial contained a story to be passed to the enemy, the date by which it had to be in his possession, and the factual evidence for it. The evidence was then compared and collated with the observing capacity of the GARBO network, and appropriate messages were devised for the agents which, after clearance with the Service authorities (at first through the Twenty Committee but increasingly direct) were then passed on to Madrid in GARBO's inimitably florid style. From Madrid, as SIGINT revealed, these were sent directly to Berlin, where they made an excellent impression. After STARKEY (a notional attack by 14 British and Canadian divisions to establish a bridgehead on either side of Boulogne between 8 and 14 September) had passed its climax on 8 September 1943, his Abwehr case officer wrote enthusiastically to GARBO on 18 September: "Your activity and that of your informants gave us a perfect idea of what is taking place over there; these reports, as you can imagine, have an incalculable value and for this reason I beg of you to proceed with the greatest care so as not to endanger in these momentous times either yourself or your organization."

Four months later, in early January, his Abwehr case officer warned GARBO once more to prepare for action. German intelligence, he informed him on 5 January 1944, had learned that preparations were far advanced for a major operation based on the United States, which might materialize at a very early date. GARBO was therefore to find out everything he could about Allied military intentions, the dates of forthcoming operations, and the locations and strength of all land, sea, air, and amphibious forces that might be employed. This, he was told, included possible operations against Norway and Denmark, as well as those against the Channel coast.

To tackle this new assignment, GARBO redeployed his agents. Fortitude North was covered basically by the Venezuelan (3) in Glasgow and by the Greek sailor (3(3)) on the Scottish east coast. "Fred" from Gibraltar had, as we have seen, insulated himself into the heart of the Allied concentration around Southampton, while the DAGOBERT network covered the rest of the south coast, with agents in Harwich, Dover, Brighton, and the west country and south Wales. GARBO's informants in Whitehall had only to keep their eyes and ears open, and he himself picked up a lot of useful news and one or two

documents in his capacity as part-time employee in the Ministry of Information. The agents sent their messages to him in secret ink, but GARBO now communicated with Madrid very largely by radio, sending an average of five or six messages a day. The information in GARBO's reports now found its way into the daily situation reports of Fremde Heere West (Army High Command Foreign Armies West); in particular, the Order of Battle projected by him and by BRUTUS (a Polish Air Force officer recruited by the Germans and sent to England via the French resistance in 1942, but who turned himself over to the British and was doubled back at the Germans-now established at First United States Army Croup (FUSAG) HQS was accepted without question. All was carefully coordinated directly with Ops B at Supreme Headquarters Allied Expeditionary Force (SHAEF), and a great deal of accurate information was included about the 21st Army Group. When the formations specified by GARBO as belonging to this Army Group were identified in Normandy, it made his further information about FUSAG all the more credible.

As part of the deception plan, GARBO was given permission to warn the Germans of the attack at Normandy. He did so at 3:00 A.M. on 6 June. The message to his controller in Madrid was timed to arrive too late to be of any value to the Germans. GARBO waited for a response, which never came. He again sent a second message at 6:08 A.M. Again in the evening he sent a third message, this time bitterly complaining of the German failure to respond to him. After his fourth message the next day, his controller finally responded, adding that the work GARBO did over the "past few weeks has made it possible for our command to be completely forewarned and prepared, and the message of Four would have influenced but little had it arrived three or four hours earlier." Undeterred by this setback, GARBO summoned a meeting of all available agents, as a result of which he transmitted a long report, on the night of 8 June about the existing Allied dispositions.

"From the reports mentioned it is perfectly clear that the present attack is a large-scale operation but diversionary in character for the purpose of establishing a strong bridgehead in order to draw the maximum of our reserves to the area of operations to retain them there so as to be able to strike a blow somewhere else with ensured success…the fact that these concentrations which are in the east and southeast of the island are now inactive means that they must be held in reserve to be employed in the other large-scale operations. The constant aerial bombardment which the area of the Pas de Calais has suffered and the strategic disposition of these forces give reason to suspect an attack in that region of France which at the same time offers the shortest route for the final objective of their illusions, which is to say, Berlin…I learned yesterday that here were 75 divisions in this country before the present assault commenced. Suppose they would use a maximum of 20-25 divisions they would be left with some 50 divisions with which to attempt a second blow."

All this his Abwehr case officer acknowledged gratefully on 10 June. "With reference to your extensive information of the 8th on the concentrations still existing in the southeast of the Island, I am interested in the transmission with the maximum urgency of as much news as you can obtain of the embarkation and destination of these forces." At the same time Bletchley Park decrypted the congratulatory messages to GARBO's German case officer from Berlin. "In the name of Fremde Heere West, stated one on 9 June, "I express appreciation of previous work in the last week from CATO (GARBO's German codename) have been confirmed almost without exception and are to be described as especially valuable."

The Germans now began to press GARBO embarrassingly closely for information about the fall of V rockets on London. To deter them from this undesirable practice, British intelligence arranged to have GARBO notionally arrested on 3 July while he was making indiscreet inquiries about V-bomb damage in Bethnal Green. Nothing could be proved against him, and he was eventually released with an official apology, which was duly transmitted to Madrid. When his Abwehr case officer congratulated GARBO on his release, he informed him also that the Fuhrer had been graciously pleased to bestow on him the order of the Iron Cross Class II. But the lesson had been learned. GARBO was asked no further questions about V-weapons, and he continued to put across prolific information about the reconstruction of FUSAG. This elicited from his Abwehr case officer the further message on 21 August: "Headquarters entrust me with the mission which I fulfill with the greatest satisfaction of again expressing to you our special recognition for the results achieved by you and your organization. They also made reference in this connection to the information which you have supplied to us since the invasion of France__news which has been of the greatest value to them…."

By the end of August, MI5 had begun to fear that GARBO's cover could not be preserved for very much longer. The growing number of Abwehr defectors in neutral countries must, MI5 thought, lead the Germans to assume that the Allies would by now have been informed of the existence of this network operating so effectively in their midst, and it would look very odd if it continued to operate undisturbed. In the middle of August, a Spanish informant did in fact tell MI6 about GARBO, and this was taken as the excuse for sending GARBO into notional retirement. GARBO informed his Abwehr case officer on 12 September that he had been warned of his betrayal by friends in Spain and was going to ground. The network would henceforth be operated by his Venezuelan Lieutenant GARBO himself would still mastermind operations from a cottage in Wales, but the British would be led to believe, by a forlorn and distraught Mrs. GARBO, that he had returned to Spain.

It was a neat solution. GARBO's deputy could not be blown, since his name had never been revealed to the Germans. An even more important guarantee of his security was that he did not exist. Communications ceased to be written in GARBO's inimitably baroque style, but they still continued, now, conducted directly by MI5. For the last six months of the war, therefore, the British security services were in direct radio communication with German intelligence, keeping it supplied with a stream of misinformation to which the latter attached the highest degree of credibility.

The Abwehr paid good money for their informa-tion. GARBO's notional expenses, partly to an address in Lisbon where the money was notionally collected by "the Courier," in fact picked up by MI6, and partly by a transfer of funds effected through a nominee of GARBO in Spain who held a sterling balance in London.

CONTINUE CHAPTER 1

Chapter 1 Chapter 2 Chapter 3 Chapter 4 Main

Igor Sergeyevich Guzenko

Igor Sergeyevich Guzenko, born 13 January 1919 at Rogachevo, Moscow Oblast, USSR, was a Soviet Army Lt. and cipher clerk in the military attaché's office in Ottawa, Canada. He defected to the Canadians in September 1945. His defection was one of the first in the immediate post World War II period and provided Western intelligence services with an insight into the extent of Soviet espionage in the West during and after the war.

Guzenko grew up in Rostov-on-Don. He was a member of the Komsomol. In 1937 he studied art in Moscow and taught at a school for illiterates to earn money for tuition. Later, he attended the Moscow Architectural Institute, and, at the outbreak of World War II, he entered the Kuybyshev Military Engineering Academy in Moscow. Subsequently, he received special training in ciphers at the higher Red Army Academy in Moscow and became a GRU cipher clerk. In April 1942, he was assigned to GRU Headquarters. Then in June 1943, under cover of translator and secretary, he was posted as a cipher clerk to the office of the Soviet military attaché in Ottawa, Canada.

As a cipher clerk and GRU officer, Guzenko was privy to many of the GRU espionage operations in Canada, USA, and UK. He was familiar with GRU activities directed against US and Canadian atomic projects and military production and the GRU staff officers and their Canadian agents engaged in these activities.

In late August 1945 Guzenko inadvertently misplaced two rough draft copies of dispatches, which were found by a charwoman and handed in by her to the ambassador's office. Guzenko eventually learned that he was to be returned to Moscow for disciplinary action. He therefore decided to break with the Soviets.

On the night of 4 September 1945, Guzenko abstracted a number of GRU operational messages, along with other miscellaneous notes concerning espionage data and three dossiers of agents residing in Canada whose activities were directed by the Soviet military attaché. On 6 September 1945, Guzenko attempted to obtain an audience with the Canadian Minister of Justice to explain his position and furnish him the information in his possession.

Guzenko was referred to the Royal Canadian Mounted Police (RCMP). He was unsuccessful in getting anyone to listen to his story on that day and returned to his apartment. As he neared his apartment, he observed a Soviet security man from the embassy loitering in the neighborhood. That evening there was knock on his door, which he did not answer. When this person departed, Guzenko took his wife and son to a

Introduction
The Office of Naval Intelligence (ONI)
Colepaugh and Gimpel
The Custodial Detention Program
President Roosevelt's Directive of December 1941
German Espionage Ring Captured
Counterintelligence Operations
FBI Wartime Operations
The Counter Intelligence Corps During World War II
Duquesne Spy Ring
George John Dasch
Plan Bodyguard
The GARBO Operation
Igor Sergeyevich Guzenko
The Postwar Expansion of FBI Domestic Intelligence
The Federal Loyalty-Security Program
FBI-Military Intelligence Jurisdictional Agreement

neighbor's apartment and notified the local police. When the police arrived, they found that Guzenko's door had been broken open and four Soviet Embassy employees were inside hiding behind the furniture. These individuals were ejected, and Guzenko and his family went to the RCMP on the morning of 7 September 1945.

In the course of subsequent interrogations, he gave a vast amount of information, supported by documents, which revealed the existence of a Red Army network in Canada. A Royal Commission, which was set up in February 1946 to examine this information, considered him to be a most reliable and informative witness. As a result of his defection, twenty persons, one of them a Canadian Member of Parliament, and many of them holding importance positions in the Canadian Government, were tried for supplying information to a foreign power, and at least one Russian espionage network was entirely broken up.

The Canadian network described by Guzenko was directed by the Intelligence Department of the Red Army. Its head in Canada was Col. Zabotin, the Soviet Military Attaché. Its agents were selected for their access to significant intelligence. A principal assignment given was information on the atomic bomb. His targets generally were military in nature, and concerned US, and even Brazilian, formations and dispositions.

Most of the agents Guzenko uncovered were employed in the Canadian Government; all were persons of intelligence and education. They were recruited through Canadian Communist Party contacts.

The Postwar Expansion of FBI Domestic Intelligence

In February 1946, Assistant Director Ladd of the FBI Intelligence Division recommended recon-sideration of previous restrictive policies and the institution of a broader program aimed at the Communist Party. Ladd advised Director Hoover:

"The Soviet Union is obviously endearing to extend its power and influence in every direction and the history of the Communist movement in this country clearly shows that the Communist Party, USA has consistently acted as the instrumentality in support of the foreign policy of the USSR.

The Communist Party has succeeded in gaining control of, or extensively infiltrating a large number of trade unions, many of which operate in industries vital to the national defense.…

In the event of a conflict with the Soviet Union, it would not be sufficient to disrupt the normal operations of the Communist Party by apprehending only its leaders or more important figures. Any members of the Party occupied in any industry would be in a position to hamper the efforts of the United States by individual action and undoubtedly the great majority of them would do so.…

It is also pointed out that the Russian Government has sent and is sending to this country a number of individuals without proper credentials or travel documents and that in the event of a breach of diplomatic relations there would undoubtedly be a considerable number of these people in the United States."

Therefore, Ladd recommended "re-establishing the original policy of investigating all known members of the Communist Party" and

reinstating "the policy of preparing security index cards on all members of the Party."

He observed that "the greatest difficulty" with apprehending all Communists if war broke out was "the necessity of finding legal authorization." While enemy aliens could be interned, the only statutes available for the arrest of citizens were the Smith Act, the rebellion and insurrection statutes, and the seditious conspiracy law. These laws were inadequate because "it might be extremely difficult to prove that members of the Party knew the purpose of the Party to overthrow the Government by force and violence" under the Smith Act and "some overt act would be necessary" before the other statutes could be invoked. Hence, he proposed advising the Attorney General plans and the need for "a study as to the action which could be taken in the event of an emergency."[116]

Consequently, Director Hoover informed Attorney General Tom C. Clark that the FBI had "found it necessary to intensify its investigation of Communist Party activities and Soviet espionage cases." The FBI was also "taking steps to list all members of the Communist Party and others who would be dangerous in the event of a break in diplomatic relations with the Soviet Union, or other serious crisis, involving the United States and the USSR" The FBI Director added that it might be necessary in a crisis "to immediately detain a large number of American citizens." He suggested that a study be made "to determine what legislation is available or should be sought to authorize effective action…in the event of a serious emergency."[117]

Assistant Director Ladd proposed another FBI program, which was not called to the Attorney Gen.'s attention. He told the Director, "Apart from the legal problems involved, another difficulty of considerable proportions which would probably be encountered in the event of extensive arrests of Communists would be a flood of propaganda from Leftist and so-called Liberal sources." To counteract this possibility, he made the following recommendations:

It is believed that an effort should be made now to prepare educational material that can be released through available channels so that in the event of an emergency we will have an informed public opinion.

To a large extent the power and influence of the Communist Party in this country, which is out of all proportion to the actual size of the Party, derives from the support which the Party receives from "Liberal" sources and from its connections in the labor unions. The Party earns its support by championing individual causes, which are also sponsored by the Liberal elements. It is believed, however, that, in truth, Communism is the most reactionary, intolerant and bigoted force in existence and that it would be possible to assemble educational materials which would incontrovertibly establish the truth.

Therefore, material could be assembled for dissemination to show that Communists would abolish or subjugate labor unions and churches if they came to power. Such material would undermine Communist influence in unions and support for the Party from "persons prominent in religious circles." Additional material could be assembled "indicating the basically Russian nature of the Communist party in this country." Ladd proposed a two-day training conference for "Communist supervisors" from eighteen or twenty key field offices so that they might have "a complete understanding…of the Bureau's policies and desires.…" These recommendations were approved by the FBI Executive Conference.[118]

The Federal Loyalty-Security Program

In 1947, President Truman established by executive order a Federal Employee Loyalty Program.[119] Its basic features were retained in the Federal Employee Security Program authorized by President Eisenhower in Executive Order 10450, which is still in effect with some modifications today.[120] The program originated out of serious and well-founded concern that Soviet intelligence was using the Communist Party as an effective vehicle for the recruitment of espionage agents; however, from the outset, it swept far beyond this counterespionage purpose to satisfy more speculative preventive intelligence objectives. The program was designed as much to protect the government from the "subversive" ideas of federal employees, as it was to detect potential espionage agents.

A Temporary Commission on Employee Loyalty developed the basic outlines of the employee security program in 1946-1947. Its understanding of the problem was shaped largely by the report of a Canadian Royal Commission in June 1946. The Royal Commission had investigated an extensive Soviet espionage operation in Canada, which was disclosed by a defector from the Soviet Embassy. Its report described how employees of the Canadian Government had communicated secret information to Soviet intelligence. The report concluded that "membership in Communist organizations or sympathy towards Communist ideologies was the primary force that caused these agents: to work for Soviet intelligence. It explained that "secret members or adherents of the Communist Party," who were attracted to Communism by its propaganda for social reform, had been developed into espionage agents. The Royal Commission recommended additional security measures "to prevent the infiltration into positions of trust under the Government of persons likely to commit" such acts of espionage. [121] The impact of the report in the United States was that "questions of thought and attitudes took on new importance as factors of safety in the eyes of all those concerned with national security."[122]

A subcommittee of the House Civil Service Committee recommended shortly after release of the Canadian commission report that the president appoint an interdepartmental committee to study employee security practices. FBI Director Hoover suggested to Attorney General Clark whom he should appoint to such a committee "if it is set up."[123] When President Truman appointed a Commission on Employee Loyalty in November 1946, the FBI Director's suggested Justice Department representa-tive was made chairman, and the other members represented the Departments of State, War, Navy, and Treasury, and the Civil Service Commission.

The President's Commission had less success than its Canadian counterpart in discovering the dimensions of the problem in the United States. FBI Assistant Director Ladd told the Commission that there were "a substantial number of disloyal persons in government service" and that the Communist Party "had established a separate group for infiltration of the government." He also called the Commission's attention to "a publication of the U.S. Chamber of Commerce" which had expressed the opinion "that Communists in the government have reached a serious stage." The War Department representative on the Commission then stated that it "should have something more than reports from the Chamber of Commerce, FBI, and Congress, to determine the size of the problem." However, when Assistant Director Ladd was asked later "for the approximate number of names in subversive files…and whether the Bureau had a file of names of

persons who could be picked up in the even of a war with Russia," the FBI official "declined to answer because this matter was not within the scope of the Commission." The meeting ended with "general agreement that Mr. Hoover should be asked to appear.…"[124] Therefore, the Commission prepared a lengthy list of questions for the FBI; but instead of Director Hoover appearing, Attorney General Clark testified in a session where no minutes were taken.

The Attorney General supplemented his "informal" appearance with a memorandum, which stated that the number of subversive persons in the government had "not yet reached serious proportions," but that the possibility of "even one disloyal person" entering government service constituted a "serious threat."[125] Thus, the President's Commission accepted its foreclosure from conducting any serious evaluation of FBI intelligence operations or FBI intelligence data on the extent of the danger. One commission staff member observed that these were felt to be "matters exclusively for the consideration of the counter-intelligence agencies."[126]

It is impossible to determine fully the effect of the autonomy of FBI counterespionage on the government's ability to formulate appropriate security policies. Nevertheless, the record suggests that executive officials were forced to make decisions without full knowledge. They had to depend on the FBI's estimate of the problem, rather than being able to make their own assessment on the basis of complete information. With respect to the employee loyalty program in 1947, the FBI's view prevailed on three crucial issues__the broad definition of the threat of "subversive influence," the secrecy of FBI informants and electronic surveillance, and the exclusive power of the FBI to investigate allegations of disloyalty.

Although Director Hoover did not testify before the President's Commission, he submitted a general memorandum on the types of activities of "subversive or disloyal persons" in government service which would "constitute a threat" to the nation's security. The danger as he saw it was not limited to espionage or the recruitment of others for espionage. It extended to "influencing" the formation and execution of government policies "so that those policies will either favor the foreign country of their ideological choice or will weaken the United States government domestically or abroad to the ultimate advantage of the… foreign power." Consequently, he urged that attention be given to the association of government employees with "front" organizations. These included not only established "fronts" but also "temporary organizations, `spontaneous' campaigns, and pressure movements so frequently used by subversive groups." If a disloyal employee was affiliated with such "fronts," he could be expected to influence government policy in the direction taken by the group."[127]

The President's Commission accepted Director Hoover's position on the threat, as well as the view endorsed later by a Presidential Commission on Civil Rights that there also was a danger from "those who would subvert our democracy by…destroying the civil right of some groups."[128] Thus, the standards for determining employee loyalty included a criterion based on membership in or association with groups designated on an "Attorney Gen.'s list" as:

Totalitarian, fascist, communist, or subversive, or has having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their right sunder the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.[129]

The executive orders provided a substantive legal basis for the FBI's investigation of allegedly "subversive" organizations, which might fall within these categories.[130]

The FBI also succeeded in protecting the secrecy of its informants and electronic surveillance. The Commission initially recommended that the FBI be required to make available to department heads upon request "all investigative material and information available to the investigative agency on any employee of the requesting department." Director Hoover protested that the FBI had "steadfastly refused to reveal the identities of its confidential informants." He advised the Attorney General that the proposal "would also apparently contemplate the revealing of our techniques, including among others, technical surveillance that are authorized by you." The Director assured the Attorney General that the FBI would make "information available to other agencies to evaluate the reliability of our informants" without divulging their identities.[131] The Commission revised its report to satisfy the FBI.[132]

Director Hoover was still concerned that the Commission (and President's executive order) did not give the FBI exclusive power to investigate allegedly subversive employees.[133] He went so far as to threaten "to withdraw from this field of investigation rather than to engage in a tug of war with the Civil Service Commission."[134] According to notes of presidential aide George Elsey, President Truman felt "very strongly anti-FBI" on the issue and wanted "to be sure and hold FBI down, afraid of `Gestapo."[135] Presidential aide Clark Clifford reviewed the situation and came down on the side of the FBI as "better qualified" than the Civil Service Commission.[136] Nevertheless, the President insisted on a compromise, which gave Civil Service "discretion" to call on the FBI "if it wishes."[137] The FBI Director objected to this "confusion" as to the FBI's jurisdiction.[138]

Justice Department officials warned the White House that Congress would "find flaws" with this arrangement, and President Truman noted "J. Edgar will in all probability get this backward looking Congress to give him what he wants. It's dangerous."[139] President Truman was correct. The administration's budget request of $16 million for Civil Service and $8.7 million for the FBI to conduct loyalty investigations was revised in Congress to allocate $7.4 million to the FBI and only $3 million to the Civil Service Commission.[140] The issue was finally resolved to the FBI's satisfaction. President Truman issued a statement to all Department heads declaring that there were "to be no exceptions" to the general rule that the FBI would make all loyalty investigations.[141]

The rationale for investigating groups under the authority of the loyalty-security program changed over the years. Such investigations supplied a body of intelligence data against which to check the names of prospective federal employees.[142] By the mid-1950s, the Communist Party and other groups fitting the standards for the Attorney Gen.'s list were no longer extensively used by Soviet intelligence for espionage recruitment.[143] Therefore, FBI investigations of such groups became__in com-bination with the "name check" of Bureau files__almost entirely a means for monitoring the political background of prospective federal employees. They also came to serve a pure intelligence function of keeping the Attorney General informed of "subversive" influence and infiltration.[144]

No organizations were formally added to the Attorney Gen.'s list after 1955. Groups designated prior to that time included numerous defunct German and Japanese societies, Communist and Communist "front" organizations the Socialist Workers Party, the Nationalist Party of Puerto Rico, and several Ku Klux Klan organizations.[145] However, the FBI's "name check" reports on prospective employees were never limited to information about groups on the list. The list's criteria were independent standards for evaluating an employee's background, regardless of whether a group was formally designated by the Attorney General.[146]

After 1955, a substitute for designation on the Attorney Gen.'s list was the FBI's "characteri-zation" or "thumbnail sketch" of a group. Thus, if a "name check" uncovered information about a prospective employee's association with a group, which *might* fall under the categories for the list, the FBI would report the data and attach a "characterization" of the organization setting forth pertinent facts relating to the standards for the list.[147] This procedure made it unnecessary for the Attorney General to add groups to the formal list, since FBI "characterizations" served the same purpose within the executive branch.

FBI-Military Intelligence Jurisdictional Agreement[148]

Delimitations Agreement Between the FBI and US Military Intelligence Services With Supplements, February 23, 1949

3-1 Delimitations Agreement
The following agreement was approved and signed on 2-23-49 by the Directors of the Federal Bureau of Investigations; Intelligence Division of the Army; Office of Special Investigations, Air Force; and the Chief of Naval Intelligence:

Subject: Delimitation of Investigative Duties of the Federal Bureau of Investigation, the Office of Naval Intelligence, the Intelligence Division of the Army, and the Office of Special Investigations; Inspector General, US Air Force. The Agreement for Coordination of the Federal Bureau of Investigation, Office of Naval Intelligence, Intelligence Division of the Army, and the Office of Special Investigations, Inspector General, US Air Force.

I. The undersigned have reviewed the directive contained in the President's Memorandum of June 26, 1939, as augmented by his Directive of September 6, 1939, the Delimitations Agreement of February 9, 1942, and the Presidential Directive of October 30, 1947. In addition cognizance has been taken of the provisions of the Atomic Energy Act of 1946, and the specific application of that Act is set forth in Section II hereof. All other provisions of this Agreement are apart from and have no relation to the stated requirements of the Atomic Energy Act. In view of the above, it is now agreed that responsibility for the investigation of all activities coming under the categories of espionage, counterespionage, subversion and sabotage (hereinafter referred to as `these categories') will be delimited as indicated hereinafter. The responsibility assumed by one organization in a given field carries with it the obligation to exchange freely and directly with the other subscribing organizations all information of mutual interest. When the organization with primary operating responsibility is unable for any reason to produce material in that field desired by the subscribing agencies, such special arrangements as may be legal or desirable will be worked out through negotiation at the national level prior to activity by one agency in another agency's field. It is recognized

by the subscribers hereto that the Headquarters Department of the Army has decentralized such functions to its major subordinate commanders. When the major subordinate commanders of the Army cannot effect satisfactory special arrangements, the matter will be referred to the Director of Intelligence for the Army for further negotiations at the national level. Close cooperation and coordination between the four subscribing organizations is a mutually recognized necessity.

II. FBI will be responsible for:

1. All investigations of cases in these categories involving civilian and foreign nationals of all classes in the continental United States, Puerto Rico, the Virgin Islands, (the State of Hawaii,) and the States of Alaska except as specifically described hereinafter in Paragraph V, Section 5.

2. All investigations of violations of the Atomic Energy Act of 1946. There are no territorial or personnel limitations on this provision.

3. The coordination of the investigative activities of civilian agencies in the United States, Puerto Rico, the Virgin Islands, and the State of Alaska except as specifically described hereinafter in Paragraph V. Section 5, which provide information regarding subversive movements and activities in these categories.

4. Keeping the other subscribing organizations advised of important developments in these categories within its cognizance, particularly:

a. Activities of inactive reserves of the armed services, including the National Guard.

b. Developments affecting plants engaged in armed forces contracts.

c. Developments concerning the strength, composition, and intentions of civilian groups within its cognizance which are classed as subversive and whose activities are a potential danger to the security of the United States.

d. Developments affecting those vital facilities and vital utilities which have been designated by the Secretary of Defense.

e. Developments affecting critical points of transportation and communication systems which have been designed by the Secretary of Defense.

(For b, d, and e above no protective coverage is contemplated.)

III. ID, Army will be responsible for:

1. The investigation and disposal of all cases in these categories involving active and retired military personnel of the Army.

2. The disposal, but not investigation, of all cases in these categories involving civilian employees of the Army in the United States, Puerto Rico, and the Virgin Islands.

3. The investigation and disposal of all cases in these categories involving civilian employees of the Army stationed in areas other than the United States, Puerto Rico, and the Virgin Islands, except that part of such investigations as have ramifications in the United States, Puerto Rico, or the Virgin Islands.

4. The investigation of all cases in these categories involving civilians and foreign nationals who are not employees of the other subscribing organization, in where they Army Commander has supreme jurisdiction

over the armed forces stationed therein, including possessions of the United States other than Puerto Rico and the Virgin Islands.

5. Informing the other subscribing organizations of any important developments.

6. Advising the Federal Bureau of Investigation of the identity and location of the plants engaged in Army contracts.

IV. ONI will be responsible for:

1. The investigation and disposal of all cases in these categories involving active and retired military personnel of the Navy.

2. The disposal, but not investigation, of all cases in these categories involving civilian employees of the Navy in the United States, Puerto Rico, and the Virgin Islands.

3. The investigation and disposal of all cases in these categories involving civilian employees of the Navy stationed in areas other than the United States, Puerto Rico, and the Virgin Islands, except that part of such investigations as have ramifications in the United States, Puerto Rico, or the Virgin Islands.

4. The investigation of all cases in these categories involving civilians and foreign nationals who are not employees of the other subscribing organization, in where the Navy Commander has supreme jurisdiction over the armed forces stationed therein, including possessions of the United States other than Puerto Rico and the Virgin Islands.

5. The investigation of all cases in these categories involving civilians and foreign nationals who are not employees of the other subscribing organizations and with the exception of civilian employees of the Executive Branch of the Government on Kodiak and Afognak Islands adjacent to the Alaska Peninsula and Adak Island in the Aleutian Chain.

6. Informing the other subscribing organizations of any important developments.

7. Advising the Federal Bureau of Investigation of the identity and location of the plants engaged in Navy contracts.

V. The Office of Special Investigations, Inspector General, US Air Force will be responsible for:

1. The investigation and disposal of all cases in these categories involving active and retired military personnel of the Air Force.

2. The disposal, but not investigation, of all cases in these categories involving civilian employees of the Air Force in the United States, Puerto Rico, and the Virgin Islands.

3. The investigation and disposal of all cases in these categories involving civilian employees of the Air Force stationed in areas other than the United States, Puerto Rico, and the Virgin Islands, except that part of such investigations as have ramifications in the United States, Puerto Rico, or the Virgin Islands.

4. The investigation of all cases in these categories involving civilians and foreign nationals who are not employees of the other subscribing organization, in where the Air Force Commander has supreme jurisdiction over the armed forces stationed therein, including possessions of the United States other than Puerto Rico and the Virgin Islands. The investigations the same cases described above in that

portion of Alaska described in Section 5, below, with the exception of civilian employees of the Executive Branch of the Government.

5. The investigation of all cases in these categories involving civilians, except as described herein above, (1) in that part of the Alaska Peninsula which is separated by a line drawn from Iliamna Bay northwest to the town of Old Iliamna and thence following the south shore of Lake Iliamna to the Kvichak River to the Kvichak Bay; (2) in the islands adjacent to the Alaska Peninsula excluding Kodiak and Afognak Islands which are the responsibility of the Office of Naval Intelligence; (3) in the Aleutian Islands excluding Adak Island which is the responsibility of the Office of Naval Intelligence; and (4) in the Pribilof Islands.

6. Informing the other subscribing organizations of any important developments.

7. Advising the Federal Bureau of Investigation of the identity and location of the plants engaged in Air Force contracts.

VI. 1. Where Sections III, IV, and I involve general territorial coverage, responsibility for such coverage will pass from one element of the armed forces to another automatically when a change of command responsibility ensues. This provision is subject to modification by direct agreement between the interested elements of the armed forces.

2. While investigative jurisdiction over the civilian populace in former enemy territories occupied by the armed forces has been provided for in Sections III, IV, and V above, those provisions are subject to direct adjustment with the Department of State if and when that Department assumes governmental direction in such areas of occupation.

VII. From time to time it may be desirable in the light of changing conditions to modify or amend this Delimitations Agreement. Subject to the exceptions already provided for above, general amendments or modifications involving all of the four subscribing organizations shall be issued in the form of a revised Delimitations Agreement and not as separate instructions.

VIII. During periods of martial law, or periods of predominant armed forces interest not involving martial law, when agreed upon by the subscribing agencies, the provisions of Appendix A or B, hereto attached will additionally apply.

IX. All agreements of a continuing nature and applicable to two or more of the subscribing agencies to the Delimitations Agreement which affect the basic jurisdiction thereof which are not or hereafter mutually entered into by any of the subscribers thereto will be reduced in writing; will thereafter become supplements to the Delimitations Agreement, and distributed only to the extent agreed upon by the co-signers.

(Signed) *S. Leroy Irwin*
Director of Intelligence
Department of the Army
(Signed) *Thomas B. Inglis*
Chief of Naval Intelligence
(Signed) *J. Edgar Hoover*
Director, Federal Bureau of Investigation
(Signed) *Joseph F. Carroll*
Director, Office of Special Investigations,
Inspector General, US Air Force

Appendix A—Period Of Martial Law

I. It is further agreed that when a state of martial law has been declared by the President, the armed forces commander will assume responsibilities for coverage in these categories. His authority to direct and control the subscribing agencies of the armed forces will be limited only by such instructions as he may receive from the Secretary of Defense. He will have authority to coordinate the intelligence activities of the subscribing agencies in his area of responsibility, within the limits of their available personnel and facilities, by the assignment of missions, the designation of objectives, and the exercise of such coordinating control as he deems necessary. He is not authorized to control the administration or discipline of the subscribing agencies in the area of his responsibility, nor to issue instructions to them beyond those necessary for the purposes stated above.

II. Personnel of the subscribing agencies in the area of responsibility of the armed forces commander will still send reports to and be under the continued supervision of their respective headquarters. They will render such aid and assistance to the armed forces commander and his designated representatives as are possible and practicable. They will furnish all pertinent information, data, and other material that are or may be necessary or desirable to the armed forces commander by the most expeditious means and methods possible consistent with requisite security. Each headquarters of the subscribing agencies will promptly be advised by its agencies of all information and data appropriately identified as having been furnished to the armed forces commander.

Appendix B—Periods of Predominant Military Interests Not Involving Martial Law

I. In time of war certain areas will come into prominence as potential theaters of operation. When an armed forces commander of such a potential theater is designated, he definitely has interest in, though not control of, the civilian life within the area. In order that the armed forces commander may prepare himself for the discharge of the possible responsibility which may affix to him, the following procedure is agreed upon:

1. Agents of the FBI: of ONI: ID Army: and the OSI, IG, US Air Force will continue to function in accordance with the provisions of Sections, II, III, IV, and V.

2. In addition thereto, the armed forces commander may take steps to analyze the facilities existing and to explore the manner in which complete coverage will be obtained if martial law is declared. Adequate liaison with the other subscribing agencies will insure that the armed forces commander will have the benefit of the experience, judgment and knowledge of the representatives of the other agencies.

3. The armed forces commander is authorized to request and receive such information from the other three agencies as he may desire and they may be able to furnish.

II. The analysis and exploration referred to above will show the coverage furnished by each of the subscribing agencies and any additional coverage each subscribing agency can undertake. When the commander feels that more complete coverage is required, it is recognized that he is authorized to augment the coverage with such elements of the subscribing agencies as are under his jurisdiction. Prior to any invasion of the spheres normally coming under the cognizance of the other subscribing agencies, the armed forces commander should obtain the necessary authority from the Secretary of Defense.

III. Irrespective of the fact that the preceding recommendations have place the initiative in the hands of the armed forces commander, whenever any of the other services feel that such a survey to determined adequacy of coverage should be undertaken, it should be so recommended.

3-2 Instructions
The major differences between the foregoing Delimitations Agreement and previous versions are as follows:

The Director, OSI, USAF, is a party thereto. The Bureau has justification over all civilians insofar as espionage, counterespionage, subversion and sabotage are concerned, regardless of employment.

3-3 Supplemental Agreements to the Delimitations Agreement
On 6-2-49, supplemental agreements to the Delimitations Agreement were approved by the members of the Interdepartmental Intelligence Conference, and they are set out below. Instructions, where necessary, concerning each of the supplements will be found at the end of that supplement:

a. Supplemental Agreement No. (I) to the Delimitations Agreement:

Cooperation And Coordination Between The Federal Bureau of Investigation, the Intelligence Division of the Army, the Office of Naval Intelligence and the Office of Special Investigations, Inspector General, US Air Force.

The Director of Intelligence, US Army, the Director of the Federal Bureau of Investigation, the Director of Naval Intelligence and the Director of the Office of Special Investigations, Inspector General, US Air force, with a view to promoting the closest possible cooperation and coordination between the Field Services of these agencies agree that the following recommendations will be transmitted to their Field installations:

(a) Special Agents in Charge of the Federal Bureau of Investigation Divisional Offices, Military Intelligence Officers of the pertinent Armies, District Officers of the Office of Special Investigations, Inspector General, US Air Force, and Naval District Intelligence Officers will maintain close personal liaison between those offices and their representatives, including a meeting of representatives of the four agencies, preferably the offices in charge, at least twice per month, for the purpose of discussing pending and contemplated investigative activities, and any other subject necessary to insure that there is proper coordination of their investigative work.

(b) The close personal liaison to be maintained between representatives of the four agencies at all times should insure that there is no duplication of effort in any field, and that a proper coverage of the whole investigative field is maintained. Particular attention should be paid to avoiding any duplication in connection with the use of informers.

(c) A distinction should be recognized

between the investigative interest of individual agencies and to the coverage interest. It is believed that all four agencies should study, from time to time, the coverage of the investigative field in order to insure that all channels of interest and avenues of information are adequately covered by at least one of the participating agencies.

(d) Where there is doubt as to whether or not one of the other agencies is interested in information collected, it should be transmitted to the other agency.

(e) Considerations should be given to the fact that certain classes of information are of general interest to the Military, Naval, and Air Force intelligence services in connection with background and knowledge of espionage and sabotage organizations, even though the Military, Naval, and Air Force intelligence services may have no apparent direct investigative interest.

(f) Should differences of opinion of a minor nature occur, the directors of the four intelligence agencies feel that with proper personal liaison, such differences can be satisfactorily adjusted locally by the officials in charge of the various divisional organizations.

3-3.1 Instructions
This supplement recommends meetings at least two monthly of the interested agencies. Where desirable or necessary, these meeting may be held more often than twice per month and in certain areas, because of the travel distances involved or other factors, meetings are being held once per month by special agreement. It is not necessary that FBIHQ be advised of the business discussed at these meetings, unless there is a particular matter of which FBIHQ should be cognizant. FBIHQ should be promptly informed of any change in the scheduling of these meetings or of any agreement to commence or discontinue meetings in a field office area.

Supplemental Agreement No. II to the Delimitations Agreement: (Rescinded.)

Supplemental Agreement No. III to the Delimitations Agreement: Investigative Jurisdiction on Vessels of Military Sea Transportation Service

1. The investigative jurisdiction of all activities under the categories of espionage, counterespionage, subversion and sabotage on vessels of the Military Sea Transportation Service is as follows:

a. Investigative jurisdiction on vessels purchased by the Navy will be the responsibility of the Office of Naval Intelligence.

b. Vessels obtained by the Navy through a `bare boat charter' will be under the investigative jurisdiction of the Office of Naval Intelligence.

c. Vessels allocated to the Military Sea Transportation Service which are manned and supervised by their private owners are under the investigative jurisdiction of the FBI.

2. When personnel who are subjects of an investigation under a or b above reach a US PORT or a port where the FBI has a field agency, or prior to reaching such a port, if practicable, the Department of the Navy will promptly furnish the FBI all pertinent information concerning the investigation. If personnel who are subjects of an investigation as above remove themselves from the vessel upon arrival of the vessel in port and further surveillance is considered necessary, the Navy will continue surveillance until notified by the FBI at local level that the FBI has taken over full responsibility for the case. However, both the Navy and FBI will make every effort to transfer responsibility upon arrival of the vessel in port.

3. When the FBI opens an investigation under c above or when an FBI investigation in progress develops or is believed about to develop ramifications under a., b. or c. above, the FBI will promptly furnish all

pertinent information to the Navy and will thereafter coordinate its actions with the Navy whenever and wherever deemed necessary to insure proper pursuit of the case.

Supplemental Agreement No. (IV) to the Delimitations Agreement: Investigations of Private Contractors of the Armed Forces

It is agreed by the subscribed of the Delimitations Agreement (hereinafter referred to as subscribers) that with reference to investigations of civilian employees, applicants for employment, directors and key personnel of privately owned plants and facilities, working or bidding on contracts important to the Army, Navy or Air Force (hereinafter referred to as the Armed Forces) procurement, the following will be followed insofar as practicable. Exceptions thereto will be adjusted by mutual agreement between the subscribers concerned.

(a) The Armed Forces will conduct background investigations of such persons unless there is a particular reason for requesting that an investigation be conducted by the FBI or the FBI has a special interest in a particular case and has notified the Armed Forces of such interest.

(b) The FBI will conduct complaint investigations of such personnel upon specific request in each case by one or more of the Armed Forces. If one of the Armed Forces has no further need for an investigation requested, but not

completed, prompt notification will be made to the FBI.

(c) Investigations conducted by the Armed Forces under (a) above will be terminated and all information passed to the FBI when credible derogatory information of a loyalty nature is uncovered. Upon receipt of such a case, the FBI will proceed as under (b) above if one of the Armed Forces so requests.

(d) When one of the subscribers is aware that another is conducting an investigation on a person or firm identical or closely connected with a person or firm it contemplates investigating, no investigation will be undertaken without the consent of the subscriber which has an investigation in progress. The investigation agency will make available to the other interested agency copies of the reports of the investigation made.

(e) Normally, identity of confidential informants will not be communicated from subscriber to another: however, when such communication occurs, the receiving subscriber will employ the highest possible safeguards to insure that such informants are not compromised. No transmittal of information concerning confidential informants to a third subscriber or to another agency is authorized except by specific consent of the originator.

(f) A subscriber who receives a report of investigation from another subscriber may freely transmit copies of such reports to a third subscriber except as provided in (e) above.

(g) A report of completed investigation received by the Armed Forces from the FBI will not be reopened without the approval of the FBI except to obtain additional background information. In such cases, the FBI will be furnished copies of all information obtained. Other information required by the Armed Forces will be requested of the FBI.

(h) If one of the Armed Forces requests the FBI to conduct an investigation or conduct additional investigations as required under (g) above, and if for any reason the FBI declines or is unable to conduct

such investigation or additional investigation, the Armed Forces concerned may proceed with the investigation. The FBI will be furnished copies of the results there if the FBI so requests or if the Armed Forces concerned considers the results to be of FBI interest.

(i) Nothing above is to be construed as altering the basic Delimitations Agreement of 1949 or current agreements concerning subversive organizations.

Investigation of Reserve and Civilian Components of the Armed Forces

It is agreed by the subscribers to the Delimitations Agreement that the Army, the Navy and the Air Force may conduct background investigations on members of the inactive reserve and National Guard who are anticipated being called back to active duty, or when investigation is undertaken for the purpose of determining whether the individual may be granted access to classified military information. The following procedures shall be pursued in each of the above circumstances:

(1) The intelligence agencies of the Army, Navy or Air Force before undertaking such background investigation will consult the FBI to determined:

(a) if the FBI has an investigation in progress; if so, no investigation will be undertaken by the intelligence agencies except as may be mutually agreeable to the Armed Forces concerned and the FBI; (b) if the FBI already has made an investigation; if so, the results will be made available to the other agencies; (c) if the FBI has information on the individual even though it may not have conducted an investigation.

(2) If, after consulting the FBI, investigation is undertaken by the other agencies, it will be pursued no further than is necessary to make the determination required by the other agencies, and all information developed pertinent to the four categories will be furnished promptly to the FBI.

This supplement has been discussed by the Interdepartmental Intelligence Conference, and it was agreed on 9-10-58 that the consultation requirement will be satisfied by the FBI is notified, by means of a statement included in a from request for a name check, that investigation is being initiated concerning the individual.

Supplemental Agreement No. (VI) to the Delimitations Agreement: Investigation in Areas Not Specifically Assigned

It is agreed by the military subscribers to the Delimitations Agreement that the references therein paragraphs III.4, IV.4, and V.4, to areas where the Army (Navy, Air Force) Commander has supreme jurisdiction over the armed forces stationed therein' shall be interpreted as referring to areas where the Department of the Army (Navy, Air Force) is responsible for the administrative and logistic support of the Headquarters of Commands established by the Secretary of Defense. (Approved by ICC November 4, 1959.)

CONTINUE CHAPTER 1

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Security and the Manhattan Project [149]

The leaders of the American atomic energy program, aware of the tremendous military potentiality of atomic research, recognized almost from the beginning the need for maintaining a high degree of secrecy. An important factor in their decision in early 1942 to turn over administration of the program to the Army was their conviction that it was the organization best prepared during wartime to enforce a foolproof system of security. Such a system would ensure that the Axis powers remained ignorant of Allied interest in developing atomic weapons; reduce the likelihood that the Axis states, particularly Germany, would accelerate their own efforts to produce atomic weapons and undertake espionage and sabotage activities against the American program; and, most significantly, from the standpoint of military effectiveness, allow the Allies to employ these weapons against the Axis nations with maximum surprise.[150]

Early Aspects

First efforts to establish security in atomic matters had occurred in 1939, when refugee physicists in the United States attempted to institute a voluntary censorship on publication of papers concerning uranium fission. American scientists did not accept this suggestion initially, but the outbreak of World War II brought home to many of them the need for control over publications relating to atomic fission. To formalize a censorship program, the Division of Physical Sciences of the National Research Council in April 1940 established a committee that succeeded in getting most scientists to withhold publication of papers on sensitive subjects, particularly those concerned with uranium fission.

In June, when the government-sponsored Committee on Uranium became a subcommittee of the newly constituted National Defense Research Committee (NDRC), it also became subject to the security measures currently in effect for federal agencies. The NDRC, knowing that it was to be concerned chiefly with projects for the Army and Navy, adopted security regulations that conformed to those of the two military services. Under these regulations NDRC subcommittees were required to adhere to a policy of strict compartmentalization of information, to classify all sensitive materials, and to obtain security clearances for all employees.

Transfer of the NDRC uranium program to the Office of Scientific Research and Development (OSRD) in November 1941 did not significantly alter existing security arrangements, because the OSRD patterned its own security system largely along the lines of the NDRC program. As the OSRD became more involved in negotiation and administration of contracts with industrial and research organizations, however, it expanded its security controls to provide a more adequate

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Igor Sergeyevich Guzenko
The Postwar Expansion of FBI Domestic Intelligence
The Federal Loyalty-Security Program
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coverage, adding security measures for personnel administration, classified information, and plant protection.[151]

Street Scene in Los Alamos. The barbed wire fence separates the technical installations from the residential area.
PHOTO

The modest OSRD security system sufficed until, in the spring of 1942, the start of the uranium program's rapid expansion__the letting of numerous contracts with industrial firms; the employment and interaction of ultimately tens of thousands of workers, scientists, and engineers; and the formation of complex organizations to construct and operate the large-scale production plants and their atomic communities—enormously complicated the pro-blems of security just at the time the Army under-took its new role as project administrator. Although these measures were necessary for the more rapid achievement of a successful fission weapon, they also tended to weaken security.[152] Consequently, the Army almost immediately undertook a reorganization and expansion of the existing OSRD security system and, eventually, also endeavored to bring the system more directly under control of the Manhattan District. The system that finally evolved was in many respects unique and introduced a number of innovations in technique and organization that subsequently would be adopted as standard features of government security programs.

The District's Security System

The security system, as it took form in the newly established Manhattan District, resembled that already in existence in most other engineer districts. Under Army regulations in force in 1942, the security program of an engineer district was limited to routine local security requirements. When broader problems arose, the district engineer or security officer could call upon the resources of the Assistant Chief of Staff, G-2, in the War Department. Since June 1939, under provisions of a presidential proclamation, the War Department's Military Intelligence Division (MID) had shared responsibility for matters of espionage, counterespionage, and sabotage in the United States with the Federal Bureau of Investigation (FBI) and the Office of Naval Intelligence. In the latest revision (February 1942) of this Delimitations Agreement—so designated because it set forth the area of jurisdiction of each agency__the MID's assignment was to cover the military establishment, including War Department civilian employees and civilians on military reservations or under military control, plus a large part of the munitions industry.[153]

Organization And Scope

Col. James C. Marshall, in organizing the Manhattan District security program soon after becoming district engineer in June 1942, formed the Protective Security Section. Under direction of a member of Marshall's staff, this section emphasized such aspects as personnel, plant, and military information security. At the same time, to provide the District security staff with counterintelligence assistance, Marshall arranged with the Assistant Chief of Staff, G-2, Maj. Gen. George V. Strong, for security liaison with the MID's operating element, the Military Intelligence Service (MIS). From his staff, Gen. Strong assigned counterintelligence responsibility for the atomic project to Maj. John Lansdale, Jr., who had been a lawyer in civilian life.

Because effective security operations required maximum secrecy, Maj. Lansdale personally visited the Western Defense Command G-2 and each service command and requested that they each select an officer to report directly to him, bypassing both the G-2 and the commanding general of each service command.[154] To further facilitate carrying out the internal security functions for the atomic project, Lansdale also organized a

quasi-clandestine counter-intelligence group. This group operated under cover of the Investigation Review Branch, Assistant Chief of MIS for Security, which Lansdale headed. He reported directly to Gen. Groves, and his group in effect was answerable to the Manhattan Project commander in all substantive respects, even though it functioned from the G-2 office in the Pentagon.[155]

By early 1943, the pace of the District's growth__ both geographically and in terms of personnel__and its increasing security requirements emphasized the need for a more comprehensive counterintelligence program. In February, Gen. Strong transferred Capts. Horace K. Calvert and Robert J. McLeod to the District headquarters, where they formed the District's new Intelligence Section. To ensure that this section, which Cap. Calvert headed, had full access to the intelligence and security facilities of the Army service commands, Strong requested that each command designate a staff officer to act as a point of liaison with the Manhattan District and, to guarantee secrecy, authorized that each correspond directly with Calvert's section. At the same time, Groves continued his earlier practice of meeting with G-2 officers to make certain that District security problems were brought to the attention of appropriate Army officials.[156]

The counterintelligence program became the foundation for a countrywide permanent organization of this aspect of the District's security system. During the course of the year, the District organized its own Counterintelligence Corps (CIC) and, as its staff increased in size, assigned new personnel to those areas where there was the greatest concentration of project activities. Ultimately, the project had a total of eleven branch intelligence offices at key points across the United States, from New York to Pasadena (California). An officer assigned to a branch usually worked out of an area engineer's office and, in addition to his intelligence duties, served as security officer on the engineer's staff. While in matters of command these officers came under control of the Manhattan District intelligence and security officer and reported to him, they also maintained a direct liaison channel with the director of intelligence of the service command that had jurisdiction over their area.[157]

Expansion and Centralization

Rapid growth also necessitated expansion of other aspects of the Manhattan Project's security system. In 1942, the District's relatively modest internal security organization had served well enough for a program that consisted primarily of administering research and development activities carried on in university and industrial laboratories; but, by the summer of 1943, a vast program of plant construction and operation had begun.

The move of the District headquarters from New York to Oak Ridge in August 1943 provided an opportune time for reorganization. The first step was consolidation in July 1943 of the Protective Security and Intelligence Sections. Capt. Calvert took over responsibility for the combined unit, designated the Intelligence and Security Section. Although this change was relatively minor from an administrative standpoint (the section continued in a distinctly subordinate position in the District's Service and Control Division), it represented a significant shift towards centralization in security matters. This change was consistent with Gen. Groves's conviction that only through a high degree of centralized control could he and his administrative staff maintain a close and constant scrutiny over the security program.[158]

Shortly after the District had completed its move to Oak Ridge, a reorganization in the Army's administration of counterintelligence

operations in the zone of interior (ZI) posed a threat to Groves's control and cognizance over the project's internal security functions. To economize on internal investigative operations and to concentrate G-2 efforts on expanding counterintelligence operations overseas, the War Department directed the transfer effective 1 January 1944 of the WDGS (War Department General Staff) G-2 counterintelligence activities in the ZI to the Office of the Provost Marshal General. The effect was to decentralize even further the Army's ZI counterintelligence functions to the service commands including maintenance of data files on individuals, which Manhattan intelligence officials considered essential to their operations. The change also seemed certain to enhance the difficulties the atomic project already was experiencing coordinating its material security operations with the service commands.[159]

From his vantage point as head of the atomic project's counterintelligence group inside G-2, Col. Lansdale endeavored to have the group exempted from the reorganization requirements. When his efforts failed, Gen. Groves decided that the only acceptable solution was to move Lansdale's unit into the Manhattan District. The G-2 sanctioned this change in December, and Lansdale secured authorization to establish a special counterintelligence detachment. Groves arranged for Lansdale's transfer to the Manhattan District; however, instead of placing him in charge of the new CIC Detachment, he brought Lansdale into his Washington office as his special assistant for security affairs. Lansdale's assignment was to keep the Manhattan chief abreast of problems and developments affecting internal security and foreign intelligence wherever they might arise in the project.[160]

The shift of all project counterintelligence activities to the District required major changes in its security organization. The Intelligence and Security Section in February 1944 became a full-fledged division and, in keeping with Groves's centralization policy, moved from the Service and Control Division into the district engineer's own office. To replace Capt. Calvert, whom Groves had selected for a special intelligence mission in London, Col. Nichols—the district engineer since August 1943—brought in an ex-perienced intelligence officer, Lt. Col. William B. Parsons, to head the new division. In this capacity, Parsons administered the District's security program with the assistance of Maj. McLeod, the deputy, and Capt. Bernard W. Menke, the executive officer, and with support from a large operating staff of military and civilian personnel. Although Parsons officially reported to Nichols, he personally kept Gen. Groves appraised of all developments.

Expanding intelligence and security activities necessitated procurement of additional personnel to carry out supportive security functions, such as plant inspections and technical and undercover investigations, Col. Parsons drew 25 officers and 137 enlisted men from the War Department's counter-intelligence manpower pool, and the District's personnel specialists recruited a large number of civilians. In May 1944, to provide administrative services for the expanding security force, Nichols activated the 13th Special Engineer Detachment (Provisional) and assigned Parsons the additional duty of unit commander. Concerned about achieving greater efficiency in security operations, Parsons requested and received permission in January 1945 to combine the 13th with the CIC Detachment.[161]

By this time, Parsons' Intelligence and Security Division had become a highly centralized unit, organizationally divided into six separate branches: Clinton Engineer Works (CEW), Security, Administration, Safeguarding Military Information (SMI), Branch Offices, and Evaluation and Review. The CEW, Security, and Administration Branches, for which McLeod had direct responsibility, dealt primarily

with security matters at the Tennessee site. The CEW Branch administered the local civilian guard force and the military police contingent that protected the Tennessee reservation; coordinated subordinate security offices in the K-25 (gaseous diffusion), Y-12 (electromagnetic), and X-10 (pile) process areas; and, through a board established for the purpose, reviewed security cases. The Security Branch chiefly monitored activities related to security of project manufacturing plants, especially at the Clinton site, and the shipping of classified materials and equipment. The Administration Branch was concerned primarily with personnel security problems, both military and civilian, but also provided facilities for the special handling of the divisions mail and records and administered certain confidential funds.

The SMI, Branch Offices, and Evaluation and Review Branches, for which Capt. Menke had direct responsibility, eventually evolved as a central clearinghouse for intelligence and security matters that related not only to the Tennessee site but also to the various project operations elsewhere. The principal responsibility of the SMI Branch was that of projectwide monitoring of programs in security education, censorship, and the handling of classified materials. The Branch Offices Branch, as its name would indicate, was responsible for coordinating field security operations in the eleven geographical areas where atomic energy activities were in progress and for reporting the area engineers' security problems to the division's Evaluation and Review Branch. The latter branch concentrated in one office the functions hitherto performed by several of the branch intelligence offices__most notably, those concerned with the conduct of subversive investigations and the preparation of special reports on District security matters for higher echelons.[162]

Counterintelligence Activities

Counterintelligence activities constituted one of the most significant aspects of the District's security program. Through effective counterintelligence measures, the District sought to provide the shroud of secrecy necessary to forestall all attempts by the enemy not only to gain information about the American atomic energy program but also to sabotage it.

Yet by its very nature, the Manhattan Project remained vulnerable to espionage and sabotage. The District's recruitment of thousands of individuals with almost every conceivable kind of background and from all parts of the country made likely the employment of some potential spies and saboteurs, no matter how efficient its clearance procedures might be, and its widely scattered installations made implementation and maintenance of uniform security procedures throughout the project very difficult. The reality of these conditions forced project leaders to assume that, sooner or later, Germany and Japan__ and even the Soviet Union__would learn of the atomic energy program and, more importantly, use espionage to expand their knowledge of it and sabotage to destroy America's military advantage.

To detect and counter potential espionage and sabotage activities, the District's CIC Detachment relied primarily upon extensive intelligence investigations. The majority of these investigations were of a preventive character, designed to minimize the likelihood that security might be breached. Of this type, for example, were the many security checks into the unauthorized transmission of classified information. In most instances, CIC personnel found that the information leaks thus uncovered were the result of carelessness or ignorance on the part of the employee or individual with knowledge of the project. But because it was always possible such leaks were surface ramifications of much more dangerous espionage activity, all cases of careless handling of classified data received prompt and rigorous corrective action.

A second type of preventive investigation was the supplementary and more thorough check into the background of employees earlier subjected to routine clearance procedures. Most supplementary investigations were made because preliminary data indicated an employee might be a potential security risk or routine procedures had not produced adequate information about the person's background. Typical cases were those involving scientists or technicians who recently had come from abroad, especially those who had come from areas under control of the Axis powers. Faced with a continuing shortage of scientifically and technically trained personnel, project leaders early had adopted the policy of weighing the degree of risk against the contributions an employee with security clearance problems could make in development of atomic weapons. "All procedures and decisions on security, including the clearance of personnel," Groves recalled, "had to be based on what was believed to be the overriding consideration completion of the bomb. Speed of accomplishment was paramount."[163]

Perhaps the most notable example of the application of Groves's dictum on employing talented individuals who were security risks was the case of J. Robert Oppenheimer. When the Manhattan commander decided to appoint Oppenheimer as head of the Los Alamos Laboratory in February 1943, he did so with full knowledge that the theoretical physicist, who had worked on the project since late 1941, had only an interim security clearance from the OSRD. OSRD Director Vannevar Bush, S-1 Committee Chairman James B. Conant, and the other scientific leaders were generally aware of Oppenheimer's past record of association with Communist-related organizations and individuals. They knew that during the 1930s he had been attracted to a number of Communist-front organizations and, while never a member of the party itself, made fairly regular contributions to Communist-supported causes. Communist fellow travelers, including his former fiancée, were among his friends, and his wife and brother and sister-in-law were former Communists. With the signing of the Nazi Soviet pact in 1939, Oppenheimer had begun to have serious doubts about the Communists; however, he continued to contribute to the Spanish War Relief through party channels until the spring of 1942 and to maintain a casual contact with his former friends.[164]

Despite his record of past Communist associations, Groves decided Oppenheimer was the best choice to direct the bomb laboratory at Los Alamos, for since 1941, he had been involved in this aspect of research and development under Metallurgical Laboratory Director Arthur Compton and in the summer of 1942 had become head of the project team concentrating on that work. Hardly had Oppenheimer arrived at Los Alamos in the spring of 1943 when the question of his clearance arose in a new form. At the request of the Manhattan commander, Lt. Col. Boris T. Pash, chief of the Counterintelligence Branch of the Western Defense Command, began an investigation of suspected Soviet espionage in the Radiation Laboratory at Berkeley. Several men known or thought to be associated with Oppenheimer came under suspicion and, as a result, so did Oppenheimer himself.[165] On 29 June, Pash submitted his conclusion that Oppenheimer "may still be connected with the Communist Party." He offered three possible courses: to replace Oppenheimer as soon as possible; to train a second-in-command at Los Alamos as a possible replacement; and, Pash's recommendation, to have Oppenheimer meet with Generals Groves and Strong in Washington so that they could brief him on "the Espionage Act and its ramifications" and also instruct him that the government was fully aware of his Communist "affiliations," that no "leakage of information" would be tolerated, and that the entire project would be held under "rigid control." In recommending this procedure, Pash was of the opinion that Oppenheimer's "personal inclinations would be to protect his own future and reputation and the

high degree of honor which would be his if his present work is successful, and, consequently,… that he would lend every effort to cooperating with the Government in any plan which would leave him in charge." In any event, he suggested, Oppenheimer should be told that two bodyguards were being assigned to protect him against violence from Axis agents. These bodyguards should be specially trained counterintelligence agents who would not only serve as bodyguards but also keep a check on Oppenheimer.[166]

Col. Pash's report did not change Groves's opinion. After a quick visit to Los Alamos, during which he presumably discussed matters with Oppenheimer, Groves directed on 15 July that he be cleared. On his return to Washington a few days later, he directed "that clearance be issued for the employment of Julius Robert Oppenheimer without delay, irrespective of the information which you have concerning Mr. Oppenheimer. He is absolutely essential to the project." As he wrote the Secretary of War four years later, "it was apparent to me that [Oppenheimer] would not be cleared by any agency whose sole responsibility was military security. Nevertheless, my careful study made me feel that, in spite of [his] record, he was fundamentally a loyal American citizen and that, in view of his potential overall value to the project, he should be employed."[167]

Security sign at the Tennessee site.
PHOTO

Most security cases investigated by the District's CIC Detachment involved breaches of classified information or allegations against employees handling classified work of disloyalty to the United States or of affiliation with organizations espousing subversive ideologies. While many such cases presented the possibility of espionage, in fact, investigations turned up only about one hundred instances of such activity. When suspected cases appeared on the increase in 1943, the Manhattan commander selected a number of the District's own CIC personnel to serve as special undercover agents. They occupied strategically located positions in project offices, laboratories, and plants, set up listening posts, checked intensively into personnel and other records of individuals under suspicion, and took other measures designed to solve espionage cases.[168]

The appointment of special agents was a move towards greater formalization of the procedure for dealing with espionage, which continued to increase as the project grew in size and scope. Another constructive measure was the establishment of a group of permanent surveillance squads to carry out supplemental and nonroutine personnel investigations. Members of these squads, as well as other District security agents, soon became adept in employing professional counterespionage techniques and in using such surveillance equipment as cameras with special lenses (telephoto and other types) and concealable listening and recording devices. During their investigations of persons suspected of espionage activities, either District employees or individuals who had contact with project personnel, the agents operated in the guise of diverse roles__to mention only a few, hotel clerks, bell captains, tourists, electricians, painters, contractors, and gamblers.

To ensure effective functioning and control of the surveillance squads and other special security agents on a countrywide basis, District security officials developed new channels of coordination and communication through Col. Lansdale's counter-intelligence staff at Groves's Washington headquarters, field security teams at the various branch intelligence offices had access to information from the FBI and other government security agencies. These field teams also had to file written reports of their findings and activities on a regular basis with the Evaluation and

Review Branch of the Intelligence and Security Division. As these reports accumulated in the files at District headquarters, they became an important source of information for operation of the whole counterintelligence program. Gen. Groves, in particular, made use of the data garnered from these reports in concert with information acquired from other government agencies in preparing his periodic Military Policy Committee and Top Policy Group briefings on intelligence developments affecting the atomic program.

Espionage Incidents

The most serious espionage activity came not from the enemy but from America's wartime ally: Soviet Russia. Having in the United States a large diplomatic and consular staff as well as other officials for overseeing lend-lease and other assistance programs, the Russians had a more than adequate reservoir of personnel for maintaining an extensive espionage apparatus in this country. Soviet agents, masking as diplomatic and consular officials, turned to members of the Communist Party of the United States and to party sympathizers for assistance in penetrating American wartime institutions and projects. The Russians, making the plea that the American Government was withholding important information and thus unnecessarily delaying Allied victory, recruited many native Communists and fellow travelers to assist them in obtaining vital secrets about wartime activities.[169]

As early as February 1943, counterintelligence agents of the FBI and Western Defense Command became aware that the Russians were obtaining data concerning activities of the Radiation Laboratory at the University of California. Further investigation revealed that, in October 1942, a leading member of the American Communist Party on the West Coast had advised a fellow party member employed at the Radiation Laboratory to retain his position so he could obtain knowledge of the secret work under way there. This employee and other Communists or Communist sympathizers working at the laboratory were passing on information about the atomic project at Berkeley to Communist Party members, who promptly turned it over to the Soviet vice consul in San Francisco. Evidence came to light in early April that a high official in the Soviet Embassy in Washington had recently given money to a West Coast Communist leader, to be used for espionage. Intensive investigation by Western Defense Command counter-intelligence agents resulted in prompt identification of those Radiation Laboratory employees who were engaging in espionage activities. The laboratory discharged the suspects and, where feasible, the Army inducted them into service, placing them in nonsensitive assignments in which they could be kept under regular observation.[170]

The District's CIC Detachment scarcely had completed breaking the original espionage chain at Berkeley when, in late August, Oppenheimer reported his suspicion that new leaks apparently had developed in the laboratory's security system. On the occasion of a visit to Berkeley, Oppenheimer met with Col. Pash and told him he had learned that a member of the University of California staff, a man who had been a close friend, was acting as an intermediary for transmission of data from certain Radiation Laboratory employees to representatives of the Soviet Union. By Oppenheimer's account, his friend had been recruited by an official of the Federation of Architects, Engineers, Chemists, and Technicians, a CIO (Congress of Industrial Organizations) union currently trying to organize employees of the Radiation Laboratory. In subsequent questioning, Oppenheimer refused to disclose the name of his friend on the grounds that he was certain the friend was no longer passing information to Soviet representatives.

Oppenheimer's uncooperativeness at this juncture resulted in the Manhattan commander taking personal action. Groves promptly met with the Los Alamos Laboratory chief and, because the security of the atomic project was at stake**,** ordered him to reveal the name of his friend. Faced with Groves's insistence in the matter, Oppenheimer named Haakon Chevalier, a professor of romance languages at the University of California. A short time later, the university dismissed Chevalier from his teaching post, and he left Berkeley. In retrospect, the likelihood that Chevalier passed any classified information about the project to the United States seems remote.[171]

The Chevalier case was not the final incident of espionage at the Radiation Laboratory. Less than a year later, another serious security leak had developed there. With assistance from Communist Party members living in the San Francisco area, a key scientist from the laboratory met with officials from the local Soviet Consulate. The scientist passed on information concerning the pile process, certain chemical data, and the recently arrived British scientists. The District's CIC Detachment was able to end this espionage activity effectively by securing immediate discharge of the offending scientist, after which, as far as is known, representatives of the Soviet Union made no further attempts to get information from the Berkeley project.[172]

Meanwhile, probably acting on the basis of information gained at the Radiation Laboratory, the Russians had assigned one of their best men to the Chicago area, with the task of establishing an espionage channel at the Metallurgical Laboratory. By early 1944, this Soviet agent, who was a highly trained engineer with working experience in both Russian and American industry, had made contacts with several Metallurgical Laboratory employees. By the time the FBI learned of his activities in April, the Soviet agent had obtained considerable technical information, which he had passed on to the Russian Consulate in New York. Once identified, the laboratory summarily dismissed the suspected employees. Subsequently, the District's CIC Detachment discovered that one of the discharged workers__a reserve officer who had been called to active duty and assigned to the Northwest Territory in Canada__had taken highly classified material with him when he left the Metallurgical Laboratory. Fortunately, District security officials were able to arrange for confiscation of this material (it was located in the officer's baggage) and for transfer of the officer to a post in the Pacific Theater of Operations where he would have no opportunity to pass on his knowledge to Russia or the Axis powers.[173]

Judged in terms of the ultimate utility of the information gained, Russian efforts at espionage at the Los Alamos Laboratory in late 1944 and early 1945, the crucial period of bomb development, were the most successful of the wartime period. But project counterintelligence agents did not learn of this activity until the late summer of 1945, after the war was over. In a sensational postwar trial, Julius and Ethel Rosenberg and Morton Sobell were convicted of stealing classified data from the laboratory with the assistance of Mrs. Rosenberg's brother, David Greenglass, an Army sergeant at Los Alamos, and of transmitting it to Russian agents. Los Alamos, too, was the place where the German refugee scientist, Klaus Fuchs, while serving as a member of the British team sent to the United States under the interchange program, gained a substantial part of the technical knowledge of the bomb that he subsequently passed on to the Russians, first in June 1945 and thence periodically until his arrest by British authorities in early 1950.[174]

Project leaders also had anticipated that, as the Russians, the Axis powers, particularly Germany would launch an equally vigorous espionage campaign, but they uncovered no evidence of such activity

during the war. In early 1944, at a time when available Allied intelligence indicated that the Germans might well have attained an advanced stage in the development of atomic weapons, the Military Policy Committee reported to the Top Policy Group that "no espionage activities by the Axis nations with respect to this project have been discovered, although there have been suspicious indications."[175]

In a project where the ultimate goal depended upon continuous progress in intricate and closely related production processes, unscheduled delays or interruptions of any kind could be disastrous. Sabotage in any form, whether perpetrated by outsiders or insiders bent upon slowing down or disrupting a particular process, constituted an ever- present hazard. Recognizing the seriousness of this threat, Gen. Groves directed that any suspicion of sabotage be reported to him immediately. In keeping with Groves's policy of constant vigilance to detect any hint of sabotage, the District's CIC Detachment thoroughly investigated every instance of mechanical failure, equipment breakdown, fire, accident, or similar occurrence not readily attributable to normal causes, and kept under constant observation all processes and activities that might attract the efforts of saboteurs. In addition, other security personnel regularly inspected the security systems and personnel clearance procedures at the project's various installations, with the objective of detecting and correcting possible weaknesses that might invite sabotage.[176]

Illustrative of Groves's policy was the investigation into the mystifying failure of the first great magnets installed in the electromagnetic plant at the Clinton Engineer Works. Following a brief period of operation, the magnets began to malfunction. After disassembling one of the magnets piece by piece, Kellex engineers found that in its oil circulation and cooling system rust and dirt particles were bridging the gaps between the silver bands forming the coil component, which they attributed to the manufacturer's failure to maintain sufficiently rigid standards of cleanliness. The significance of this incident was that it revealed the inherent vulnerability of the electromagnetic installations and the need for constant surveillance in order to thwart possible sabotage.[177]

Changing of the Guard: Military Police Contingent at CEW.
PHOTO

The district's continuous and thorough efforts to protect the project's installations and operations against sabotage were successful. During the war years, there were no definitely established incidents of sabotage traceable to enemy agents. In most cases where breakdowns or other failures occurred under suspicious circumstances, investi-gations revealed they were probably the result of causes other than enemy sabotage. For example, during construction of the original gaseous diffusion plant at the Tennessee site, inspectors discovered someone had driven nails through the rubber coverings of vital electric cables leading underground from the power plant to the main production plant. The perpetrators of this act were never found, although the evidence indicated strongly it was the work of disgruntled employees.[178]

A quite different type of interference with plant operation briefly threatened the Hanford Engineer Works in early 1945. Groves reported to the Military Policy Committee in February that Army and Navy intelligence had recorded more than fifty incidents of Japanese balloons at various sites along the Pacific Coast, some of them carrying incendiary and fragmentation bombs. While none of these appears to have been directed specifically against the Hanford installations, on 10 March a balloon of this type struck a high tension transmission line running between the Grand Coulee and Bonneville generating stations and caused an electrical surge through the interconnecting Hanford line

that carried power to the production piles. Automatic safety devices at the three piles were activated, briefly shutting down their operation. Fortunately, the bombs attached to the balloon did not explode and the transmission line was not seriously damaged.[179]

Compartmentalization Policy

One of the most unusual duties assigned to the District's CIC Detachment was that of furnishing bodyguards for key Manhattan scientific leaders. CIC personnel accompanied J. Robert Oppenheimer, Ernest Lawrence, Arthur Compton, and Enrico Fermi almost continuously. They accompanied other scientists at intervals, when they were at work on projects that required their special protection.

Col. Marshall had originated the idea of bodyguards, suggesting that they serve also as drivers, to conceal their true function and to reduce the likelihood of accidents. Compton's bodyguard, a former Chicago policeman, traveled with him in the guise of a special assistant. When Compton was in residence at Oak Ridge, his guard served as a member of the local police force. District security officials exercised considerable care in selecting individuals for bodyguards, seeking those who had demonstrated ability to adapt themselves readily to the kind of situations in which scientists were likely to be involved.[180]

Even though District security officials had planned and implemented a multifaceted security system to protect all aspects of project operations and developments, they fully realized that maintenance of total secrecy in such a vast project was unlikely. What was more feasible, they believed, was to prevent leakage of any useful knowledge of the program's special scientific concepts, industrial techniques, and military objectives or, in Army parlance, safe-guarding military information."[181]

Under the provisions of Army security regulations, the basic responsibility for the protection of classified information rested upon "all military personnel, civilian employees of the War Department, and the management and employees of all commercial firms engaged in classified work or projects for the War Department."[182] In applying this principle to the atomic program, District security officials placed particular emphasis upon limiting the amount of classified information permitted to any single individual or group of individuals. District security regulations established two basic rules, which were to "govern the right to possess classified information;" a person must need the information in order to carry out his job and have access only to the amount of information "necessary for him to execute his function." To make doubly certain an individual employee was restricted to "the minimum necessary for the proper performance of his duties," District regulations further directed that "employees… shall be organized into small working groups or teams so far as possible, each working on its own phase of the job and not being permitted to inspect or discuss the work being done by others."[183]

This compartmentalization policy became a far more pervasive influence in the project after the Army assumed full responsibility for its administration. Where the OSRD had applied compartmentalization primarily to research and development organizations, the Army incorporated it into virtually every type of activity undertaken by the project. Typical was the District's insistence that production plant blueprints be broken down and distributed in such a way as to reveal as little as possible to any one individual about the overall character of the project. Similarly, the District required that equipment orders to commercial firms specify that an item not be manufactured and assembled at the same location. And when the production plants reached the point of startup operations, plant managers received instructions to

split up orders for raw materials among a number of suppliers so that the purpose for which they were being used could not be readily ascertained.

While project leaders agreed that some compart-mentalization of information was necessary, considerable difference of opinion prevailed on the extent of limiting scientific and technical interchange, both between sections functioning within a laboratory or plant and between the various interrelated installations of the project. Military administrators, in contrast to their civilian counterparts, favored the enforcement of stricter controls. These generally took the form of written agreements covering those organizations and installations that needed to exchange data. The agreements specified in detail how and what information could be interchanged. Inevitably, occasions arose when developments required interchange of classified information not covered in agreements. In such instances, project leaders applied directly to the district engineer or to Gen. Groves for special permission to exchange the data needed.[184]

One of the most important interchange arrangements formed occurred in June 1943, when Gen. Groves met with Compton and Oppenheimer for the purpose of establishing "the principles which should govern the interchange of information between the Chicago [Metallurgical Laboratory] and Los Alamos projects.…" As a basic criterion determining what information should be interchanged, they set up the test that only data that would "benefit work at both Chicago and Los Alamos" should be exchanged. The agreement that resulted spelled out, in considerable detail, exactly what information could and could not be interchanged (the latter included those categories relating to production piles, military weapons, and the time schedules of various developments); designated by name those individuals at each installation who were qualified to carry on interchange; and outlined exact procedures of exchange__by formal reports, secret correspondence, or visits and conferences. On the most sensitive matters, or where there was serious doubt about interchange, the only channel of exchange was through a visit to the Chicago laboratory by either Oppenheimer or a specifically designated group leader. Although negotiators of the agreement must have been aware of the generally restrictive character of its provisions, they nevertheless emphasized that its major objective was "to maintain as rapid and effective interchange of information as possible."[185]

Compartmentalization of information probably aroused more adverse criticism__both from partici-pants in the atomic program and from some of those who, in retrospect, have reviewed its history__than any other single aspect of the project's security system. Among the participants, the most vociferous critics were the scientists, accustomed to working in college and university laboratories where they could freely interchange the results of their work with scientific colleagues in all parts of the world. Project scientists, such as Leo Szilard, held that over-compartmentalization was a primary cause of extended delays in achievement of scientific and technical objectives of the program. Testifying before a committee of Congress after the war, he asserted, for example, that "compartmentalization of information was the cause for failure to realize that light uranium U235 might be produced in quantities sufficient to make atomic bombs.… We could have had it eighteen months earlier. We did not put two and two together because the two two's were in a different compartment.…"[186] On another occasion he contended also that compartmentalization was not really "too successful" because "significant matters gradually leak through anyway."[187]

Joining Szilard in condemning compartmentalization in the strongest possible terms was Edward U. Condon, the prominent American

physicist who had come to the atomic project from the Westinghouse Research Laboratories. In fact, after spending only a month at Los Alamos, Condon came to the conclusion that he would be of more use to the war effort at Westinghouse than at the New Mexico laboratory. The project's security policy, he asserted, had a morbidly depressing effect on him. "I feel so strongly," he continued, "that this policy puts you in the position of trying to do an extremely difficult job with three hands tied behind your back that I cannot accept the view that such internal compart-mentalization is proper."[188]

Most other contemporary critics took a somewhat less extreme position. Concerned about insufficient interchange of data among atomic project scientists causing delays in the solutions of problems related to bomb development, Compton suggested to the OSRD S-1 Committee in December 1942 that it might be wise to increase the number of "responsible persons who are free of compartmentalization.…"[189] Similarly, in June 1943, physicist Richard C. Tolman, in his role as Groves's scientific adviser, expressed concern that the "proposed regulations to govern interchange between the Chicago and Los Alamos scientists were perhaps not quite as liberal as may later prove warranted." In the weeks following the institution of these regulations, both Oppenheimer and Edward Teller, who was working on a part-time basis at Los Alamos, were troubled by what they viewed as inadequate liaison channels between the New Mexico laboratory and the other installations where related work was in progress.[190]

When British officials and scientists came to the United States in late 1942, they were surprised to learn that Gen. Groves planned further compartmentali-zation, which many of them viewed as already having been applied to an extent that made efficient operation impossible. Furthermore, the British soon found that the Americans used the policy as a convenient excuse for withholding information. Thus, the policy became intermeshed with the whole question of interchange with the British, a problem that was resolved only after many months of negotiation.[191]

By early 1944, most project personnel had come to accept the policy as a fact of life. In looking back after the war was over, even some scientists who had found compartmentalization so distasteful grudgingly conceded it had probably been necessary. The eminent American (German-born) physicist James Franck, for example, while speaking at a conference on atomic energy at the University of Chicago in September 1945, concluded that "so far as secrecy is concerned, the Army officers were unrelenting and, in all honesty, we have to admit that they had to be." But, he went on to remind his listeners that the policy had exacted a "stiff price" in the "wasting of talent and scientific manpower and the loss of precious time."[192]

From the military point of view, compart-mentalization was precisely what was required, both for security and for achieving the most efficient functioning of scientists and technologists. As Gen. Groves expressed his conviction in retrospect:

"Compartmentalization of knowledge, to me, was the very heart of security. My style was simple and not capable of misinterpretation__each man should know everything he needed to know to do his job and nothing else. Adherence to this rule not only provided an adequate measure of security, but it greatly improved overall efficiency by making our people stick to their knitting. And it made quite clear to all concerned that the project existed to produce a specific end product—not to enable individuals to satisfy their curiosity and to increase their scientific knowledge."[193]

The District's policy of compartmentalization of information on the atomic project, in Groves's words, applied "to everyone, including members of the Executive Department, military personnel and members of Congress." No one was to have access "solely by virtue of his commission or official position." Adherence to this policy was possible as long as Manhattan's funding came from sources already earmarked for the War Department. But project leaders anticipated considerable trouble in the future, because securing new funds would entail congressional authorization.[194]

By early 1944, the compartmentalization policy was becoming less and less feasible with Congress because of the increasing size of the program, its rapidly rising cost, and the need to begin planning for its postwar administration. Under the original directive from the President, the atomic program obtained funds from the money appropriated under the Engineer Service-Army budgetary category. Funds from this source sufficed as long as Manhattan's budgets remained relatively modest. But when project leaders estimated that the program would need at least $600 million for fiscal year (FY) 1945, they decided they would have to find a way to provide some information to selected members of Congress who had a need to know. They consulted with President Roosevelt, who thereupon directed that Stimson, Bush, and Gen. Marshall brief the leaders of both parties in the House and the Senate.[195]

On l8 February, Stimson, Bush, and Marshall went to the office of Speaker of the House Sam Rayburn, where they were joined by Majority Leader John W. McCormack and Minority Leader Joseph W. Martin, Jr. Stimson outlined the history of the atomic project, including its cost to date and estimated the total amount needed to complete it; Bush described the project's scientific background and indicated the likely destructive power of an atomic weapon; and Marshall discussed the potential role of atomic bombs in the Allied strategy for winning the war. The legislators pledged their unreserved support, stating that they viewed its high cost as well worth the price. They promised to work out a system for handling the Manhattan appropriations in committee so that there would be no danger of disclosure of their purpose. Bush found that the "entire meeting was most reassuring, as it was quite evident the three congressmen were exceedingly anxious to be of aid to the War Department in carrying a very heavy responsibility."[196]

In June, Stimson, Bush, and Maj. Gen. George J. Richards, the War Department budget officer who was substituting for Marshall while he was out of town, repeated the briefing for the leaders of the Senate. Present were Majority Leader Alben W. Barkley and Minority Leader Wallace H. White, as well as Chairman Elmer Thomas and Senior Minority Member Styles Bridges of the military subcommittee of the Senate Appropriations Committee. Stimson recalled that "the four gentlemen who met with us were very much impressed. They promised that they would help and keep absolute silence about it and prevent discussion in public as to what it was about."[197]

During the remaining months of 1944, congressional leaders succeeded in keeping the vast majority of the members of Congress ignorant of the atomic project. Accustomed to wartime restrictions, most members were willing to accept—without protest—the assurance of their leaders that the work was secret and that the needed appropriations were essential to the war effort. But for a few members this policy was unacceptable, and they directed individual inquiries to the War Department about rumored developments at the atomic sites.

A case in point was Congressman Albert J. Engel of Michigan, a member of the House Appropriations Committee, who in February 1945 was

unwilling to accept automatically the War Department's request for FY 1946 funding from money appropriated under the Expediting Production budgetary category. In a visit to Under Secretary Patterson on the 24th, the Michigan representative stated that he had heard rumors of extravagance and waste and that he wanted more information before approving the War Department's FY 1946 funds. Remembering that in late 1943 War Department officials had dissuaded him from making a proposed trip to the Clinton site, this time he firmly insisted that Patterson allow him to inspect the atomic installations. When Stimson heard from Patterson of Engel's insistence upon visiting project facilities, he sought assistance from the leaders of the House of Representatives. As Speaker Rayburn was away, Stimson turned to Congressman John Taber of New York, another member of the Appropriations Committee. He and Taber sat down with Engel and persuaded him to forgo objections to funds on the floor of the House, but only after promising him an opportunity to visit some "outside installations" of the project.[198]

This experience convinced the Secretary of War and the Manhattan commander, as well as other project leaders, that more and more members of Congress would be demanding current information about Manhattan's activities. Consequently, they arranged to have a selected delegation from each House visit Clinton and, if they wished, also Hanford. With the President's approval for this plan, Groves and Stimson, accompanied by the Secretary's aide, Col. William H. Kyle, visited Clinton on 10 April to prepare "for future trouble with Congressmen."[199]

Upon the unexpected death of Roosevelt on the twelfth, the inspection trip to Clinton was delayed, but only temporarily. In May, after President Truman had given his assent, Speaker Rayburn helped select five members from the House Appropriations Committee—Clarence Cannon, the chairman, George H. Mahon, J. Buell Snyder, Engel, and Taber. Under the careful guidance of the Manhattan commander and the district engineer, the five congressmen spent two days inspecting the Clinton Engineer Works. The legislators returned to Washington convinced that public funds had been well spent and prepared to support the project's budgetary requests for FY 1946. A visit by a comparable Senate delegation to inspect atomic facilities was not feasible until after V- J Day, when a group from the upper house toured the Hanford Engineer Works.[200]

Administrative Aspects

As security requirements increased, the Army established a variety of units to administer its highly compartmentalized information security program. By necessity, the program from about late 1942 up until the District's major intelligence and security reorganization in early 1944 was limited in scope. Faced with a rapid influx of new personnel, both civilian and military, the District's Protective Security Section concentrated chiefly on developing ways for instructing them in the meaning of classified information and the correct methods for handling it. To facilitate this education process, the small staff hurriedly prepared and distributed a manual that provided a "statement of District policy regarding Protective Security procedures," including an extensive section on safeguarding classified information.[201]

An intensification of protective measures during the first half of 1943 resulted in the establishment in August of the Plant Security Section for Safeguarding Military Information (SMI). In an effort to assure attainment of the desired security objectives, the SMI staff developed a new intelligence bulletin. This bulletin, issued in November, set forth in detail the requirements and procedures for safeguarding military information, emphasizing that "matters of vital importance to the

government must be protected at all times whether at war or at peace… and thus great caution must be exercised in the handling and in the dissemination of *all* information—written or oral—relative to this Project at any time."[202]

By early 1944, consolidation of the District's intelligence and security facilities opened the way for a more comprehensive information security program and the establishment in May of a separate SMI Section (redesignated SMI Branch in 1945, when organizationally restructured as a subordinate unit of the District's Intelligence and Security Division). Under the expanded program, security officials launched studies of all aspects of the atomic project— equipment, material, products, processes, operations, administrative matters—to determine the appropriate classification for their mention in correspondence and other documents. They set up codenames (some already in use) for major sites, important materials, items of equipment, and even for the more widely known scientists working on the project. Under this scheme, for example, Los Alamos became Site Y., plutonium became 94, the implosion bomb became Fat Man, and scientist Arthur I. Compton became A. H. Comas. Using the staff and resources of the SMI Section, District authorities directed attention to those areas where security leaks were most likely to occur. Thus, the section regularly reviewed project correspondence with other government agencies, such as the Selective Service concerning deferment of key personnel, and advised on the security classification that should govern each of the thousands of contracts that the District negotiated with outside individuals and firms.[203]

The establishment and maintenance of effective adherence to security requirements among the project's thousands of contractor organizations comprised one of the most challenging and complex aspects of the information security program. District authorities oversaw contractors' security activities through several channels. The branch intelligence offices in principal cities throughout the United States provided a convenient point of contact, and periodic checks of contractor facilities and operations by security inspectors from District headquarters constituted a second avenue of control. These inspectors particularly observed methods of handling classified materials and storing documents. District security officials also investigated contractors' personnel recruitment programs, written correspon-dence, stock registration statements to the Securities and Exchange Commission, and similar activities in which security leaks were likely to occur. Finally, when a contractor terminated his contract with the atomic program, District security officials made certain that all classified materials were returned to project control or that the contractor provided for their adequate protection.[204]

Security problems involving firms under contract most frequently arose where these organizations were carrying out large-scale development of project facilities. Such development, as at the Clinton and Hanford sites, inevitably brought overcrowding of local housing, acute labor shortages, greatly increased road traffic, and other adverse changes that placed a severe strain on normal community activities. The resulting public resentment, generally focused on the contractor firms, created an environment in which threats to security were more likely to occur. In the spring of 1943, for example, Du Pont's effort to arrange for housing and other facilities for the thousands of employees who would work on the Hanford project stirred up resentment in surrounding communities, already aroused by the Army's land acquisition program. The spread of rumors, adverse criticism in the local newspapers, and unfounded statements by local officials tended to draw widespread public attention to the project, posing a serious threat to security. Lt. Col. Franklin T. Matthias, the Hanford area engineer, and members of his staff spoke at

meetings of service clubs in communities adjacent to the project, in an endeavor to counter the rumors and misinformation concerning Du Pont's role in the project. By these and similar efforts they laid the groundwork for obtaining the support and good will of the local citizenry—an absolute essential to maintaining the security of the project.[205]

Efforts to maintain good community relations was an important aspect of the District's information security program, which had as its prime objective the forestalling of security breaks, first by anticipating them and second by teaching project personnel how to be "instinctively alert-minded and security-wise." Although the SMI Section had primary responsibility for carrying out the program, employee education in security matters devolved chiefly to the SMI staffs at the branch intelligence polices. Each staff, for example, conducted orientation and refresher sessions for Corps of Engineers personnel; provided each contractor with instructional materials for in-house security education briefings for its personnel; and used a variety of media—training films, circulars and handbills, payroll inserts, telephone stickers, and editorials in project newspapers—to remind District employees of the importance of unremitting attention to the demands of security.[206]

Because of the policy of compartmentalization, the quantity and variety of educational subject matter available for training purposes was limited. Most workers had knowledge of only the project activity under way at the site where they were employed and most generally did not even know exactly what was being made in the facility where they worked. And even in some instances, project officials had concocted for employees—those working at the elec-tromagnetic plant—a plausible but inaccurate and misleading explanation of the process involved and the product produced, with the warning that this information was given to them only to help them carry out their jobs. Lacking concrete data on which to base an appeal to employees, security officials had to request that they accept the necessity for strict adherence to secrecy largely on faith and out of a sense of patriotism and loyalty to the men on the fighting fronts.

As did most wartime agencies involved in secret work, the Manhattan District resorted to censorship of various kinds as a means of safeguarding classified information. In the first few months after the Army assumed responsibility for the atomic program, the District and branch security staffs began a cursory review of a few leading daily newspapers and periodicals and gradually enlarged this check of publications until it covered some 370 newspapers and 70 magazines. The censors, several of whom were Women's Army Corps members, were particularly on the lookout for publication of anything that would reveal classified information, attract attention to the project, or furnish an enemy agent or anyone else with knowledge sufficient to determine the nature of the project.[207]

While review of newspapers, periodicals, and other publications provided some protection against damaging revelations about the project, the fact remained that once such information appeared in print an element of secrecy was lost. Much more effective was a system that prevented publication of sensitive information. Under the Office of Censorship's "Codes of Wartime Practices for the American Press and American Broadcasters," newspapers, periodicals, and radio broadcasters voluntarily agreed to refrain from discussing certain specified subjects and mentioning certain terms. In February 1943, Vannevar Bush proposed that the atomic energy program be brought under this voluntary censorship. At first, both Gen. Strong, the Army intelligence chief, and Gen. Groves had serious reservations about making the atomic energy

project subject to this censorship arrangement, fearing that the results "might be more detrimental than otherwise."[208]

Finally, military leaders reluctantly agreed to the voluntary press censorship plan, persuaded primarily by the insistence of Nathaniel R. Howard, assistant director of the Office of Censorship and a former editor of the *Cleveland News,* that this was the only way to maintain press security of the project. On 28 June 1943, Byron Price, director of the Office of Censorship, sent out a special request to all editors and broadcasters that they extend the previously issued precaution not to publish or broadcast anything about "new or secret military weapons or experiments" to include:

> *Production or utilization of atom smashing, atomic energy, atomic fission, atomic splitting, or any of their equivalents.*
>
> *The use for military purposes of radium or radioactive materials, heavy water, high voltage discharge equipment, cyclotrons.*
>
> *The following elements or any of their compounds: plutonium, uranium, ytterbium, hafnium, protoactinium, radium, thorium, deuterium.*[209]

The aim of censorship was to prevent all mention of the atomic program in the American press; however, on the advice of the Office of Censorship, the District permitted a limited amount of information about certain aspects of the project to appear in newspapers published in communities near the Clinton and Hanford sites. Office of Censorship officials pointed out that complete suppression of information about activities at these locations would actually draw more attention than a policy of judicious release of news of local interest, carefully controlled so as not to reveal any vital secrets. They cited as an example the land acquisition at Hanford, which required relocation of many people and resulted in court proceedings. Stories on these events in newspapers of the Washington-Oregon region would not violate essential security as long as they did not reveal the purpose of the acquisition or the interconnection of the Hanford project with other parts of the atomic program. Gen. Groves assented to this policy but took the added precaution, suggested by Office of Censorship officials, of having Manhattan District representatives visit the editors or publishers of local newspapers and operators of local radio stations to request their cooperation in maintaining the security of the project.[210]

At Los Alamos, security authorities endeavored to keep all mention of the site and its activities out of the press. Total exclusion was more feasible at the New Mexico installation because of its military administration and geographic isolation from surrounding communities. The policy was reinforced in late 1943 through the use of regular mail censorship and other measures to minimize the likelihood that knowledge of the site would come to the attention of the press.[211]

It was inevitable that a voluntary censorship system would not be totally effective, and, on those occasions when some reference to the project or atomic energy occurred in the press or on the radio, the District Security Office and the Office of Censorship took immediate steps to limit its circulation and to run down it origins. A rash of censorship violations occurred in late 1943. A columnist in the *Washington Post* announced that the Senate's Truman Committee was about to investigate a "half-a-billion dollar" War Department project in the state of Washington that

was "reported to be one of the largest single projects that's to be built From scratch in the Nation's history." On the same day the *Post* article appeared in the *Spokane Spokesman Review,* and soon thereafter the wire services picked up the news item. Almost simultaneously, several newspapers in Tennessee ran a story on the state's Selective Service that contained a passing reference by the head of the service, Brig. Gen. Thomas A. Frazier, to " the Clinton Engineer Works in secret war production of a weapon that possibly might be the one to end the war." In both instances, prompt action by the Office of Censorship led to withdrawal of the articles before they had received wide circulation. Subsequent action by the War Department resulted in tracing down the sources of the leaks and in implementing improved security measures to prevent such occurrences in the future.[212]

Poster used by isolationists to maintain the US policy of neutrality at the beginning of World War II.
PHOTO

END OF CHAPTER 1

Secretary Terasaki Established Net in South America

As a result of the conference of Mr. Terasaki with the Japanese Ministers of Argentina, Brazil, and Chile, Tokyo was informed on August 22, 1941 that the establishment of an intelligence network in Latin America had been proposed to secure information in the United States. Spies would be placed within the United States, American propaganda as revealed in printed matter and radio broadcasts would be analyzed, and intelligence secured from sources in Latin America would be collected and evaluated.

No. 643
From: Santiago
21 August 1941
To: Buenos Aires #62.

(Part 1 of 3) (Message to Tokyo #230)

From TERASAKI.

The results of my conference with the Ministers to Brazil, Argentina, Chile, and_ _ _ _are as follows:

1. We propose an (intelligence) set-up in Latin America in order that we might secure intelligence on the public opinion of the United States, her situation militarily and diplomatically. The method by which this is to be accomplished is roughly as follows:

a. We propose the establishment of spies within the United States. From these we shall obtain secret intelligence.

(1) This set-up shall perform the duties of collecting and evaluating information obtained from the offices and personnel of American ministries in Latin America.

(2) It shall study the effectiveness of the propaganda contained in American and Latin American printed matter and radio broadcasts.

(3) It shall collect and evaluate intelligence secured from persons with whom they are in close contact, as well as the offices of third-powers in Latin America.

(4) It shall collect and evaluate intelligence secured from individuals and government offices in Latin American countries.

2. Though we plan for the organization of an intelligence net and the distribution of agents necessary for the operation of these proposed steps, in light of current affairs when anything of great importance arises, we, of course, will put every detail into operation with the

Introduction

Japan Discovers the United States is Reading Its Codes

Expansion of Japanese Espionage in North and South America

Japanese Concern About Allied Counterespionage

Japanese Interest in American Labor Unions

Reports of Japanese Intelligence Agents in America

Japanese Reports From the United States

Japanese Attempts to Expand Its Naval Intelligence Activities

Japanese Foreign Minister Requests Special Intelligence Reports Concerning Pearl Harbor

American Officials Search Japanese Business Offices in Los Angeles

Japanese Authorities Express Concern over United States' Official Inspection

Consul Morishima Suggests Further Precautions to Ensure Secrecy of Dispatches

Mr. Terasaki Plans To Confer With

"America First" Committee

Arrest of Japanese in Possession of Illegal Passports

Freezing Order Curtails Japanese Intelligence Activities in America

Maj. Yano Arranges Anti-American Espionage

Minister Akiyama Estimates his Espionage and Propaganda Expenditures

Japanese Military Attaché Requests Expansion of Intelligence Facilities in the United States

Secretary Terasaki Established Net in South America

Japanese Espionage Network Begins Operations

Japanese Naval Officials in Mexico Disapprove of Furnishing General Intelligence

Ambassador Nomura Sends Representatives to "America First" Meeting

Frequency of Ship Movement is Left to Discretion of Consul

Japanese Continue To Watch Navy Maneuvers

Mr. Fuji Changes American Ship Maneuver Signals

U.S.S. Lexington Departs Hawaii

Consul Kita Notifies Tokyo of Balloon Barrage Defenses

Last Intercepted Intelligence Report Before Pearl Harbor Attack Lists Ships in Port

Inaccuracy of Japanese Intelligence Reports

Japanese Official Analyzes Roosevelt's Domestic and Foreign Strategy

Magic Bibliography

effectiveness with which it is carried out in spy stories.

Japanese Espionage Network Begins Operations

In line with the establishment of an efficient Japanese spy organization in South America on 22 August 1941 by Mr. Terasaki, the Japanese intelligence coordinator for the Americas, all Japanese offices in North America were ordered to give their immediate attention to the selection of qualified espionage agents. Among the spies was a seaman who was to be placed with some prominent steamship company servicing North American ports.

Foreseeing difficulties in selecting reliable individuals and in checking information derived from foreign countries, Mr. Terasaki emphasized the necessity of Japan's spending vast sums to procure men and administer the whole intelligence network. Combating American counterespionage activities presented a problem since FBI agents were known to be attempting to gain the confidence of those employed in the office of the Axis nations. He urged, therefore, that all Japanese agents be selected with care.

Each Japanese office in South America was to be equipped with radio sets capable of receiving US domestic broadcasts. Moreover, a central listening post would be located possibly in Brazil, where a secretary proficient in English shorthand would be on duty at all times. It was learned later that American broadcasts would not reach beyond 1,000 miles. This made it impossible to establish a post either at Buenos Aires or Rio de Janeiro to listen to broadcasts made in the United States.

Subscriptions to American papers and magazines were to be procured in the name of a South American for analysis by trained Japanese agents. Important spy centers were to be located in Brazil, Argentina, Chile, and Colombia, the latter country was of importance because of the nearness to the Panama Canal. It would be necessary, therefore, to enlarge the telegraphic sections of all Japanese offices and to use the intelligence sources supplied by the local Domei news agency, special correspondents, and Spanish and Portuguese language correspondents. Japanese merchants would be employed to keep the organization informed of economic conditions in the United States. If the Axis diplomatic staffs were ordered out of the country before the Japanese, their German and Italian informants would be hired. Not only were Latin American spies to be used, but also those who lived in Spain and Portugal, since it would be possible, should Mexico enter the war, to relay information from Mexico to Spain where it could be retransmitted to Japan.

No. 652
From: Santiago
17 September 1941
To: Washington #65.

(Circular.) (In 3 parts _ _complete.)

Santiago to Tokyo #261.

(Separate wire.)

Regarding paragraphs 1 to 3-a of my message #231.

All of our offices in North America should give their immediate attention to the selection of spies. They should choose only those who are best qualified for the job and have them go to work on collection of

information and, if possible, liaison. The offices in Latin America shall accept those reports from them in which they can place credence. If it is possible to obtain the services of an informant who has been a seaman, it might be a good plan to try and get him a job in a steamship company. (There is one who falls in this category in New York. It would be very much to our interest if a job could be found for him in some steamship company which as a North American service.)

It must be borne in mind, of course, that it is exceedingly difficult to select individuals who can be reliably utilized. Moreover, it is very difficult to check any information from a foreign country. Therefore, it is of primary importance that we make up our minds to spend vast sums of money.

It is a known fact that the F.I.B. (F.B.I.?) is making a practice of trying to get its men into the confidence of those in the offices of the Axis nations. Please note this point carefully and exercise the utmost caution in making the selections.

The matter contained in (b) of the above referred section, would be next to impossible to put into effect. However, if there is one with whom very close relations have been maintained in the past, it may be that he could be utilized.

With regard to (c) of the same section, each office should be equipped with good radio sets of the middle wave band. They shall be used to listen to domestic broadcasts in the United States. The central listening post shall be located, let us say, in Brazil, where one who is proficient in shorthand of English shall be on-duty at all times.

The leading U.S. newspapers and magazines shall be subscribed to now in the name of some foreigner. These shall be thoroughly perused (even to the society columns) and carefully analyzed.

The intelligence officers referred to in section 4 of the same message shall be stationed in Brazil, Argentina, Chile, Colombia, (the last mentioned is looked upon as a very important post by our Army and Navy, with a view to obtaining information about Panama, as you are already aware), and Mexico.

To fulfill all of these duties, the telegraphic section of all of those offices concerned will have to be considerably enlarged. This is at present the most important actual step to be taken.

As sources of supplies for the above mentioned intelligence personnel, the present sources of Domei news agencies and others of our special correspondents shall be utilized. We shall also make indirect use of the Spanish and Portuguese language correspondents.

Since it will be of interest to keep abreast of the economic conditions in the United States, we shall maintain close contact with our merchants who in turn will keep themselves advised through local native merchants who have access to the information in the United States.

Should the German and Italian diplomatic officers be ordered out of a country before the Japanese, we shall make arrangements to take over their informants.

The informants referred to above shall not be limited to Latin Americans but shall also include those who reside in Spain and Portugal. (Should, for example, Mexico get into the war, our informants in Mexico shall relay their information to those in Spain and Portugal who in turn shall pass it on to Japan.)

Relayed to Washington. Mailed to Rio de Janeiro and Buenos Aires.

No. 653
From: Buenos Aires (Tomii)
26 September 1941
To: Washington #15

Re #261 sent from Chile to the Foreign Minister.

According to what the specialists say _ _ _ _broadcasts do not reach any point beyond 1000 (miles?). I understand that even with a good receiving set it is impossible to listen in here or in Rio to broadcasts made in the United States.

Japanese Naval Officials in Mexico Disapprove of Furnishing General Intelligence

To Foreign Minister Togo's inquiry whether the office in Mexico had begun the work of furnishing general information, Ambassador Miura replied that he had discussed this matter with his Naval Attaché and had subsequently wired the Chief of Special Service Section of the Naval General Staff. Although at present they were waiting a reply, he pointed out that because of the necessity of maintaining the security of the "L" organ, the naval authorities disapproved of furnishing general information. He asked that the Japanese Foreign Office discuss this matter with Navy and subsequently wire its decision.

Eight days later Foreign Minister Togo declared that general intelligence was to be distinguished from naval intelligence in that it was used for reference purposes by the Foreign Office. He was instructed to reorganize his office immediately for the collection of general intelligence.

No. 260
From: Tokyo
28 October 1941
To: Mexico #218.

(Strictly Secret.)

Have you begun the work of furnishing general information? Please wire me the results.

No. 261
From: Mexico (Miura)
28 October 1941
To: Tokyo #427.

(Secret.)

Re your #218.

After talking the matter over with the Naval Attaché here, we wired #57 to the Chief of the Special Service Section of the Naval General Staff, and we are present waiting for a reply. Since, for reason of the necessity of maintaining the security of the "L" organ, the naval authorities are not in favor of furnishing general information, will you please take the matter up again with the Navy and wire me the reply.

No. 262
From: Tokyo

5 November 1941
To: Mexico City #225

Re your #427.

General intelligence in contradistinction to Naval intelligence is used for reference purposes by the Foreign Office. Therefore please reorganize your office immediately along the line of my communication No. 953.

No. 263
From: Mexico City (Miura)
5 November 1941
To: Tokyo #432.

Re your # 225.

Your communication No. 953 has not arrived. Please wire the gist of it immediately.

Ambassador Nomura Sends Representatives to "America First" Meeting

Ambassador Nomura informed Tokyo that he had rushed Secretary Terasaki to New York on October 30 for the meeting of the America First Committee. There the intelligence agent has met_____(Comment: DoD withheld name). Secretary Terasaki asked _____ (Comment: DoD withheld name) to tell Colonel Lindbergh, who was for "America First," that the United States was about to fight with Germany concerning its policy of "Britain First" in the Atlantic, and with Japan under its policy of "China First" in the Pacific. He commented on the fact that a crisis was at hand between Japan and the United States and that the American people did not understand the reason for such a war, although, fundamentally, it would be due to the China problem. Secretary Tarasaki had further stated on this occasion that it was a mistake to think that Japan would give in if it were driven into a tight corner by the United States. It was necessary to view realistically the situation in the Orient, since it was most inconsistent to fear a southward push by Japan and at the same time to cut off her petroleum supplies.

No. 374
From: Washington (Nomura)
1 November 1941
To: Tokyo #1027.

Secret outside the Department.

As the American First Committee was meeting in New York on the night of 30 October, I rushed Terasaki up to New York on that date. He met with (an associate of officials of the Committee). (As the American First Committee is being watched by the F.B.I. this must be kept strictly secret.) After commenting on the fact that a crisis is right at hand between Japan and the United States he told _ _ _ _that he would like to have him tell Colonel Lindbergh, who is for America first, that, while the American people do not understand the reason for such a war, it has to do with the China problem, that the United States is about to fight with Germany over her policy of Britain first in the Atlantic, and with Japan over her policy of China first in the pacific. _ _ _ _consented and later the same evening he said that he had told him.

On this same occasion Terasaki also strongly asserted that it is a mistake, based on a misunderstanding of the Japanese psychology, to think that Japan will give in if she is driven into a tight corner by the United States, and that even as the United States is adopting a realistic policy in regard to Central and South America, it is also necessary to take a realistic view of the situation in the Orient, and that it is most inconsistent to express fear of a southward push by Japan, while at the same time cutting off petroleum supplies.

Relayed to New York.

No. 387
From: San Francisco (Muto)
9 November 1941
To: Washington Circular #282.

San Francisco to Tokyo #285.

The F.B.I. investigation of _ _ _ _(who was president of the committee concerned last year, at the time when the organization was dissolved) and others connected with the organization is being continued.

The F.B.I. has seven able investigators on this job, so that it would seem as though they considered the case an important one.

Although judging from the type of investigation, it would seem as though they were most interested in gathering evidence to be used against _ _ _ _and

_ _ _ _, it also is apparent that the Department of Justice feels the necessity of looking into this case, due to the numerous statements being made by the Dies Committee regarding Japanese propaganda in the United States. It also may be that they hope to make this the excuse for demanding recall from the United States of all Japanese Consuls-Generals and Consuls to Japan.

2. A rigid investigation of _ _ _ _ is being carried on. As he is officially registered as a foreign correspondent for the _ _ _ _, there is little danger of his being indicated (prosecuted). During the examination he will no doubt have to prove that he was hired by the _ _ _ _at $350 per month. Therefore, please arrange matters there so that if _ _ _ _should wire to "GO" of the _ _ _ _for a confirmation of the above, "GO" is to wire back to _ _ _ _this effect.

Frequency of Ship Movement is Left to Discretion of Consul

Since intelligence reports of battleship movements were made once a week, and the vessels could have traveled far from the vicinity of the Hawaiian Islands in that interval, Consul Kita was instructed by Tokyo to use his own judgment in reporting such movements. In addition, the Consul was asked to note the entrance or departure of capital ships and the length of time they remained at anchor. This dispatch of November 28 was translated on December 8, 1941.

According to a dispatch transmitted on November 29 and read by United States translators on

December 5, Tokyo requested that, in addition to giving reports on ship movements, Japanese officials in Honolulu report even when there were no ship movements.

No. 287
From: Tokyo (Togo)
28 November 1941
To: Honolulu #119.

Secret outside the Department.

Intelligence of this kind which are of major importance, please transmit to us in the following manner:

1. When battleships move out of the harbor if we report such movement but once a week the vessels, in that interval, could not only be in the vicinity of the Hawaiian Islands, but could also have traveled far. Use your own judgment in deciding on reports covering such movements.

2. Report upon the entrance or departure of capital ships and the length of time they remain at anchor, from the time of entry into the port until departure.

No. 288
From: Tokyo
29 November 1941
To: Honolulu #122.

We have been receiving reports from you on ship movements, but in future will you also report even when there are no movements.

Japanese Continue To Watch Navy Maneuvers

From December 1 to December 6, 1941, Japanese intelligence dispatches were transmitted regularly to Tokyo. On December 1 a significant dispatch reported that ship maneuvers were held approximately 500 nautical miles southeast of Honolulu, with the battleships leaving Tuesday and returning Friday or leaving Friday and returning Saturday of the following week. It was noted that the fleet had never sailed westward or headed for the "kaiui" straits northward; the sea west of the Hawaiian Islands was not suitable for ocean maneuvers. The estimate of distance was based on the fact that fuel was plentiful, long-distance high speed possible, and the guns could not be heard at Honolulu.

No. 290
From: Honolulu (Kita)
1 December 1941
To: Tokyo #241.

(In 2 parts complete.)

Re your #119.

Report on the ship maneuvers in Pearl Harbor:

1. The place where practice maneuvers are held is about 500 nautical miles southeast of here.

Direction based on:

(1) The direction taken when the ships start out is usually southeast by south and ships disappear beyond the horizon in that direction.

(2) Have never seen the fleet to westward or head for the "KAIUI" straits northwards.

(3) The west sea of the Hawaiian Islands has many reefs and islands and is not suitable as an ocean maneuver practice sea.

(4) Direction of practice will avoid all merchant ship routes and official travel routes.

Distance based on:

(1) Fuel is plentiful and long distance high speed is possible.

(2) Guns cannot be heard here.

(3) In one week's time, (actually the maneuvers mentioned in my message #231 were for the duration of four full days of 144 hours), a round trip to a distance of 864 nautical miles could be reached (if speed is 12 knots), or 1152 miles (if speed is 16 knots), or 1440 nautical miles (if speed is 20 knots) is possible, however, figuring on 50% of the time being used for maneuver technicalities, a guess that the point at which the maneuvers are held would be a point of about 500 miles from Pearl Harbor.

2. The usual schedule for departure and return of the battleship is: leaving on Tuesday and returning on Friday, or leaving on Friday and returning on Saturday the following week. All ships stay in port about a period of one week.

No. 291
From: Tokyo (Togo)
2 December 1942
To: Honolulu #123.

(Secret outside the department.)

In view of the present situation, the presence in port of warships, airplane carriers, and cruisers is of utmost importance. Hereafter, to the utmost of your ability, let me know day by day. Wire me in each case whether or not there are any observation balloons above Pearl Harbor or if there are any indications that they will be sent up. Also advise me whether or not the warships are provided with anti-mine sets.

Mr. Fuji Changes American Ship Maneuver Signals

On December 3, 1941, Ichiro Fuji informed the chief of the #3 section of Military Staff headquarters that he wished to change his communication signals for American ship maneuvers. Signal one would mean that the battleship divisions included some scouts and screen units and were preparing to sortie; signal two that a number of carriers were preparing to sortie; signal three that all battleship divisions had departed Hawaii between December 1 and 3; signal four that several carriers had departed between December 1 and 3; signal five that all carriers had departed between December 1 and 3; signal six that all battleship divisions had departed between December 4 and 6; signal seven that several carriers had departed between December 4 and 6; and signal eight that all carriers had departed between December 4 and 6.

A house on Lanikai Beach would be used as a signal station and would show lights during the night. One light in the window between 8 and 9 P.M. would denoted signal one, one light between 9 and 10 P.M. would mean signal two, and so on; two lights between midnight and 1 A.M. would signify signal five, and so on. It was further explained that if there was a star on the head of the sail of the Star Boat it would indicate

signal one, two, three, or four; if there was a star and the Roman numeral III, it would indicate signal five, six, seven, or eight.

Also used at night would be the attic window of the Kalama House, located on the east coast of Oahu, northwest of Lanikai. A similar system was to be used; for example, if the window was lighted between 1900 and 2000, it would indicate signal three, between 2000 and 2100 signal four, and so on.

In addition, signals would be transmitted through the regular broadcast station in Honolulu. For example, if a radio advertisement read, "Chinese rug for sale, apply P.O. Box 1476," it would indicate signal three or six, whereas the advertisement, "Beauty operator wanted, apply P.O. Box 1476," it would indicate signal five or eight.

In case the light or broadcast signals could not be sent from Oahu, the signals would be given by bonfire daily on Maui Island until the Japanese "EXEX" signal was received. The signal bonfire would be located at a point halfway between lower Kula Road and Haleakala Road and would be visible from seaward to the southeast and southwest of Maui Island. If the fire was seen between 7 and 8 P.M., it would indicate signal three or six; between 8 and 9 P.M., signal five or eight.

No. 292
From: Honolulu (Kita)
3 December 1941
To: Tokyo #245.

From Ichiro Fuji to the Chief of #3 Section of Military Staff Headquarters.

1. I wish to change my method of communicating by signals to the following:

a. Arrange the eight signals in three columns as follows:

Meaning and Signal

Battleship divisions preparing to sortie:

1, including scouts and screen units

- A number of carriers preparing to sortie: 2

- Battleship divisions all departed between 1st and 3rd: 3

- Carriers, several departed between 1st and 3rd : 4

- Carriers, all departed between 1st and 3rd: 5

- Battleship divisions, all departed between 4th and 6th: 6

- Carriers, several departed between 4th and 6th: 7

- Carriers, all departed between 4th and 6th: 8

2. Signals

a. Lanikai Beach. House will show lights during the night as follows:

Signal

- One light between 8 and 9 p.m.: 1

- One light between 9 and 10 p.m.: 2

- One light between 10 and 11 p.m.: 3

- One light between 11 and 12 p.m.: 4

b.

- Two lights between 12 and 1 a.m.: 5

- Two lights between 1 and 2 a.m.: 6

- Two lights between 2 and 3 a.m.: 7

- Two lights between 3 and 4 a.m.: 8

Part 2.

c. Lanikai Bay, during daylight.

- If there is a "star" on the head of the sail of the Star Boat it indicates signals 1, 2, 3, or 4.

- If there is a "star" and a Roman numeral III it indicates signals 5, 6, 7, or 8.

d. Lights in the attic window of Qualm House will indicate the following:

Times Signal

- 1900-2000: 3 - 2200-23__:6

- 2000-2100: 4 - 2300-2400:7

- 2100-2200: 5 - 0000-0001:8

e. K.G.M.B. Want Ads.

A. Chinese rug etc. for sale, apply P.O. box 1476 indicates signal 3 or 6.

B. CHICH..GO farm etc. apply P.O. box 1476 indicates signal 4 or 7.

C. Beauty operator wanted etc. apply P.O. box 1476 indicates signal 5 or 8.

3. If the above listed signals and wireless messages cannot be made from Oahu, then on Maui Island, 6 miles to the northward of Kula Sanatorium at a point halfway between Lower Kula Road and Haleakala Road (latitude 20-40N, longitude 156-19W), visible from seaward to the southeast and southwest of Maui Island) the following signal bonfire will be made daily until your EXEX signal is received:

Time and Signal

- From 7-8: 3 or 6

- From 8-9: 4 or 7

- From 9-10: 5 or 8

(COMMENT: This message was sent on December 3, 1941 but was not translated by American cryptanalysts until after the attack on Pearl Harbor.)

USS *Lexington* Departs Hawaii

Noting that three battleships had been at sea for eight days, Consul Kita said that the vessels returned to port on Friday morning, December 5. On the same day, the Lexington and five heavy cruisers left port. In port on the afternoon of December 5 were eight battleships, three light cruisers, and sixteen destroyers, while four ships of the Honolulu class were in dock.

No. 296
From: Honolulu (Kita)
5 December 1941
To: Tokyo #252.

(1) During Friday morning, the 5th, the three battleships mentioned in my message #239 arrived here. They had been at sea for eight days.

(2) The Lexington and five heavy cruisers left port on the same day.

(3) The following ships were in port on the afternoon of the 5th:

8 battleships

3 light cruisers

16 destroyers

Four ships of the Honolulu class and _ _ _ _were in dock.

(Comment: At sea near the end of the first week in December was the carrier USS *Lexington* accompanied by three cruisers and five destroyers on a combined search, which took them to the south and westward. - Battle Report, p.8.)

Consul Kita Notifies Tokyo of Balloon Barrage Defenses

On December 2, 1941, Tokyo directed the Japanese Consul at Honolulu to wire day-by-day reports concerning observation balloons above Pearl Harbor, or any indication that they would be sent up. In view of the present situation, the presence of battleships, carriers, and cruisers was of utmost importance, Foreign Minister Togo declared. He asked also that he be advised whether or not the warships were provided with antimine (torpedo) nets. This dispatch was not translated until December 30, 1941.

In accordance with these orders, the Consul informed Tokyo on December 6 that 400 or 500 balloons had been ordered in America and that their use was being considered in the defense of Hawaii and Panama. He reported, however, that, as far as Hawaii was concerned, no mooring equipment had been set up at Pearl Harbor nor had the troops been selected to man them. Furthermore, there were no indications that any training for the maintenance of balloons was being undertaken.

In addition, it was difficult for him to imagine that the Hawaiian defenses actually possessed any balloons. Moreover, there were limits to the balloon defense of Pearl Harbor. He imagined that in all probability there was considerable opportunity left for a surprise attack against Pearl Harbor, Hickham, and Ford. He added that he thought the battleships did not have any torpedo nets, but he would investigate the

details further.

No. 297
From: Honolulu
6 December 1941
To: Tokyo #253.

Re the last part of your #123.

1. On the American continent in October the Army began training barrage balloons, but it is understood that they are considering the use of these balloons in the defense of Hawaii and Panama. Insofar as Hawaii is concerned, though investigations have been made in the neighborhood of Pearl Harbor, they have not set up mooring equipment, nor have they selected the troops to man them. Furthermore, there is no indication that any training for the maintenance of balloons is being undertaken. At the present time there are no signs of barrage balloon equipment. In addition, it is difficult to imagine that they have actually any. However, even though they have actually made preparations, because they must control the air over the water and land runways of the airports in the vicinity of Pearl Harbor, Hick, Ford and We, there are limits to the balloon defense of Pearl Harbor. I imagine that in all probability there is considerable opportunity left to take advantage for a surprise attack against these places.

2. In my opinion, the battleships do not have torpedo nets. The details are not known. I will report the results of my investigation.

Last Intercepted Intelligence Report Before Pearl Harbor Attack Lists Ships in Port

In an intercepted intelligence dispatch transmitted on December 6, 1941 from Hawaii, the last before the Japanese attack on Pearl Harbor, the Japanese Consul reported that a number of battleships and one submarine tender had entered port on the evening of December 5. Nine battleships, three light cruisers, three submarine tenders, and 17 destroyers were at anchor, and four light cruisers and two destroyers were lying at the docks. The heavy cruisers and airplane carriers had left Honolulu. It appeared that no air reconnaissance was being conducted by the fleet air arm.

(Comment: Berthed in Pearl Harbor were eight of the nine battleships of the US Pacific fleet, nine cruisers, and a third of the Fleet's destroyers. Battle Report, p 6.)

No. 298
From: Honolulu
6 December 1941
To: Tokyo $254

1. On the evening of the 5th, among the battleships which entered port were ——and one submarine tender. The following ships were observed at anchor on the 6th:

> *9 battleships, 3 light cruisers, 3 submarine tenders, 17 destroyers, and in addition, there were 4 light cruisers, 2 destroyers lying at docks (the heavy cruisers and airplane carriers have all left).*

2. It appears that no air reconnaissance is being conducted by the fleet air arm.

Inaccuracy of Japanese Intelligence Reports

Since it was obvious at this time that Japan was attempting to obtain a total picture of military and naval strength in the Philippines, we well as last- minute information of ship movements and troop allocations, the accuracy of their spy reports may be gauged by comparing the information with an estimate of the strength of US air forces in the Philippines on November 27, 1941, as released by the Office of the Chief of Naval Operations. Japanese agents estimated that 1,283 military and 26 naval planes were based in the Islands (the former was later very slightly raised). Since according to the American estimate, 43 Navy planes and 298 Army planes were based in the Philippine Islands, our air strength in the Islands was greatly overestimated: there were 17 more Navy planes then were reported but 985 fewer Army planes than were listed by Japanese agents.

No. 332
27 November 1941
U.S. AIR FORCES IN THE PHILIPPINES NAVY

Type and Strength

- PBY-4 (Patrol): 14

- PBY-4 (Patrol): 14

- SOC-3 (Scout Observation): 4

- SOC-1 (Scout Observation): 2

- J2F-4 (Utility): 3

- SOC-1 (Scout Observation): 2

- SOC-2 (Scout Observation): 2

- 052U-2 (Observation): 2

TOTAL: 43

Two squadrons of OS2U airplanes, 24 in all, are being sent to the Philippines as soon as practicable. It is expected that they will be shipped from San Pedro in January, 1942.

ARMY

- B-18 (Heavy Bomber): 18

- B-17 C&D (Heavy Bomber): 35

- P-35A (VF): 52

- P-40B (VF): 30

- P-40E (VF): 117

- O-46A (VO): 7

- O-49 (VO): 3

- O-52 (VO): 10

- A-27 (Dive Bomber): 9

- A-39 (Combat): 1

- C-49 (Combat): 1

- P-26A (VF): 15

TOTAL: 298

In addition to the above 57 type A-24 dive bombers have been shipped to the Philippines this month, and further extensive reinforcements have been approved for complete delivery by February, 1942.

No. 306
From: Manila (Nihro)
1 November 1941
To: Tokyo #722.

1. The TON, MADDO, HON, 7 destroyers, 8 submarines and 3 minesweepers entered port on the 31st. But the TON left again on the morning of the 1st, destination unknown.

2. On the morning of the 2st the President Cleveland and President Madison left port loaded with American soldiers whose time was up, (number uncertain).

3. According to reports received from what we believe are reliable sources the number of American military and naval plans in the Philippine Islands is as follows:

(a) Military Planes

- Large, bombers, 29.

- Scout planes, 324.

- The same, B type, 62.

- Fighters, 317.

- The same, B type, 62131

- Pursuit planes, 302.

- The same, D type, 69.

- Training planes, 49.

- Total, 1283.

(b) Naval planes

- Large flying boats, 26.

4. Ships in port on the 1st: MAD, BAKE, PIES, HON, BEER, 9 destroyers, 3 submarines, WOHOTOSU, 3 minelayers. In Cavite: REI,

PASU, 2Z.

5. According to a report from the De La Rama steamship company two of their ships, the Dona Estaban (1616 tons), and the MADBUKARU (191 tons), had been requisitioned by the local American Army.

No. 316
From: Manila (Nihro)
10 November 1941
To: Tokyo #746.

Re my #722, first part of part 3—the number of large attack planes, latest models, 4-motored B-19's, is 32.

Re my #727, the black soldiers are American Negroes.

Japanese Official Analyzes Roosevelt's Domestic and Foreign Strategy

On November 12, 1941, a Japanese intelligence official in Washington sent Tokyo a report on the Roosevelt administration's method of dealing with the Japanese-American situation. In an effort to aid in the defeat of Germany, President Roosevelt had inaugurated military, economic, and industrial measures, which would eventually lead America into complete war. By assisting Great Britain, it had already entered the conflict on the high seas. While the US Army was not yet equipped to fight a war with Germany on land, for the present at least, the US Navy could engage German warships on the high seas. Nevertheless, in spite of the fact that President Roosevelt had almost dictatorial powers in regard to Congress and the military officials, the American people were not in complete sympathy with his policies. For example, on 10 November 1941, the *Times Herald* had stated that Roosevelt was as much a dictator as Hitler or Stalin. Furthermore, the American First Committee was secretly working to impeach President Roosevelt. On 30 October 1941 at Madison Square Garden, 8,000 members of the America First Committee gathered as a demonstration against the foreign policies of the present American Government.

In Washington, a former American Ambassador demanded that President Roosevelt be forced to resign his position as President by means of a referendum. He even went so far as to state that President Roosevelt might easily die during this disastrous period in the nation's history. This statement grew great applause from the audience. Apparently, the Japanese intelligence official went on to say, the move to impeach President Roosevelt was widespread and was initiated by many varying factions. An editorial in the *Times Herald* on November 4, 1941 warned that it would be impossible for Congress to impeach President Roosevelt because of the whip he held over the Army and Navy. Nevertheless, the editorial in this and other papers did mention the possibility of President Roosevelt's being impeached at some time, and the Japanese intelligence official believed this to be extremely significant.

As an indication that the American people were not entirely behind President Roosevelt's aid to Britain, the Japanese official cited the occurrence in Detroit when Ambassador Halifax was pelted with eggs. The American public as a whole had begun to view the prospect of war in its unprecedented aspects and after the sinking of the *Reuben James,* the country received a great shock. Although President Roosevelt took advantage of this sinking to declare an unlimited national emergency, in his speech on October 27, 1942, he did not stress foreign questions but placed his emphasis almost entirely upon America's internal problems.

No. 86
From: Washington (Nomura)
12 November 1941
To: Tokyo #1077.

(Part 1 of 4.)

From the Intelligence Official.

1. The ROOSEVELT administration is dashing along the road of military, economic, and industrial reconstruction with the object of defeating the Nazis.

So far as war on the sea is concerned, the United States has already entered the conflict. Even if ROOSEVELT should now decide to leave the Nazis be, he is already in too deep. Even though he tried to do a 180 degree turn, his economic reconstructionists would not let him. Therefore, it can be said that the United States is following the one road to complete war.

2. It is true that the American army is not yet equipped, but even if war were declared against Germany, no more than the present ocean fighting would be necessary and, therefore, such a declaration is possible. The reason why things are not going so well for the administration in this connection, however, is because the people are not complete behind it.

ROOSEVELT has the full support of the government, the military, and the Congress and is tantamount to a dictator (on the 10th, the Times Herald said in an editorial that ROOSEVELT is a dictator in no way less than HITLER or STALIN). The people, however, most certainly do not support ROOSEVELT. During the last two or three weeks this has been particularly evident. Let us look into some concrete examples: According to reliable reports the leaders of the America First Committee are secretly endeavoring with all their ingenuity to impeach ROOSEVELT. The stronger government pressure against it becomes, the more belligerent does this committee grow, and it may well be that the time will come when they will resort to force. The pressure of the government against the America First Committee is also becoming fierce. On October 30 in New York, there was a meeting of this committee, but they could not make any radio broadcasts. ROOSEVELT's own life is in grave danger. On that night in Madison Square Garden, the immense crowd totally 8,000 filled the building to overflowing.

No. 86
From: Washington (Nomura)
12 November 1941
To: Tokyo #1077

(Part 2 of 4.)

At a mass meeting in Washington, _ _ _ _, a former Ambassador, made a scathing attack on the ROOSEVELT regime and demanded a referendum against this deliberate drift toward war. On that occasion he said that at this so fateful moment in the nation's history Roosevelt might die. These were words of profound meaning and drew great applause from the audience. The Times Herald in an editorial said that the President holds the whip over the Army and Navy and has the full support of the Government. Therefore, it will be impossible for the Congress to impeach him. The editorial said, however, that some believe that he will be impeached, in any case, later on. Now, for papers in their editorials to use the world "impeach" cannot be overlooked as something light. Furthermore, pickets in front of the White House recently carried placards on which were written the words "Impeach the President". Another thing, some days ago in Detroit, Ambassador HALIFAX was pelted with eggs. Again the sinking of the Reuben James gave the popular spirit of this country a great shock and filled the people with a gloomy foreboding. In his speech on October 27th, ROOSEVELT did not stress foreign questions so much as he did internal matters. This is to be regarded as a declaration of internal warfare whereby ROOSEVELT whipped from its scabbard the sword of

an unlimited national emergency.

No. 88
From: Washington (Nomura)
12 November, 1941
To: Tokyo #1077.

(Part 3 of 4.)

2. The congress, as I said, is supporting ROOSEVELT. True enough, the Senate approved the entrance of armed merchantmen into the war zones; however, the actual figures were 50 to 37, and this could not, by any means, be called a crushing defeat of the opponents. This also may be regarded as a reflection of public opinion.

Things being as they are in he country, in order to dispel the dilemma and to condition the people for a war against Germany, it may be now that a counter-hand will be played. I mean to say, many people in the United States fear the German war machine frightfully. However, they know how we have fought so hard in China for four years and figure that we are about worn out. They also figure that we are weak in materials. They do not think that we could resist them very much and optimize over how quick we could be to come to our knees.

If we scrutinize this psychology closely, we find that the ROOSEVELT administration, although it does not want a two-ocean war, would probably not do anything to prevent the outbreak of a war with Japan, depending on how we Japanese act. Perhaps a point-blank declaration of war might be made. Then the people's thirst for blood could be stimulated, an unlimited emergency declared, the America First Committee dispersed, and all opposition crushed. Then they figure the popular mind might turn favorable for a war with Germany. In other words, we Japanese would be merely the tool with which the American administration prepares the way for coming to grips with the Reich.

4. What will happen if the United States and Japan come to blows? Well, Germany now has a vast occupied territory and is in the most favorable position to talk peace. England is already complaining that the United States is not sending her enough help. Germany, of course, does not want a long war, and she may suddenly, on unexpectedly generous terms, conclude peace with England. I mean to say that while the United States would be at grips with us, American aid to England would naturally slow down and give Germany a chance to make a separate peace with Great Britain. Germany will certainly do her best to achieve this feat.

No. 89
From: Washington (Nomura)
12 November, 1941
To: Tokyo #1077.

(Part 4 of 4.)

The New Deal failed, and the opposition to ROOSEVELT within the country became unmanageable. Just then the European war took a more lively turn through Germany's invasion of the Netherlands. ROOSEVELT, who is well-versed in international questions, joined the war then and there. It might be said that HITLER's attack on the Netherlands caused ROOSEVELT to enter the struggle immediately. Japanese-American relations are now at identically that same pass. I mean to say that a war with Japan would put the people squarely behind ROOSEVELT and make him a dictator. He knows fully that if he has to

fight, there will be a suitable opportunity which would not admit delaying war. Furthermore, in view of Japan's foreign policy, it can be seen that our relations with the United States have reached such a pass that a decision on war is about the only thing that could raise them from the dead. Judging from internal conditions in the United States, for the foregoing reasons there is no hope for a thorough-going pact at the present time. It would be better to devise some relatively easy small-scale makeshift of a temporary nature laying stress on economic matters. Germany will keep sinking American ships and the President's position will become harder and harder, so as soon as a show-down with Germany is inevitable, then we can get a full-fledged pact. Again, if we do have to fight the United States, we could do this much better after she is at war with Germany.

END OF CHAPTER 2

Counter-Espionage (X-2)

This section was taken from the official history of OSS. The text has been slightly edited.

Counterespionage (CE) is a distinct and inde-pendent intelligence function. It embraces not only the protection of the intelligence interests of the government it serves, but, by control and manipulation of the intelligence operations of other nations, it performs a dynamic function in discerning their plans and intentions, as well as in deceiving them. An effective counterespionage organization is therefore an intelligence instrument of vital importance to national security.

The development of a secret intelligence organi-zation makes protective counterintelligence inevitable. However, to confine such activity to its protective aspects would be to eschew the development of the affirmative phases of counterespionage, which give it its unique and distinct value.

A counterespionage organization usually develops slowly. Basic to it is the vast body of records, which is the key to its operations and which normally takes years to accumulate. A second requirement, however, no less vital, is skilled personnel familiar with the intricate techniques by which the intelligence efforts of other nations may be controlled and directed.

The United States lacked these basic factors. At the outbreak of the war, its counterintelligence activities were performed by several agencies and departments of the government and the armed forces, principally FBI, G-2, and ONI. Fortunately, the domestic security problem, most important at that time, was efficiently handled by the FBI, which kept itself alerted to threats from beyond US borders by liaison with Allied security services, chiefly those of the British. With respect to areas outside the Western Hemisphere, however, the United States had virtually no security protection. Also, the divisions of interest of the various American organizations concerned with counterintelligence and the limitations upon their several missions had resulted in incomplete and duplicative records, which were scattered and uncoordinated. The lack of complete past and current records of enemy espionage organizations, their personnel, and activities made the effective pro-secution of counte-espionage seem impossible.

The development by COI/OSS of a secret intelligence organization to operate outside the Western Hemisphere made it obvious that it would be necessary to establish a security organization for its protection. It is, of course, inevitable that a secret intelligence agent in a foreign area

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Extract of Memorandum from Brig. Gen. William J. Donovan to Maj. Gen. W.B. Smith

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will attempt to acquaint himself with the intelligence activities and undercover personnel of other nations operating in the same area. This, however, provides only localized and uncoordinated knowledge. Furthermore, it does not take advantage of the affirmative possibilities inherent in the possession of such knowledge, if it is coordinated with related data and supported by an efficient centralized organization.

It was widely recognized that centralization was the key to counterespionage. This may be said to be true of secret intelligence generally. When it became apparent in early 1942 that SI would have to set up some form of security organization, the question of centralization was raised. By midsummer, the subject had been discussed by COI/OSS, not only with other agencies and departments of the government, but with the British Security Coordination. Such discussions stimulated the move to establish a CI division in SI.

The British had been sharing with COI, G-2, FBI, ONI, and other interested agencies certain counterespionage information. Experience gained in unraveling Axis espionage and sabotage organizations had developed a high degree of efficiency in the coordinated net of security services, which the British had long maintained. In addition, they had built up over many years one of the essential instruments for CE work —a comprehensive and current registry on hostile and suspected persons and on their organizations and relationships. Nothing remotely like it on overseas CE intelligence was available to American agencies. Nor could such a body of records be produced except after decades of extensive operations. Therefore, the British were particularly anxious that the handling of the information, which they made available to the American services should be consonant with the highly specialized CI techniques they had evolved. This demanded carefully trained specialists, solely concerned with CE material loosely coordinated with US agencies.

In August 1942, therefore, representations were made by the British, which strongly suggested an arrangement between the British and American agencies that would provide a more restricted and secure channel for the handling of CI information. If such an arrangement was concluded, the British indicated that they would be willing to make available all the CI information in their possession. The significance of this offer to the development by the United States of a counterespionage organization cannot be overstated. The United States was given the opportunity of gaining in a short period extensive CE records, which represented the fruits of many decades of counterespionage experience. Further-more, the British offered to train American personnel in the techniques essential to the proper use of those records and the prosecution of CE operations.

The proposed arrangement envisioned the establishment of a civilian CE organization within OSS—in short, an American entity similar to MI6(V) and MI5, the British services for overseas and home security respectively, both of which were civilian services only nominally under military control. Following preliminary discussions in the United States, Donovan designated one of his special assistants to proceed to London in November 1942, where he worked out with the British arrangements whereby a small liaison unit of the projected CE organization would be stationed in London. Procedure for transmission of the CE material to the United States also resulted from these discussions.

At that time it was intended that the new CE unit to be established within OSS should become the exclusive link between British and American CE services. FBI, however, had long maintained a close and cordial liaison with British security services, particularly MI5, in the

interests of American security in Western Hemisphere. It was therefore agreed that FBI, in view of its jurisdiction over CE in Western Hemisphere, would continue its independent liaison with British services insofar as exchange of CE information relating to that area was concerned.

Definitive arrangements having been concluded, a Counterintelligence Division within the SI Branch of OSS was established by General Order No. 13 of 1 March 1943. Arrangements were made to send four officers and four secretaries to London for the sole purpose of preparing the British channels to the United States. This group arrived in London by the end of March. The American offices of the Division were established in the OSS headquarters in New York City, which adjoined the offices of the British Security Coordination. CE material from overseas and from Washington was received through the British in New York and was indexed and carded by the CI Division there. The New York office served as headquarters for the new Division for some six months.

As the CI Division of SI expanded, realization of the full possibilities of counterespionage, together with certain problems of relationships both within OSS and with various British agencies, made it evident that the ultimate development of the CE function would not be possible if its divisional status was maintained. In the first place, counterespionage, as explained above, serves a greater purpose than the protection of secret intelligence activity. Secondly, the British SIS and their domestic and foreign security services were totally separate and distinct organizations between which rivalry existed. Also, COI/OSS policy had been from the beginning to maintain complete independence in the secret intelligence field, whereas close cooperation and collaboration with British CE were essential to the CI Division. As has been noted, it is doubtful that the activity could have been more than nominal during the war years had not the cooperation of the British been offered and advantage taken of the unique opportunity thus presented.

An additional factor which complicated the position of the new Division as a part of SI was that the approach to Controlled Enemy Agents (CEA) necessarily had to functional, in effect, as opposed to the geographic setup of the SI desks; that its Registry (which formed its major activity in the United States) had to be completely separate; and that CE security problems were distinct from those of a secret intelligence service.

In view of these factors, it was proposed that the Division be given independent status as one of the intelligence branches. In this proposal SI concurred on 15 June 1943. Therefore, General Order No. 13 was recinded and a new order issued to create the Counterespionage Branch (X-2) of the Intelligence Service of OSS.

X-2 was therefore free to develop the possibilities of CE in the protection of the security of American intelligence activities abroad, as well as the protection of national interest in foreign areas. In addition, the Branch was in a position to take advantage of long British experience and knowledge of the techniques of manipulating enemy agents and therefore to enter the intricate field of CE operations.

The London office of X-2 soon became, and remained for the duration of hostilities, the base for the control of CE operations in Europe. The broad liaison established in London, consequent upon the elevation of X-2 to branch status, diminished the significance of the relations with the British in New York. Further, the arrangements for carding and processing of incoming material in New York, useful while the

American carders were in the tutorial stages and needed the help of their British colleagues, became awkward when that stage had passed. Much of the material arrived initially in Washington, had to be transmitted to New York, for a short time, and then returned to the permanent and central X-2 Registry in Washington. In addition, CE material had to be screened from the mass of information flowing into other OSS branches in Washington, and such material could not be conveniently sent to New York for carding. Therefore, in September 1943, the research work in New York was discontinued and the files transferred to Washington. The move facilitated the work of X-2, tightened the unity with which the Branch operated, and placed the control of the Branch closer to the central authority of OSS.

By September 1943, X-2 was therefore in a position to address itself to the job of developing a major security organization in the remaining period of the war.

Organization

In January 1944, by the end of the formative period, it was possible for X-2 to lay out a firm plan of branch organization. An assistant Chief, who served as head of the office in absence of the Chief, dealt with current policy problems. The Administrative and the Liaison Officers, together with a Deputy Chief, reported directly to him.

The Administrative Officer was responsible for all budget and finance matters, the procurement of office personnel, arrangements for home and overseas travel, and other administrative functions.

The Liaison Officer established and maintained channels for the exchange of intelligence with other branches of OSS, with ONI, G-2, FBI, State Department, Office of Economic Warfare (OEW), X-B, and other American and Allied agencies.

The Deputy Chief had charge of the procurement of military and civilian personnel for overseas duty; for the headquarters services to overseas operations and research; for the training, indoctrination and briefing of all personnel; and for the organization of field offices and field communication procedures. He had under him a field procurement and training officer.

The Deputy Chief was assisted by an Executive Officer whose main concern was the four offices, which handled Security, Planning, Personnel, and Training.

Headquarters intelligence activities were organized under an Operations Officer and a Director of Research who reported to the Deputy Chief.

The Operations Officer was responsible for all overseas operations; for all routine functions in connection with procurement for overseas personnel; for cover, communications, and other like arrangements.

The Director of Research supervised the work of the "geographical" desks—divided on the basis of theaters of war—where reports were processed and marked for carding and for distribution. He also supervised the Traffic Index and Registry Section, which maintained the card index system of enemy agents, organizations and their relationships, maintained files of documents and cables, and received, recorded, and dispatched all X-2 documents. Under him were four desks for special studies: The Enemy Intelligence Organization Section —which produced overall studies for use in operational planning and for the information of field personnel—the Watch List Unit, the

Insurance Intelligence Section, and a CE/Smuggling Section. The X-2 Art Unit was added to these special sections a year later.

The first drastic change in the early arrangements for handling the intelligence (Registry-Desk) activities in the Washington headquarters came in April 1944, when the Divisions of Operations and Research were abolished. Their functions, hitherto separated, were combined under geographic area offices, supervised by Theater Officers. The Carding Section was discontinued as a unit, and its files were divided among the geographic area offices. Thereafter, the carding was done under the immediate direction of the area intelligence officers. The alphabetical control card file, which showed the location of all personality cards, was located in the X-2 Registry. The Office of Special Studies continued as an independent unit on the same level as the Theater Offices and reported directly to the Deputy Chief. The former Director of Research was made Coordinator of Analysis to assist him.

A further change was made in November 1944 with the creation of the Office of Executive Assistant to the Chief of the Branch. This officer was given authority to act in the name of the Chief over the entire Washington X-2 organization. At the same time, a Chief Intelligence Officer was appointed to supervise the work of all intelligence personnel, this eliminating the Office of the Deputy Chief.

The Office of Special Studies was abolished, as was that of the Coordinator of Analysis. These functions were place under the Chief Intelligence Officer, as were those of the Theater Officers. A vetting Officer was placed on this staff, and the X-2 Registry was taken from the administration office and put under his direct control. This adjustment placed all research activities—intelligence reporting, the making of intelligence records processing, and the like—under the direction of the Chief Intelligence Officer. One of the purposes of the change was to bring headquarters handling of intelligence into line with that of the London War Room, which had been set up to assist SCI units with armies and army groups in the field after D-day.

The reorganization symbolized the fact that the field offices, controlled and directed in the beginning by the area desks, were largely self-sufficient. The executive function was on the receiving end, either of requests for services, which could be handled by administration or for information, which could be produced by a staff intelligence officer.

Registry

One of the main coordinating CE instruments is the body of records—of foreign, enemy or potential enemy personnel, organizations, relationships, activities, known plans—kept by the registry section. In a certain sense, the organization exists to produce its files of current, tested, and readily available information and to apply them to the protection of national interests. It is, therefore, at once an end and means of all CE activities, being the focal point at which all lines of such activities meet. It thus provides the basis for the coordination, which is essential. The files provide leads for the filed, which in turn produces material for the growing accumulation of data in the files. The CE registry may supply data useful in illuminating decisions on the application of national policy in certain areas or for the light it can throw on the problems met by CE workers in the field. No positive intelligence collecting agency can operate safely for long without the protection CE files can afford to its agents.

CE cases may take years to mature. Items in the files that have every appearance of being dead can suddenly become of primary importance. Thus it is known that enemy organization will normally plant as many

"sleeper" agents as they can to be alerted and used at a later date. It is well in all cases to go on the old CE axiom: "Once an agent, always an agent—for someone." Such individuals may not be important in themselves, but they will in due time be visited by and call attention to more significant figures.

The assembling of CE records is usually a long and expensive business. The European intelligence services—because of the geographical, industrial, military, and political situation of their states vis-a-vis their neighbor states—have been forced to recognize the significance of security information. They never go out of business, and they regard the money laid out for keeping up their files as money well spent. CE operations cannot be mounted quickly and still be made to yield useful returns.

Liaison with other government agencies and the intelligence services of friendly governments and, on occasion those of unfriendly ones, provides a valu-able source of CE information. This is particularly true in time of crisis or of war when mutual interest can be served by exchange of information, thus the X-2 liaison in Washington with FBI, G-2, ONI, State Department, Office of Censorship, Treasury Depart-ment. Foreign Economic Administration (FEA) and Office of War Information (OWI), was carefully maintained throughout the war. The reports passed on by other branches of OSS also added valuable material to the files. The richest sources, however, were those opened to the Branch by the British, and, in varying degrees, by other Allied services.

Like control of the enemy's pouched messages, the interception, when possible, of his telephoned, telegraphed, or wireless messages provided positive and security intelligence of the highest value. A CE organization inevitably secures—especially in war-time from captured agents—information very useful to the cryptographic department of its government; in turn, such relevant information as those departments pass on is used to protect the security of national interests. Interchange of mutual services apart, there is normally in all major intelligence systems a close tie, based on security considerations, between the overseas CE organization and the departments that work on codes.

The improvement of the mechanics of the Registry, and of the related processing of reports by intelligence desks, was a matter of constant concern to X-2. The efficiency of the CE Registry is an index of the efficiency of the organization that exists to produce and apply it; any maladjustments in the organization of the headquarters office is felt there seriously; maladjustment in the Registry, in turn, reacts on the work of the liaison section and on the operations of the agent network. The basic principle that the CE reistry must be separate from other intelligence registries and be served by people trained in CE methods and procedures was recognized at an early date; when an independent section of the OSS Registry within X-2, manned by Branch personnel, was established. It took some time, however, to get the Registry and desk arrangements running smoothly. Such arrangements aimed at a full and free flow of information from and to the field, a speedy, accurate recording system, and an organization of the records which would at once reflect the worldwide unity of the agency and make all items easily available. In the beginning, the Registry-desk problems arose chiefly from a lack of experience and of trained personnel.

The Branch Chief was able to announce in September 1945 that X-2 had received a total of more than 80,000 documents and reports and 10,000 cables, yielding a card file of some 400,000 entries. Lists, reports, and studies based on this material had been distributed to US

departments and agencies, to Allied organizations, and to X-2 offices in the field. In the period 1 April 1944 to 1 April 1945, for example,

X-2/Washington distributed 2,780 classified reports, ranging from overall studies to reports of more usual length, to government departments and agencies.

Personnel Procurement and Training

The Personnel Procurement and Training and the Administrative Sections were faced with multiple difficulties, which inevitably grew out of the rapid expansion of the Branch in the first six months. The task of carrying through the necessarily slow processes of contacting, checking, assessing, indoc-trinating, training, and briefing more than 200 CE workers and subsequently dispatching a large percentage of them to the field was particularly formidable in view of the Branch's rigid security standards. The strictness of the procedural and security arrangements of a CE machine, the tightness of allotments of Army and Navy personnel during those months, the shortage of transportation, and other elements in the wartime situation restricted freedom of choice and movement.

With settlement of policy and practice with respect to recruiting and training and the acquisition of a larger number of more experienced officers in the Washington field office to help with the program, the training of the 400 recruits, later added to X-2, became more manageable. A formal indoctrination course, which followed attendance at the assessment school, was set up in June 1944 for overseas personnel. It was given in part in the headquarters offices and in part at a staging area in New York City while personnel awaited transportation to the field. A month later a program was established for the training of headquarters officers and secretarial workers.

Percy E. (Sam) Foxworth, Special Agent in charge, FBI, New York City.
PHOTO

Inter-Branch Relations

All matters of inter-Branch policy were determined in Washington. Questions arising on matters within the jurisdiction of the London office were decided in Washington on information from London. As the field operational control office, London was vested with the authority to make decisions necessary for field operations in Europe, North Africa, the Balkans, and the Middle East.

Problems of adjustment were inevitably numerous in the first few months—especially those that involved interpretation of the basic principles of X-2 to other branches of Special Operations (SO) and to other agencies.

The peculiarities of a CE organization were for a time not fully understood within OSS and the necessity for special X-2 arrangements was not at first acknowledged. The need for separateness of its Registry was one such matter. Unique CE security regulations, especially with respect to cable communications, was another.[1] Also, Special Training (ST) had originally based its curricula on the special needs of SI and SO, and changes, which were necessary for the adequate training of X-2 personnel, could only be brought about slowly. Misapprehensions as to the close relations between X-2 and the British services were not infrequent. For the last months of 1943, then, the establishment of Branch policy in these respects was one of the main preoccupations of the Branch Chief and his assistants.

The definition and adjustment of such policy decisions in terms of the organization and work of the Branch were constant. Frequent adjustments within the frame of established policies were called for by

management difficulties that arose from forces beyond the control of the Branch—the regulations of other services and the like—and by those that came from the necessarily exploratory and tentative character of the organizational pattern during a period of very rapid expansion.

Liaison With Other Agencies

One of the chief activities of X-2/Washington was the transmission of CE information to other user agencies and for that reason the Liaison Section was one of its busiest units. In addition to responsibility for arrangements within the Branch to expedite liaison with Allied services, the Section maintained continuous liaison with State Department, G-2, ONI and FBI, as well as with Air Intelligence (A-2), the Office of Censorship, FEA, OWI, Treasury (including the Bureau of Narcotics, Secret Service, War Refugee Board, Foreign Funds Control, Bureau of Customs, Bureau of Internal Revenue), and such other governmental departments and bureaus as were interested in CE information. It also maintained the American contact with British counterintelligence and British Imperial Censorship.

In the year before the German collapse, more than 3,000 reports were disseminated to Washington agencies. Of these, 682 went to the Office of Censorship, 410 to FBI, 977 to G-2, 480 to State, and 125 to ONI. In addition to such disseminations, X-2 made available to FBI a list of approximately 5,000 documents of an intelligence nature from its records. The liaison with FBI was concerned largely with the exchange of information on the overseas background of persons of interest to the Bureau; with intelligence regarding enemy agents who might operate in the United States; and with the coordination of policies and arrangements for the handling of certain double agents prior to their departure from Europe for the United States.

Special Units

A Watch List Unit was set up in July 1943 to collect for dissemination to the US Office of Censorship, British Imperial Censorship, and French Censorship all CE information derived by X-2 from the communications of known or suspected agents. The Unit listed all names of such agents and their cover addresses, letter boxes, or mail drops so that enemy communications could be intercepted and surveyed. It was possible for the Unit to pass on to the censorship offices with which it cooperated studies not only on persons and organizations but also on methods of secret communication. In turn, it received like information from those offices.

An Insurance Unit was established when X-2 headquarters were in New York, and its work was directed from there throughout the existence of the Branch. Its function was the detection of enemy intelligence activities operated through insurance cover. As its work progressed, it evolved into an X-2_SI unit, with its most profitable investigations those of a secret intelligence nature. Never a large unit —it was staffed by six officers who were insurance experts—it did impressive work. For example, its London office secured, after other American intelligence investigations had failed, information valuable to the military, naval, and especially air commands with regard to the Far East, as well as Europe. The procurement of such information illustrated once more the intelligence principle that the richest intelligence on an area frequently can be gathered at a point outside that area.

A CE Smuggling Unit, planned toward the end of 1943, was designed to coordinate information on smuggling from all available sources because of the frequent tieup between that activity and espionage. It was hoped that such a unit, surveying, for instance, the smuggling

traffic between Iberia and South America, could produce for OSS, FBI, and other American intelligence agencies studies on the relations between various Fascist intelligence systems, their communications, etc. Actually, this promising plan came to nothing because of a shortage of officers. As a result, the geographical desks had to deal piecemeal with such problems as they arose.

An X-2 Art Looting Investigation Unit was established in the second half of 1944, when it became apparent that the Germans intended to carry on with plans for subversive action after the cessation of hostilities and were making arrangements for a supply of funds during the post-hostilities period. It was known that various sorts of treasure, in the form of items of small bulk but great value (jewels, paintings, objects d'art), which could be converted into money, had been stolen or otherwise acquired and were being stored at various places in Europe. The Allies appointed the Roberts Commission and the McMillan Commission to advise the US War Department and the British War Office, respectively, on questions involving the return of such objects to their rightful owners. X-2 was primarily interested in the people who would attempt to dispose of works of art of this kind, as a source of information on current and future activities and plans of the enemy. The staff of the Art Looting Investigation Unit, which was related to the commissions mentioned above, worked under the direction of the London office.

OSS Field Security

The rapid growth of CE files, resulting from Washington and London liaison and from field operations, made it possible by early summer of 1944 for X-2 to be increasingly useful to OSS field security at a time when SI and other OSS operations ramified on the European Continent. Pursuant to a directive from Donovan, X-2 took over the CE investigation of a large number of new categories of OSS personnel: In July 1944, 677 names were vetted;[2] in August, 1,167. Field stations of American agencies, other than OSS, had recourse to X-2 files for the vetting of employees, especially in enemy territory under American control, as did foreign offices of the State Department in connection with visa applications and arrangements for the entry of members of foreign missions to the United States. Such work was performed under the supervision of an X-2 Vetting Officer.

By 1944, also, careful studies of prisoner-of-war lists were undertaken through liaison with the Captured Personnel and Materials (CPM) Branch of MIS, with increasingly interesting results. Subsequently, an arrangement was made whereby an interrogation officer from CPM was assigned to X-2 for CE liaison. He was briefed by X-2 from its files so that CPM could use the material without endangering the security of sources. Relations with the office of the Provost Marshal General were maintained to locate prisoners of war in order that identifications of certain prisoners as known or suspect agents could be supplied.

Field Operations

The principal function of CE was to penetrate the enemy's or potential enemy's closely guarded undercover intelligence services in order to discover his intelligence objectives. Knowing the enemy's aims, it was the further function of CE to neutralize his intelligence efforts or control and direct them to its own purposes.

One of the principal methods by which this was accomplished was the manipulation of double agents, that is to say, captured agents who would be persuaded to continue their activities for the enemy, ostensibly in good faith but actually at the direction of X-2. Various forms of pressure were brought to bear upon such agents, depending

upon the particular situation. Generally, however, the motivations of self-interest and self-preservation were sufficient. A second standardized form of double-agent operation would be the case of an agent recruited by X-2 and infiltrated into enemy territory to induce the enemy to employ him as an agent and return him to Allied territory.

In both of the above basic types of double-agent operations, there were varying benefits from the stand point of intelligence. The controlled agent could call for supplies or money. His reports to the enemy could attract replies, which revealed not only actual or projected enemy intelligence activities, but enemy intentions of greater magnitude. Further, such a controlled agent could serve as a magnet to draw other enemy agents into the CE-controlled network.

Such operations naturally required the utmost delicacy in handling. The two basic types of operations mentioned above were subject to an infinity of variations and adaptations, depending upon the particular circumstances. On occasion, operations involving controlled agents became extremely complicated. The enemy, of course, engaged in the same types of activity. Thus, an enemy agent might be infiltrated into Allied territory to seek employment as an agent. His objective would be to return to enemy territory, ostensibly working for an Allied service, but actually operating for the enemy. Such an agent might be tripled, if his real purpose were discovered when he sought employment with Allies.

Another variation would be a captured agent who might agree to be doubled, that is, to continue ostensibly operating his radio or other channel of communication for the enemy while under Allied control. If the enemy realized that such an agent had been "turned," he might try to feed the Allies deceptive material in the form of questionnaires. However, if it were realized that the enemy was aware of Allied control, the agent might be quadrupled in an intricate operation of deception and counter-deception. On occasion, the oration might become too complicated, whereupon it would be dropped.

One of the principal uses of double agents was to feed the enemy such seemingly good information from a given area that he would feel no need of sending additional agents to the region. In this fashion, X-2 could gain complete control of the intelligence, which the enemy received from a particular area.

There were infinite variations in methods of manipulating agents. They depended solely upon imagination, ingenuity, and judgment. The value of success in such operations was, of course, great. Control of the enemy's intelligence instruments provided an important channel of deception; examination of the enemy's intelligence question-naires to agents gave an indication of what he wished to know and thereby provided a basis for deducing his plans and intentions.

A primary principle was not to induce open defections on the part of enemy agents. If the enemy were aware that one of his agents had defected to the Allies, not only was an important channel of deception and a source of information closed, but the enemy would be inclined to send other, and perhaps more successful, agents to the region in question.

The actual operations of X-2 were, of course, carried out in the field. It was the function of the Washington headquarters to receive and preserve in usable form the fruits of field operations. The Washington Registry, however, made many field operations possible. The central Registry, in which was collected all available data concerning enemy intelligence organizations, agents, and subagents, as well as

organizational and individual relationships, provided the coordinating instrument, which was vital to success in counterespionage. Those files did not lose their value at the conclusion of the given operation, or of a war.

Individuals or relationships, which have seemed dormant for a long period, may become active again and provide the key to detection of widespread intelligence activities.

The uncoordinated fragments of enemy subversive personality lists, which had existed in June 1943 when the Branch was established, had by 1945 grown to a registry of some 400,000 carded names. These records, together with those of the FBI, provided a foundation for American security intelligence.

By October 1945, when OSS liquidated, X-2/Washington had become the headquarters for a widespread net of overseas stations, with a total of some 650 personnel. London was operational headquarters for North Africa, Western Europe, the Balkans, and the Middle East, with missions in France, Belgium, Italy, Germany, Austria, Switzerland, Sweden, Spain, Portugal, Rumania, Bulgaria, Hungary, Greece, Turkey, Syria, and Egypt. CE work in India, Burma, Ceylon and China had been organized around headquarters in New Delhi, Myitkyina, Kandy, Kunming, and Shanghai, each of which reported directly to Washington.

In addition to the valuable files of CE intelligence kept current by these stations and the reports resulting from liaison, X-2 had developed two other major elements of an effective CE organization: A pool of trained and experienced personnel and a net of relationships, principally in the form of basic agreements and operating contracts, with Allied counterespionage services at home and abroad.

Virtually all of the X-2 staff had received extensive CE operational training and experience in cooperation with Allied specialists in such work, both in the United States and overseas. The high success of a number of exclusively conducted X-2 operations in the field indicates the degree to which the staff of the Branch benefited from this experience.

In the two years and four months of its existence, X-2 worked out firm agreements with the FBI, G-2, and the State Department. In London, the basic operating agreement that was negotiated in 1943 with MI6(V) was supplemented by a scarcely less important agreement with MI5 in early 1944. X-2 thus gained full access to the experience and extensive files of both the external and internal British CE services. Similar working agreements were concluded with the French services. Liaison contacts were established with the competent services in liberated countries, notably Belgium, Holland, Denmark and Norway. Basic agreements with the military, for example, SHAEF, AFHQ, Com Z, and 6th and 12th Army Groups, implemented by SCI units had prepared the way for X-2 to service the occupation authorities after the collapse of Germany. Similar agreements in the Far East had opened up an additional field of operations.

Starting at a late date, X-2 developed a CE organization for wartime service, which could take its place among the major security services of the world. No small part of the credit for making this achievement possible was due to the records and experience made available by the British. In the course of exploiting that opportunity for wartime purposes, the United States assembled the elements of an effective CE service.

(b) X-2/London
A Counterintelligence Division of SI, organized March 1943, became the Counter-Espionage (X-2) Branch of OSS by June of that year. Despite the late start, by 1945 the United States had acquired an experienced group of professionals in the complicated techniques required for the protection of US services abroad. The advance was made possible by the extensive cooperation of British MI6 (Section V) and MI5.[3]

The British Services
From the beginning of the war, the British had urged creation of such a service either in OSS or jointly between OSS and the FBI. After it had been formed, the British carried out a thorough policy of offering the new section complete access to files in London, sources, secret methods, procedures, and knowledge of the personnel, organization, and operations of what was probably the world's most experienced and efficient, and therefore most carefully safeguarded, security system.

Characteristic of the apprentice training offered OSS by the British was that given to some X-2 members in the double-agent section of MI5(B). These officers were assigned desks in the offices of that section and had free access to the files of double-agent cases, to the traffic of current ones, and to the officers who had directed or were directing such cases. Normally, in the course of their study, they met both double and controlled enemy agents whom the British were operating, helped to gather the "chicken feed," which was to be transmitted to the Germans, and learned the relationship between the section to which they were attached and the other intelligence organizations which shared the exploitation of double-agent networks. One American officer was given a desk in the room of the director of the double-agent section and was made party to all conversations and conferences on problems arising in connection with management of current British cases, some of which were of a long-range character and therefore involved the highest security. When the secret methods of the British agencies were fully understood, the importance of the security risk they took was appreciated as overwhelming.

It was on this basis that X-2/London opened offices adjoining those of the British and began in March 1943 to learn the job. It became obvious early that London would have to be the center of X-2 operations in Europe, North Africa, and the Middle East due to the presence in London of other Allied counterespionage services and the sources of intercepted material, which were available only there. It was clearly impossible to transmit in a short time the vast stores of CE material in the British Registries, made available to X-2 through its liaison with MI6(V). Until the Washington CE files had grown from liaison sources, and from X-2's own subsequent field operations, to something like the quantity of those in London, action on cases of American interest would have to be handled by the group stationed in England.

This decision was not intended to, and did not, stop the flow to the United States of CE material of all classifications. The accumulation of CE files in the OSS Registry by the end of the war attested to the steady and voluminous flow of CE reports and studies from the London desks to those in Washington. It did mean, however, that, on the whole such material would be of use there chiefly for information purposes and for organization into a basic American registry of CE intelligence relating to areas outside the Western Hemisphere.

Other Liaisons
The prime necessity of maintaining a direct and close coordination, not only with the British but with other Allied CE agencies was another

important consideration in centering American overseas CE headquarters in London_at least until the last stages of the war. The headquarters, files, and staffs of the Free French, Norwegian, Dutch, Belgian, Polish, Czech, Greek, and Yugoslav Governments were located in London, as were those of the French Service de Securite Militaire. The eagerness of the chiefs and officers of these services to cooperate with the Americans provided an opportunity that no American CE group could disregard.

Liaison with the French was closer than that with other agencies, although it never reached the level of that with the British. British counterespionage agencies were unwilling to admit the French services and reserved joint operation to X-2 only.

Source material came not only from Allied counterespionage services but also through liaison with SHAEF Evaluation and Dissemination Section, Combined Services Detailed Interrogation Center (U.K.), London Military Documents Center (the earlier Military Intelligence Records Section), War Department, War Office, War Crimes Commission, Special Operations Executive (SOE), Admiralty, FBI, ONI and US Army Central Registry of War Criminals and Security Suspects.

Training

CE schooling of the more formal kind supple-mented the apprentice training. From the earliest days, English and French officers from London headquarters or from the field shared their experiences with X-2 personnel in frequent formal training talks. The subjects of these talks ranged from notes on communications, office procedures, and the like to analyses of the overall CE situations in certain areas. One series illustrated the interrogation methods of the Germans (by men who had been interrogated by them) and of the English (by men who had conducted the interrogations of enemy agents). Such English establishments as central registries, interrogation centers, and training schools were open to X-2 officers for observation visits. Another principal element in the X-2/London training was the schooling that grew out of the day-to-day association with colleagues in the British and other Allied CE services.

Desks

X-2 was first organized on a regional basis to match British opposite numbers: (1) The Western European section was established with three main desks, French (including Belgian and Dutch), German, and Swiss; (2) the Iberian section included Spanish, Portuguese, Italian and_through 1943_North African desks; (3) The Scandinavian; and (4) the Middle Eastern sections (established during the first quarter of 1944) handled the affairs of their areas under an arrangement of one desk each. American CE interests in Eire were covered by an officer who made visits to Dublin at regular intervals and kept close liaison with the section of MI5 that dealt with British security problems in southern Ireland.

In May 1944, Reports section was added to these and placed under an officer whose responsibility was the supervision of all X-2/London reporting procedures.[4]

The work of these desks comprised the bulk of X-2 activity: carding, collating, and interpreting all reported items of CE information in terms of the centralized intelligence available in land through the London registries; preparing notes for the field based on these studies, embodying information, suggestion, and direction; answering specific inquiries of field officers; preparing, for Washington and the field, handbooks, and other overall studies of the CE situation, enemy

organizations, and enemy methods; disseminating relevant intelligence items to other Allied agencies; and conducting liaison with other OSS, American, British, and Allied offices.

X-2 also personally checked SI agents against the British files, as well as employees of other US agencies. Such vetting had disturbed SI/X-2 relations for some time, because SI feared that the tracings would reveal its agents to the British services. Growing recognition by the other branches of OSS that such revelations could be avoided and that the benefits received from that service were valuable enabled X-2 to carry out more fully the directives of the Joint Chiefs of Staff and of the Director, OSS, to safeguard the undercover operations of the other branches in the field. Further evidence of profitable cooperation between SI and X-2 was the preparation by the X-2/French Desk, in July 1944, of CE briefs used for SI agents who were dispatched into five areas in France during that month. As the armies advanced, X-2 also conducted interrogations of SI agents who had been overrun by the armies and had been returned to England.

Preparing Special Counterintelligence Teams (SCI)

In preparation for the invasion of Europe, the X-2 intelligence sections for the areas to be occupied had two main tasks: the gathering of as great a store of basic counterespionage files as possible from the registries of the British and other Allies; the preparation of a machine consisting of Special Counterintelligence teams[5] for work with invading armies, and a headquarters War Room to support their operations.

These tasks were clearly parts of the one main purpose: the liquidation of the enemy intelligence and subversion services. The earlier operations, from neutral countries and newly gained footholds in Africa and on the Continent, aimed at drawing a tight intelligence ring about the periphery of enemy-occupied and dominated Europe; those that accompanied the attack of the armies applied in the field the stores of intelligence so far gathered toward the neutralization and control of enemy services.

There was in London a startlingly large and accurate mass of data on individual enemy agents and their organizational relationships, on channels of communication and the like; it was possible not only to list and map enemy offices and operational stations, communications chains and training schools, but also to pinpoint the location of individuals and of related groups of the German satellite undercover agencies. This information had been gathered from the activities of Allied CE stations in neutral countries, the surveillance of known enemy chains, the operations of double agents and controlled enemy agents, the interrogation of defected or captured enemy agents, censorship sources and various other means. The SCI teams carried this information to the field with them—information, which they, and the CIC teams of the armies, exploited with results that expanded at times in almost geometrical progression: the swift capture and interrogation of one pinpointed agent led to the identification and location of one, two, or three others, who each might yield like identifications in his turn.

Members of the SCI teams to accompany American armies in the field were trained and briefed in the X-2/London office, and, for a group of selected officers, in the double-agent section of MI5 (B). The training consisted of formal lectures on enemy organizations and their relationship; the study of CE files of invasion areas; classes in codes and communications procedures; work with desk personnel in the preparation of SHAEF cards, target lists, and the like; land discussion

and study group meetings with experienced British and American officers.

To supply a stream of information to SCI and CIC teams in the field, a series of cards was prepared by MI6 (V) and X-2. These were file cards, edited in a standard style, on which were summarized in a complete but compact form all information available from all sources on a single enemy or suspect personality. Cross references to organization and personal relationships were contained in the data given or were specially noted. A maximum use of symbols and abbreviations made it possible to pack the cards with information, so that reference to related cards could provide the basis for a quick but fairly thorough interrogation. Additions were to be made to these cards as new information came in; when need arose, amended new cards were to be printed and distributed. The cards were produced in several colors: data on persons connected or believed to be connected with the Abwehr or the Sicherheitsdienst (the main target of Allied CE agencies) were printed in pink cards; those on political quislings and collaborationists, on buff; those on friendly persons, on white. The Evaluation and Dissemination Section (EDS), which was set up by SHAEF to collect and collate information on the Nazi Party, police, paramilitary organizations, etc., received the pro forma of the pink cards assembled by X-2 and MI6(V), and printed and distributed them to the CI staffs.

War Room

In late April 1944, the training of the SCI units and Western European Desk's arrangements to serve them, were tested in a three-day field exercise carried out, together with SI and SO units, at Horsham under simulated battle conditions. An analysis of the weakness of the liaison and communications methods, brought out under this test, indicated the need of more standard procedures, which were accordingly prepared and published in May. The document fixed the terms under which a joint British and American headquarters' Western European Desk, to be known as the SCI War Room, was to operate, and defined the relationships between SI, SO, and X-2 with respect to the handling of agents, the interchange of information, and the interrogation of certain categories of persons. The plan established two separate organizations in Chief of Staff to the Supreme Allied Commander (COSSAC). One of these was the Evaluation and Dissemination Section (EDS) to compile, analyze, edit, and distribute (a) the semi-overt type of counterintelligence (on collabora-tionists, police, political papers, etc.), and (b) such secret intelligence as MI6/X-2 furnished it for production and distribution in the form of handbooks and pink SHAEF cards. The other was the so-called SCI War Room, an unofficial arrangement completely under the control of MI6/X-2 for the purpose of servicing SCI unites in the field and EDS in London.

The SCI War Room contained master maps pinpointing all known German agents and espionage centers, including "national" subagents of Allied-controlled German agents. It was a headquarters desk, geared to serve as the operational and intelligence base for the units with the armies. In the period before the liberation of Paris, it handled all requests, even for supplies, from the field.

Besides the normal desk work of receiving, processing, carding, and distributing the mass of information from all sources and preparing target lists and studies for the unites, it answered queries for checks on arrested or suspect agents, assisted with fuller information for field interrogations, and arranged with field units for shipment to the UK interrogation centers of enemy agents of importance or special promise as double agents. By September 1944, X-2 began to receive and distribute through the

War Room copies of the valuable "020 Reports"[6] (on the interrogation of enemy agents at Camp 020, the chief British interrogation center for agents apprehended in the United Kingdom or brought there from other countries). Until a special Vetting Desk was set up at the end of 1944, the War Room had also the task of carrying through security tracings on an increasingly large number of SI agents recruited in the files as military operations progressed.

Reorganization

In early March 1945, a reorganization of the War Room and desk system was accomplished, which (a) made of the War Room a broader and less secure agency, and (b) gave to the desks the job of handling double agents. The desks were now organized, not according to countries within the SHAEF area of responsibility, but according to branches of the German intelligence services.

The SHAEF G-2 Joint Counterintelligence War Room was to work directly for the SHAEF Counterintelligence Branch (CIB) staffs during the last phase of military operations and through the liquidation period that would follow the collapse of Germany. It was based on the large and efficiently staffed MI5 registry, together with that of MI6, and a number of posts in it were assigned to MI5 officers, secretaries, and clerical help. The French services were also admitted to participation.[7] The Director and Deputy Director were attached to SHAEF and were not responsible to their respective Services. The War Room had neither concern with the running of agents, although it did receive relevant information produced from such operations nor was it responsible for German activities outside the SHAEF area except for Austria, which, by special agreement, was to be the concern of the War Room during the occupational phase.

The new War Room was looked upon by the CIB staffs as part of their own machine, and they had recourse to it constantly for information on the German intelligence services and guidance in the conduct of their operations. This relationship made for a diffusion of information on enemy intelligence personnel and organizations to lower field units, which had hitherto known little or nothing about them. The War Room assisted in training and briefing interrogators assigned to American Interrogation Centers, a number of whom came to London for study and conference. It also sent to the field overall studies on enemy sabotage activities and methods, although none was prepared on such general topics as types of agents employed, missions, cover stories, etc.[8]

At the same time, it was decided that the London headquarters' handling of double-agents cases should be done, not by the War Room, but by the appropriate desks of X-2 and MI6(V), with the understanding that information derived from double-agent sources necessary for the operations of the CI staffs would be transmitted to the latter in a secure form by the War Room staff.

Desks were also relieved of the manual work of producing or amending SHAEF cards, by an arrangement that had all checking and processing, as well as the making of new entries on cards, done by a staff of expert women at the Registry. The translation, evaluation, and distribution of all in-coming captured documents were managed by a single section under the direction of an experienced officer, who supervised the production of English precis of relevant documents and of accession lists of all documents for officers of the interested desks. That officer also supervised Registry action on his material. Such work as overall studies, including the London weekly survey of the CE

situation for SHAEF, was taken care of by a small section of expert editors.

The most striking of the new features, however, was that the desks were assigned, not to the study of the GIS in certain areas, but to that of highly particular sections of the Abwehr or the Sicherheitsdienst themselves. Thus the several desk officers could become final experts on assigned sections and subsections of the German Intelligence Service (GIS). Given that concentration of specialty, an officer could have at his command all the information available on his subject and could, therefore handle more business more effectively in a day then he could if his interests were more dispersed and the necessity of refresher reading on various kinds of scattered cases necessary. Such functional arrangement of targets was an ideal one for a CE agency since the targets were not areas, but enemy undercover agents and operations themselves. Normally the area desk was the only

workable solution to the problem of world coverage; the final integration of data had to take place in general study sections working with registry files. In 1945, however, the enemy undercover agencies were concentrated in a small enough area to permit desk specialization.

An X-2 London Desk

A typical desk history, through the various reorganizations, was that of the German Desk, which began its work in January 1944. As was true of all the London desks, its first activities centered chiefly on the job of building up its basic file of records from the large accumulations of the counterpart British desk. It focused on the enemy undercover organizations in Germany, which for the purposes of the Desk, included Austria.

In August, of 1944, the Polish, Czechoslovak, and Swiss desks were incorporated into a German Desk, in preparation for a German War Room to service SCI teams and the filed stations, before and after the German surrender. Actually, no such War Room came into full operation for the season that the joint Z-2/MI5/MI6 SHAEF, G-2 Counterintelligence War Room came into being in time to deal with the mass of work on the arrests, interrogations, and the like, that came with the decline and collapse of the German military strength. The new arrangement left to the Desk the management of all special cases and the processing and distribution to Washington of the reports transmitted to it by the War Room on German cases. Lists of suspect persons, organization studies of the GIS, and area target lists and similar material made in preparation for the support of the field teams in Germany were, despite the change, distributed to the field.

Targets list, worked out from sources ranging from Top Secret material to German telephone books, were found to be highly useful to Theater-Forces (T-Forces) and CIC teams, which went into towns and cities with the first army units. Such raids yielded in turn, from captured documents and the speedy interrogations of captured GIS personnel, fuller and more recent information of target ahead. A staff of the German section in the Paris office worked on this project exclusively. Its lists, produced and distributed at top speed, were, when time allowed, supplemented and corrected by cabled and pouched notes drawn from the London files of the German Desk and of the War Room. Headquarters could, by this time, draw on fully checked and detailed interrogation reports of captured or defected German officers and agents of high grade. Toward the end of the fighting and after, only the more highly placed and more knowledgeable members of the GIS could be given thorough interrogation. They would yield more information of the significant personnel in the echelons below and above them, with the least expenditure of time and energy.

The German Desk collaborated with the War Room, not only in making target lists, but in the preparation of studies and reports on the methods and techniques of German intelligence services, recent changes in the relationships among branches of the various German services, their plans for long-range resistance, sabotage and intelligence operations, and related activities.

During the period of settlement after VE-Day, the Desk served the X-2 staffs at Wiesbaden, Frankfurt, Munich, Salzburg, Berlin, Stuttgart, and Bremen. All special cases handled by these stations were directed by the London German Desk.

The SHAEF War Room aimed at rapid self-liquidation as possible. By the end of the summer of 1945, the German intelligence services had disappeared as organizations. By that time, too, the Counterintelligence Branch (CIB) staffs were in a position, with the information provided by the War Room, to take over much of the work hitherto done by that unit. In September 1945, it was terminated, and X-2 London remained the controlling center for US counterespionage operations in Europe.

The War Room had been an arrangement for the servicing of the mobile CE units that mediated between the London registries and the CIB staffs with armies and at army groups. However, much CE data one X-2 filed unit might carry with it, it was unlike SI or SO field units in its continued dependence on the central registries. Swift recourse to the full information in the central files was a prime requisite for counterintelligence and counterespionage operations. Control had to rest at the center in which the registries were located.

The only serious division of authority occurred in September 1944, when a Paris office was established to coordinate, under London direction, US counterespionage in France. Despite the difficulties inherent in this division, the office and the SCI teams offered an excellent opportunity for many of the X-2/London personnel to test independently, in actual field operations, their extensive British training.[9]

Insurance Unit

The Insurance Unit had been established in Washington under COI and continued under Z-2 because of the counterespionage value of its researches.[10] The London unit was initiated in February 1944 to tap British insurance companies for intelligence on firms in enemy territory. Its main product, however, was positive secret intelligence, and its chief liaison within OSS was with the Research and Analysis Branch (R&A). Outside OSS, it worked with FEA and other American and British agencies responsible for assembling economic intelligence and target information for Army, Navy, and Air Force commands from the files of insurance and other commercial sources in the United Kingdom.

Before writing, for example, a fire policy, an insurance company must make decisions based on thorough studies of the locations to be insured: buildings, docks, warehouses, industrial plants, and related installations. No company will consider insuring a building unless it has complete blueprints of the construction plan, details of wiring and hundreds of other facts, which can be evaluated only after a complete study of the physical composition of the area. Obviously, such detailed and current information was of great intelligence value. An exhaustive indexed library of such material—architects' or insurance engineers' plans, detailed inspectors' reports, copies of fire insurance schedules, photographs of establishments, waterfronts and towns, harbor town, street, water supply, police land fire plans, city and telephone directories, and the like—provided current, checked data of a kind that

only large chains of expensive agents could have gathered at great risk and with much uncertainty.

At first, the Insurance Unit's chief problem was that of care in approaching the British companies. It was important to know by how many intelligence research agencies they had already been approached and how thoroughly their sources of information had been canvassed. It took some time and much tact to discover that the FEA mission, which was cooperating with a Far East Foreign Service officer attached to the American Embassy, had by one means exhausted available sources.

The Unit's first liaison was with the Fire Officers Committee, a group of senior officers of insurance firms, which had been providing the RAF with material for target folders on industrial objectives on the Continent. Through this Committee, it was possible to examine files which turned up items of value on the Far East that had never been collected before. The discovery led to an arrangement to index methodically, through one project, all such information on each area of the Far East, in the files of all the companies in London engaged in international business. The manpower problem was solved by the companies providing clerical help, which would work under direction of the Insurance Unit. A system of symbols and of protected channels assured the security of the operation.

From the beginning, the Unit forwarded material to Washington, for the R&A Branch there, and carried out research on industrial and other installations in Far East at R&A request. The work led to direct liaisons with various Far East divisions of the British services and agencies, including Navy Intelligence Division-21 (the collection agency for Inter-Services Topographical Department, ISTD), which had contact with some two thousand British firms with interests abroad and had indexed the materials available in the UK for all prominent firms with Far East interests. The liaison made the files of NID-21 available to the unit and opened the way to profitable direct liaison with various sections of ISTD itself. ISTD, in turn, developed like liaisons with Ministry of Economic Warfare and with A-13(c) l of the Air Ministry. The Unit had a channel to the War Office through the geographic section of R&A. Thus, by June 1944, it was sending Far East material reproduced by it to OSS/Washington and to FEA through FEA/London. It was, in like manner, distributing information to ISTD, NID-21, Ministry of Economic Warfare (MEW), A-13(c)1, and to the Ministry of Home Security, (which prepared target folders for the strategic bombing of Europe and, later, of the Far East, particularly Japan).

An example of the kind of service the Unit was able to give Washington was the reply to a questionnaire calling for detailed information on 94 installations and activities in the Hong Kong area. The Unit returned answers on 64 items. Much of its information came from insurance sources; other important items were obtained through its liaisons. The War Office handed to the Unit complete engineering details of railway lines. The Admiralty provided complete plans and up-to-the-minute intelligence reports on naval installations. ISTD made available all its information on both topographical and economic matters and also introduced the Unit to the British Crown agents, who opened their files to the Unit. NID-21 approached all commercial firms known to have interests in the area for relevant data.

The Unit also maintained coverage of the European Theater. For example, it provided important intelligence for the Eindhoven airborne operation of September 1944. Through its index, the Unit knew that buildings in Eindhoven, which were on the Allied priority list had been

insured by London companies since 1926. Complete and accurate plans of the entire area were speedily made available to the Allied military authorities.

Establishment of Central Intelligence Agency

Substantive Authority Necessary in Establishment of a Central Intelligence Service
In order to coordinate and centralize the policies and actions of the Government relating to intelligence:

1. There is established in the Executive Office of the President a central service, to be known as the_____ as head of which shall be a Director appointed by the President. The Director shall discharge and perform his functions and duties under the direction and supervision of the President. Subject to approval of the President, the Director may exercise his powers, authorities and duties through such officials or agencies and in such manner as he may determine.

2. There is established in the an Advisory Board consisting of the Secretary of State, Secretary of the Treasury, the Secretary of War, Attorney General, the Secretary of the Navy, and such other members as the President may subsequently appoint. The Board shall advise and assist the Director with respect to the formulations of basic policies and plan of the _____.

3. Subject to the direction and control of the President, and with any necessary advice and assistance from the other departments and agencies of the Government, the _____ shall perform the following functions and duties:

(a) Coordination of the functions of all intelligence agencies of the Government, and the establishment of such policies and objectives as will assure the integration of national intelligence efforts;

(b) Collection either directly or through existing Government Department and agencies, of pertinent information, including military, economic, political, and scientific, concerning the capabilities, intentions and activities of foreign nations, with particular reference to the effect such matters may have upon the national security, policies, and interests of the United States.

(c) Final evaluation, synthesis and dissemination within the Government of the intelligence required to enable the Government to determine policies with respect to national planning and security in peace and war, and the advancement of broad national policy;

(d) Procurement, training and supervision of its intelligence personnel;

(e) Subversive operations abroad;

(f) Determination of policies for and coordination of facilities essential to the collection of information under subparagraph (b) hereof;

(g) Such other functions and duties relating to intelligence as the President from time to time may direct.

4. The _____ shall have no police or law enforcement functions, either at home or abroad.

5. Subject to paragraph 3 hereof, existing intelligence agencies within the Government shall collect, evaluate, synthesize and disseminate

departmental operating intelligence, herein define as intelligence required by such agencies in the actual performance of their functions and duties.

6. The Director shall be authorized to call upon departments and agencies of the Government to furnish appropriate specialist for such as may be required.

7. All Government departments and agencies shall make available to the Director such intelligence material as the Director, with the approval of the President, from time to time may request.

8. The shall operate under an independent budget.

9. In time of war or unlimited national emergency, all programs of the _____ in areas of actual or projected military operations shall be coordinated with military plans and shall be subject to the approval of the Joint Chiefs of Staff. Parts of such programs which are to be executed in a theater of military operations shall be subject to the control of the Theater Commander.

10. Within the limits of such funds as may be made available to _____ the Director may employ necessary personnel and make provision for neces-sary supplies, facilities and services. The Director shall be assigned, upon the approval of the President, such military and naval personnel as may be required in the performance of the functions and duties of the _____. The Director may provide for the internal organization and management of the _____ in such a manner as he may determine.

Executive Order 9621

Termination of the Office of Strategic Services and Disposition of Its Functions

By virtue of the authority vested in me by the Constitution and Statutes, including Title 1 of the First War Powers Act, 1941, and as President of the United States and Commander in Chief of the Army and the Navy, it is hereby ordered as follows:

1. There are transferred to and consolidated in an Interim Research and Intelligence Service, which is hereby established in the Department of State,

(a) the functions of the Research and Analysis Branch and of the Presentation Branch of the Office of Strategic Services (provided for by the Military Order of June 13, 1942), excluding such functions performed within the countries of Germany and Austria, and;

(b) those other functions of the Office of Strategic Services (hereafter referred to as the Office) which relate to the functions of said Branches transferred by this paragraph. The functions of the Director of Strategic Services and of the United States Joint Chiefs of Staff, relating to the functions transferred to the Service by this paragraph are transferred to the Secretary of State. The personnel property, and records of the said Branches, except such thereof as is located in Germany and Austria, and so much of the other personnel, property and records of the Office and the funds of the Office as the Director of the Bureau of the Budget shall determine to relate primarily to the functions are transferred to the said Service. Military personnel now on duty in connection with the activities transferred by this paragraph may, subject to applicable law and to the extent mutually agreeable to the Secretary of State and

to the Secretary of War or the Secretary of the Navy, as the case may be, continue on such duty in the Department of State.

2. The Interim Research and Intelligence Service shall be abolished as of the close of business December 31, 1945, and the Secretary of State shall provide for winding up its affairs. Pending such abolition:

(a) the Secretary of State may transfer from the said Service to such agencies of the Department of State as he shall designate any function of the Service,

(b) the Secretary may curtail the activities carried on by the Service,

(c) the head of the Service, who shall be designated by the Secretary, shall be responsible to the Secretary or to such other officer of the Department of State as the Secretary shall direct, and,

(d) the Service shall, except as otherwise provided in this order, be administered as an organizational entity in the Department of State.

3. All functions of the Office not transferred by paragraph 1 of this order, together with all personnel, records, property, and funds of the Office not so transferred, are transferred to the Department of War; and the Office, including the Office of the Director of Strategic Services, is terminated. The functions of the Director of Strategic Services and of the United States Joint Chiefs of Staff, relating to the functions transferred by this paragraph, are transferred to the Secretary of War. Naval personnel on duty with the Office in connection with the activities transferred by this paragraph may, subject to applicable law and to the extent mutually agreeable to the Secretary of War and the Secretary of the Navy, continue on such duty in the Department of War. The Secretary of War shall, whenever he deems it compatible with the national interest, discontinue any activity transferred by this paragraph and wind up all affairs relating thereto.

4. Such further measures and dispositions as may be determined by the Director of the Budget to be necessary to effectuate the transfer or redistribution of functions provided for in this order shall be carried out in such manner as the Director may direct and by such agencies as he may designate.

5. All provisions of prior orders of the President which are in conflict with this order are amended accordingly.

6. This order shall, except as otherwise specially provided, be effective as of the opening of business October 1, 1945.

Harry S. Truman
The White House
September 20, 1945

Recommendations from the Bureau of the Budget, Dated 20 September 1945

Many of the specific changes to internal organization that are indicated from a consideration of the conclusion are of interest or concern only to one department. Recommendations applicable to a single department are presented in broad terms only when they are of general interest to illustrate the broad principle involved. Recommendations, concerning proposed change or action of common or over-all concern, are, however, presented to some detail.

The greater portion of this section of the report is thus devoted to the proposed central coordinating machinery. This should not lead to the assumption that the creation of central machinery is view as the most important step to be taken. Of far greater importance is the creation of strong departmental organizations particularly in the State Department, and the separation of security intelligence operations from the more basic intelligence operations especially in the State, War, and Navy Departments.

More Widespread Understanding of Intelligence

Throughout this memorandum it has been noted how vital to a more adequate Government-wide foreign intelligence program is a more wide-spread understanding of what intelligence is, how it is produced and how the intelligence agency relates to and serves the action-taking or policy-determining groups. No specific recommendation is possible.

Conduct of the Intelligence Operation at the Departmental Level

Each department (and in some cases subdivision of department) which has important responsibilities in international matters including our national defense, or which has public responsibilities for providing foreign information should provide for a competent foreign intelligence operation.

The kind of facilities which will be required in the various departments and their size will vary. Except in the case of departments with major responsibilities, such as the State Department, the facilities can be quite small.

In each case however, some provision must be made for the following functions:

1. The careful determination of the departments' actual requirements. This determination will require the development in each department of a Planning Staff. The requirements of the department of a Planning Staff will need to be expressed in accor-dance with a standardized terminology and classification of intelligence and will need to be stated in sufficient detail to guide reporting, either by activities of the department itself or of other departments on which on which the department may rely for information.

2. The systematic cataloging and utilization of all possible sources to supply the needed information or intelligence.

3. The thorough analysis and evaluation of information through research techniques. In this way new information is tested against the accumulated knowledge and established facts of the past and a complete and digested picture is available in which each pertinent piece of relevant information is present and in the right place with the whole so interpreted that conclusions can be drawn and trends are visible.

4. Careful dissemination of the resultant evaluated product rather than the mere distribution of incoming reports `of interest'. The intelligence office must be responsive to the needs of its department and see that those needs are supplied in full and when needed. On the other hand, it must protect the department from the voluminous flood of casual, unrelated, and unevaluated reports or scraps of information. Just as one expects its statistical office to analyze, tabulate, and summarize data and point to its significance, so in its search for knowledge and foreign nations, peoples, conditions or events it must look to its intelligence office to do a similar job on the raw material of foreign information.

Our wartime experience has shown that the need for foreign information and intelligence in any department far exceeds the ability of its intelligence office to secure or produce without the utilization of facilities that exist elsewhere. In each case therefore, whether the intelligence facilities provided in a de-partment are large or small, the responsibilities of such groups would include not only responsibilities of their departments but to total Government program as well. In the latter category are responsibilities such as (1) to participate in the planning of a Government-wide program, (2) to interpret the needs of their agencies to the other agencies of which they may rely for evaluated summary intelligence, (3) to review the adequacy obtained through the competency of result with respect to intelligence obtained through other agencies, (4) to serve as the liaison point between their agencies and the intelligence groups of other agencies. In general, the departmental intelligence units should only establish such independent facilities for collection, evaluation or dissemination as are constant with their role in a Government-wide program.

The success of our post-war intelligence operation rests on the creation within the State Department of an intelligence operation with responsibilities such as those stated above. The creation of a centralized intelligence operation in State Department would not only provide that Department with facilities it has long needed. In addition it would serve to provide the place where leadership of Government-wide intelligence activities would be centered.

The intelligence operations of the Army and Navy Departments need to be readjusted to post-war needs. The war has been responsible for an emphasis on current news as exemplified in daily situation reports and on operational intelligence as reflected in large scale order—of battle operations. Neither the organizations nor organization nor the staffing have been fully developed to serve the purposes of active Army and Navy Department participation in interdepartmental discussion of high future policy. In the Navy Department as an illustration, the entire intelligence mission is stated to be in support of the fleet. In neither of the two Departments has sufficient emphasis been given to research and analysis nor has provision been made for all available information to be brought together at one point for evaluation. Further, as already pointed out both still permit an over-emphasis on security intelligence to interfere with the full development of more basic intelligence.

Other Departments such as Commerce and Agricul-ture need to recast their intelligence organizations so as to become participating groups in a total Government-wide foreign intelligence program.

Separation of Security Intelligence Activities

The security intelligence activities either at home or abroad, serving internal security purposes should be separated organizationally from the more basic intelligence activities, except for the mutual exchange of highly evaluated and summarized reports of general import (not merely of "cases"). It is further recommended that an integrated security program including the security intelligence activities that support it be planned for the Government as a whole.

The implementation of the first recommendation will require action in a number of departments, not necessarily simultaneously.

In the State Department, for example, the creation of new central intelligence facilities should not be accompanied by a transfer of activities now centered in the Office of Controls in the Division of Foreign Activities Correlation.

In the Navy Department some separation had been undertaken by the creation of new intelligence facilities in the Office of the Commander of Chief apart from the Office of Naval Intelligence which is the principal Navy Department organization concerned with security and security intelligence. These new facilities offer the possibility of becoming the nucleus for an expanded basic intelligence operation in the post-war era when the needs for strictly operational intelligence will be greatly curtailed irrespective of whether the Office of the Commander in Chief is retained is or not. The role of NO, however, as the central staff agency for security matters is not clear, and a number of related activities, not only in Bureaus and Auxiliary Services but in the Office of Chief of Naval Operations itself, are not now coordinated under a single head or staff unit.

In the War Department, too, some separation has resulted from the reactivation of the Office of the Provost Marshal General. The predilection for continuance in field of security intelligence, however, still permits the Military Intelligence Service to become too engrossed with matters that could be further centralized outside MIS. Further, because of its organizational placement the PMG cannot be fully effective as a staff agency to coordinate all security matters. In both the War and Navy Departments the separation of the security intelligence operation and the more basic foreign intelligence operation should be furthered and the security intelligence an the various forms of internal security operations be more closely coordinated.

The implementation of the second recommendation will require the creation of an interdepartmental coordinating committee described below.

Coordination of Intelligence and Security Operations
To insure that the intelligence and security activities of the Government, carried on by a number of agencies, fulfill all the national requirements, that they are developed as a total program producing the maximum result with a minimum of duplication, overlap and confusion and that adequate planning is accomplished for their expansion in any future emergency, it is recommended that two interdepart-mental groups be organized under the leadership of the Department of State.

To one group, which would consist of the Assistant Secretaries of State, War, Navy and Commerce, would compose an Interdepartmental Intelligence Coordinating Committee. It would be concerned with developing an integrated Government-wide foreign intelligence program. It also would be concerned with planning for the future.

The other group, consisting of the Assistant Secretaries of State, War, Navy and Treasury and the Assistant Attorney General, would compose an Interdepartmental Security Coordinating Committee. It would be concerned with developing an integrated Government-wide internal security program and of an integrated Government-wide security intelligence program. It also would be concerned with planning for the future.

These two groups by direction of the President and by means of planning conducted by permanent staff of their own working through sub-committee including representatives of any agency of interest either as customer or contributor, would develop a series of specific operating plans. These plans would serve as common directives for the assignment of operating responsibilities among the departmental intelligence and security agencies. The manner in which such planning would be conducted will be the same in both the security coordinating committee and in the intelligence committee, and is described below.

Except as directed later under `Conduct of Central Operations' the committees would have no responsibilities for the production of intelligence itself nor for the conduct of operations. Rather their responsibilities would consist of the following.

1. To develop a detailed and clear statement of the national intelligence objectives and requirements, including those of all departments and agencies.

2. To determine the means in terms of actual operations for meeting the national intelligence and national security requirements.

3. To assign, through a series of specific operating plans, operating responsibilities to the various departments.

4. To review the adequacy and economy of the total intelligence program of the Government and of the total security program of the Government.

5. To develop plans, legislation and other instruments in readiness for the adjustment of the intelligence and the security programs in the event of emergency or other changed conditions.

The above list of responsibilities describes in effect the steps in planning. The visible result of such planning and, therefore, the principal concern of the committee would be the operating plan itself. Each operating plan when issued would reflect the determination of the appropriate committee under each of the first three continuing an long range responsibilities shown above, i.e., the requirements, the means for their accomplishment, and the specific operating assignments allocated to the various departments and agencies. When issued, the specific operating plans would be directives to the department and agencies. When issued, the specific operating plans would be directives to the departments and agencies would adjust their operations to conform to them.

Production of High Level Intelligence

The need to provide for some facilities to serve groups at a level above the departments themselves is one which should be anticipated but action is not now recommended.

With principal intelligence activities of the Government being carried on in the departments in accordance with a planned and coordinated program, such intelligence as may be needed at the top of the Government can be produced through or secured from the intelligence operations in the department. The State Department would provide the principal facilities for bringing to bear on any high level problem the total intelligence available anywhere in the Government.

Should it later be found, however, that independent facilities are desirable to serve the President in the occasional instance in which he may wish direct and immediate access to the intelligence involving a matter of high decision, these facilities, which should be organized in his own office, can be small and need not engage in large scale initial research and analysis on original raw material.

Conduct of Central Operations

The strengthening of intelligence activities in the departments and agencies and their coordination by a central planning staff are the principal means of providing a total operation serving the total national needs. Central facilities should not be created, therefore, to engage in operations which can be performed at the departmental level.

The planning conducted by the two coordinate committees may result in a decision that some types of operation may be found to be practicable only if operated centrally or under strong day to day central direction. It is recommended that any such services as is determined to require centralization, be conducted as an interdepartmental service under the appropriate coordinating committee.

CONTINUE CHAPTER 3

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Memorandum for the Director of the Strategic Services Unit

Subject: Transfer of OSS Personnel and Activities to the War Department and Creation of Strategic Services Unit

26 September 1945

By letter from the Deputy Chief of Staff dated today, you have been designated to represent the War Department in the transfer of those OSS activities which will come to the War Department in their continued operation. I shall recommend that the Secretary of War confirm this designation as requested by you.

These activities will become for the time being, as a matter of War Department organization, subject to the authority of my office and for convenience will be referred to as the Strategic Services Unit. This assignment of the OSS activities, so to be transferred to the War Department, is a method of carrying out the desires of the President, as indicated by representatives of the Bureau of the Budget, that these facilities of the OSS be examined over the next three months with a view to determining their appropriate disposition. Obviously this will demand close liaison with the Bureau of the Budget, the State Department and other agencies of the War Department, to surveying that the facilities and assets of OSS are preserved for any possible future usefulness to the country. However, any integration of its activities with those of other agencies of the War Department should proceed only after consultation with the Bureau of the Budget and State Department, in view of the desire of the President (expressed in his letter of 20 September to the Secretary of State) that the Secretary of State take the lead in surveying the whole field of intelligence operations during the next few months. Obviously the whole subject is one for careful and cooperative study and analysis of the functions now being performed by OSS.

In the meantime, the continuing operations of OSS must be performed in order to preserve them as a going operation. As you know the staff of my office is too small to exercise detailed supervision over an enterprise of the size of the OSS activities to be subject to your control. It is not desirable to increase that staff. Accordingly on matters of administration, I expect that you will conform, as fully as is practicable, with applicable War Department policies and regulations and will consult and coordinate your actions with the appropriate War Department agencies.

I am particularly anxious that you keep the Budget Fiscal and Accounting officers of the War Department fully advised of the

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activities of the Unit and arrange to obtain their assistance and guidance to the fullest practicable extent. In general, I expect you to keep not only my office, but also the Deputy Chief of Staff, advised of your plans and activities so that he may be in a position to furnish to the Secretary of War and to me advice and recommendations.

Major questions of policy should be discussed with my office. I am particularly anxious that my office be kept informed as to proposals for the disposition of particular substantial operations, facilities or assets of the present OSS organization. I think you should inaugurate a system of periodic written reports of progress and outlines of future plans, of which copies should be furnished to the Deputy Chief of Staff.

I desire that the status of the assets to be taken over by the War Department as of 1 October 1945 be carefully checked by the proper Budget and Fiscal Officers of the War Department, to the extent that they deem necessary, and as you know, instructions for such check, by inventory and otherwise, have been given.

If you require additional assignment of staff from the War Department, I expect that you will ask for the assignment of the necessary personnel and make direct arrangements with Deputy Chief of Staff for such assignment.

This memorandum is furnished for your information and guidance as an expression of my general views as to policy

John J. McCoy
Assistant Secretary of War

Memorandum for the Brig. Gen. John Magruder, USA

War Department
Washington, DC
27 September 1945

By Executive Order dated September 20, 1945, the President terminated the Office of Strategic Services, effective 1 October 1945; transferred certain of its personnel, records, property and funds to the Department of State; and transferred the remaining functions, personnel, records, property and funds to War Department. You are hereby appointed as the representative of the Secretary of War and War Department to exercise, administer, and operate (with power of delegation and successive redelegation where appropriate) the functions, personnel, records and property which have been, or will be, transferred to the War Department and the Secretary of War under the Executive Order and to administer all funds allocated to you by the Budget Officer of the War Department, such operations to be known as Strategic Services Unit. Subject to the authority of and policies determined by the Assistant Secretary of War, and such persons as he may designate, you will continue the program of liquidation of those activities and personnel so transferred which are no longer necessary or desirable, and persevere as a unit such of these functions and facilities as are valuable for permanent peacetime purposes, or which may be required by Theater Commanders or occupational authorities to assist in the discharge of their responsibilities.

You will report to and receive instructions from the Assistant Secretary of War or such persons as he may designate. Subject to the authority of

the Assistant Secretary of War or of the persons designated by him, you may have direct contact with any of the appropriate offices of the armed services or government departments as may be necessary for the proper performance of your duties.

I would appreciate your informing all of your personnel of the importance which I attach to the achievement of the objectives set forth in this memorandum.

/s/ Robert P. Patterson
Secretary of War

Contents of Memorandum Signed by Gen. Magruder

26 November 1945

1. This memorandum is written to clarify a problem which has gradually developed over the last six months concerning the handling by representatives of SI and X-2 Branches of material dealing with foreign intelligence services. It is of sufficient importance to warrant this statement of policy which you will refer to the principal field representatives of SI Branch (in particular the Reporting Board) and X-2 Branch for their positive guidance.

2. It is to be understood that all information concerning foreign intelligence services falls within the exclusive jurisdiction of the X-2 Branch, regardless of source. Such information includes, but is not necessarily limited to, intelligence concerning individuals, structure, plans and operations of such services. This means that X-2 Branch has the sole responsibility for processing and disseminating intelligence of this character. All such information originating with SI will be given to X-2 in the field with only such preliminary processing as may be required for the protection of sources. The local representative of X-2 will determine what field distribution, if any, will be made. He will, of course, respect any requests by SI for special handling of reports originating with that Branch when the security of a source may be at stake. Counterespionage intelligence handed over to X-2 will be forwarded through X-2 channels to Washington for checking, supplementing, and for dissemination. SI will make no dissemination of such material unless specifically authorized by X-2.

3. The handling of counterespionage information in any other manner not only short-circuits the extensive machinery of central records, staff experience and counterespionage contacts which have been built up by X-2, but in many cases may result in the discrediting of counterespionage material, the blowing of penetration operations and agents, and the loss of operational value which such information may have X-2 field work.

4. It should be emphasized that this places upon X-2 Branch the active responsibility to present to SI in Washington and in the field, by proper briefing of field operatives or through the preparation and delivery of written material, all information concerning foreign intelligence systems and agents which is necessary for the planning and protection of SI operations and useful for their implementation. Information delivered to SI for such purposes will not be disseminated outside SI. If circumstances require, SI field personnel will be originally briefed by X-2 Washington prior to departure for the field, with the added expectation that secure arrangements for supplemental and emergency briefings by the X-2 field representative will be made.

5. In accordance with the basic directives of SSU, X-2 will continue to deliver to SI for processing and dissemination all intelligence collected by X-2 which is not counterespionage in nature. As to certain foreign organizations, political or economic in character, but also engaged in or furnishing a cover for subversive activities (for example the Falange, Anti-Fascist League, Communist Party and certain Refugee organizations) it is recognized that both SI and X-2 may have legitimate interests. Both Branches will collaborate closely in the preparation of reports and studies concerning such organizations. Dissemination will be special and limited when the X-2 field representative requests such handling for specific security reasons. The "Communist Party" as used here does not mean the Russian Intelligence System as such; the Russian Intelligence system is understood to be of X-2 interest in accordance with the provisions of paragraph 2 above. When items of positive intelligence are delivered to SI in the field or in Washington by a representative of X-2 Branch, his statement of the necessity of source protection will be honored and his instructions, if any, with regard to special dissemination will be followed. SI source protection will be similarly respected by X-2 as to any counterespionage information collected by SI.

Gen. Donovan's Letter to the Director of the Bureau of Budget, Harold D. Smith

As our liquidation proceeds (Donovan states) it will become increasingly difficult to exercise our functions so that we have found it necessary to set up a liquidating committee with procedures and controls to provide for the gradual elimination of our services in step with orderly reduction of personnel.

It is our estimate, however, with the strictest economy of man-power and of funds the effectiveness of OSS as a War Agency will end as of January 1, or at latest February 1946, at which time liquidation should be completed. At that point I wish to return to private life. Therefore, in considering the disposition to be made of the assets created by OSS, I speak as a private citizen concerned with the future of his country.

In our government today there is no permanent agency to take over the functions which OSS will have then ceased to perform. These functions while carried on as incident to the war are in reality essential in the effective discharge by this nation of its responsibilities in the organization and maintenance of the peace.

Since last November I have pointed out the immediate necessity of setting up such an agency to take over valuable assets created by OSS. Among these assets was establishment for the first time in our nation's history of a foreign secret intelligence service which reported information as seen through American eyes. As an integral and inseparable part of this service there is a group of specialists to analyze and evaluate the material for presentation to those who determine national policy.

It is not easy to set up a modern intelligence system. It is more difficult to do so in time of peace than in time of war.

It is important therefore that it be done before the War Agency has disappeared so that profit may be made of its experience and "know how" in deciding how the new agency may best be conducted.

I have already submitted a plan for the establishment of centralized system. However, the discussion of that proposal indicated the need of

an agreement upon certain fundamental principles before a detailed plan is formulated. If those concerned could agree upon the principles with which such a system should be established, acceptance of a common plan would be more easily achieved.

Accordingly, I attach a statement of principles, the soundness of which I believe has been established by study and by practical experience.

Principles–The Soundness of Which It is Believed Has Been Established by Our Own Experience And First-Hand Study of the Systems of Other Nations—Which Should Govern the Establishment of a Centralized United States Foreign Intelligence System. The formulation of a national policy both in its political and military aspects is influence and determined by knowledge (or ignorance) of the aims, capabilities, intentions, and policies of other nations.

All major powers except the United States have had for a long time past permanent world-wide intelligence services, reporting directly to the highest echelons of their governments. Prior to the present war, the United States had no foreign secret intelligence service. It never has had and does not now have a coordinated intelligence system.

The defects and dangers of this situation have been generally recognized. Adherence to the following would remedy this defect in peace as well as war so that American policy could be based upon information obtained through its own sources on foreign intentions, capabilities, and developments as seen and interpreted by Americans.

1. That each department of Government should have its own intelligence bureau for the collection and processing of such informational material as it finds necessary in the actual performance of its functions and duties. Such a bureau should be under the sole control of the department head and should not be encroached upon or impaired by the functions granted any other governmental intelligence agency.

Because secret intelligence covers all fields and because of possible embarrassment, no executive department should be permitted to engage in secret intelligence but in a proper case call upon the central agency for service.

2. That in addition to the intelligence unit for each department there should be established a national centralized foreign intelligence agency which should have the authority:

A. To serve all departments of the Government.

B. To procure and obtain political, economic, psychological, sociological, military and other information which may bear upon the national interest and which has been collected by the different Governmental departments or agencies

C. To collect when necessary supplemental information either at its own instance or at the request of any Governmental departments or agencies.

D. To integrate, analyze, process, and disseminate, to authorized Governmental agencies and officials, intelligence in the form of strategic interpretive studies.

3. That such an agency should be prohibited from carrying on clandestine activities within the United States and should be forbidden the exercise of any police functions at home or abroad.

4. That since the nature of its work requires it to have status, it should be independent of any department of the government (since it is obliged to serve all and must be free of the natural bias of an operating department). It should be under a director, appointed by the President, and be administered under Presidential direction, or in the event of a General Manager being appointed, should be established in the Executive Office of the President, under his direction.

5. That subject to the approval of the President or the General Manager the policy of such a service should be determined by the Director with the advice and assistance of a Board on which the Secretaries of State, War, Navy, and Treasury should be represented.

6. That this agency, as the sole agency for secret intelligence, should be authorized, in the foreign field only, to carry on services such as espionage, counterespionage, and those special operations (including morale and psychological) designed to anticipate and counter any attempted penetration and subversion of our national security by enemy action.

7. That such a service have an independent budget granted directly by the Congress.

8. That such a service should have its own system of codes and should be furnished facilities by departments of Government proper and necessary for the performance of its duties.

9. That such a service should include in its staff specialties (within Governmental departments, civil and military, and in private life) professionally trained in analysis of information and possessing a high degree of linguistic, regional, or functional competence, to analyze, coordinate and evaluate incoming information, to make special intelligence reports, and to provide guidance for the collecting branches of the agency.

10. That in time of war or unlimited national emergency, all programs of such agency in areas of actual and projected military operations shall be coordinated with military plans, and shall be subject to the approval of the Joint Chiefs of Staff, or if there be consolidation of the armed services, under the supreme commander. Parts of such programs which are to be executed in the theater of military operations shall be subject to control of the military commander.

Executive Directive of 22 January 1946 Addressed to the Secretaries of State, War, and Navy

1. It is my desire, and I hereby direct, that all Federal foreign intelligence activities be planned, developed, and coordinated so as to assure the most effective accomplishment of the intelligence mission related to the national security. I hereby designate you, together with another person to be named by me as my personal representative, as the National Intelligence Authority to accomplish this purpose.

2. Within the limits of available appropriations, you shall each from time to time assign persons and facilities from your respective departments, which persons shall collectively form a Central Intelligence Group and shall, under the direction of a Director of Central Intelligence, assist the National Intelligence Authority. The Director of Central Intelligence shall be designated by me, shall be responsible to the National Intelligence Authority, and shall sit as a non-voting member thereof.

3. Subject to the existing laws and to the directions and control of the National Intelligence Authority, the Director of Central Intelligence shall:

a. Accomplish the correlation and evaluation of intelligence relating to the national security, and the appropriate dissemination within the Government of the resulting strategic and national policy intelligence. In so doing, full use shall be made of the staff and facilities of the intelligence agencies of your Departments.

b. Plan for the coordination of such of the activities of the intelligence agencies of your Departments as relate to the national security and recommend to the National Intelligence Authority the establishment of such over-all policies and objectives as will assure the most effective accomplishment of the national intelligence mission.

c. Perform, for the benefit of said intelligence agencies, such services of common concern as the National Intelligence Authority determines can be more efficiently accomplished centrally.

d. Perform such other functions and duties related to intelligence affecting the national security as the President and the National Intelligence Authority may from time to time direct.

4. No police, law enforcement or internal security functions shall be exercised under this directive.

5. Such intelligence received by the intelligence agencies of your departments as may be designated by the National Intelligence Authority shall be freely available to the Director of Central Intelligence for correlation, evaluation, or dissemination. To the extent approved by the National Intelligence Authority, the operations of said intelligence agencies shall be open to inspection by the Director of Central Intelligence in connection with planning functions.

6. The existing intelligence agencies of your departments shall continue to collect, evaluate, correlate, and disseminate departmental intelligence.

7. The Director of Central Intelligence shall be advised by an Intelligence Advisory Board consisting of the heads (or their representatives) of the principal military and civilian intelligence agencies of the government having functions related to national security, as determined by the Director of Central Intelligence.

8. Within the scope of existing law and presidential directives, other departments and agencies of the executive branch of the Federal Government shall furnish such intelligence information relating to the national security as is in their possession, and as the Director of Central Intelligence may from time to time request pursuant to regulations of the National Intelligence Authority.

9. Nothing herein shall be construed to authorize the making of investigations inside the continental United States and its possessions, except as provided by law and presidential directives.

10. In the conduct of their activities the National Intelligence Authority and the Director of Central Intelligence shall be responsible for fully protecting intelligence sources and methods.

NIA Directive No. 1, Dated 8 February 1946: Policies and Procedures Governing the Central Intelligence Group

Pursuant to the attached letter from the President, dated 22 January 1946, designating the undersigned as the National Intelligence Authority, you are hereby directed to perform your mission, as Director of Central Intelligence, in accordance with the following policies and procedures:

1. The Central Intelligence Group shall be considered, organized and operated as a cooperative, interdepartmental activity, with adequate and equitable participation by the State, War and Navy Departments and, as recommended by you and approved by us other Federal departments and agencies. The Army Air Forces will be represented on a basis similar to that of the Army and the Navy.

2. The Central Intelligence Group will furnish strategic and national policy intelligence to the President and the State, War and Navy Departments, and, as appropriate, to the State-War-Navy Coordinating Committee, the Joint Chiefs of Staff, and other governmental departments and agencies having strategic and policy functions related to the national security.

3. The composition of the Intelligence Advisory Board will be flexible and will depend, in each instance, upon the subject matter under consideration. The Special Assistant to the Secretary of State in charge of Research and Intelligence, the Assistant Chief of Staff G-2, WDGS, the Chief of Naval Intelligence and the Assistant Chief of Air Staff, Intelligence (or their representatives will be permanent members). You will invite the head (or his representative) of any other intelligence agency having functions related to the national security to sit as a member on all matters within the province of his agency.

All recommendations, prior to submission to this Authority, will be referred to the Board for concurrence or comment. Any recommendation which you and the Intelligence Advisory Board approve unanimously and have the existing authority to execute may be put into effect without action by this Authority. If any member of the Board does not concur, you will submit to this Authority the basis for his non-concurrence at the same time that you submit your recommendation.

4. Recommendations approved by this Authority will, where applicable, govern the intelligence activities of the separate departments represented herein. The members of the Intelligence Advisory Board will each be responsible for ensuring that approved recommendations are executed within their respective departments.

5. You will submit to this Authority as soon as practicable a proposal for the organization of the Central Intelligence Group and an estimate of the personnel and funds required from each department by this Group for the balance of this fiscal year and for the next fiscal year. Each year thereafter prior to the preparation of departmental budgets, you will submit a similar estimate for the following fiscal year. As approved by this Authority and within the limits of available appropriations, the necessary funds and personnel will be made available to you by arrangements between you and the appropriate department through its members on the Intelligence Advisory Board. You may determine the qualifications of personnel and the adequacy of individual candidates. Personnel assigned to you will be under your operational administrative control, subject only to necessary personnel procedures in each department.

6. The Central Intelligence Group will utilize all available intelligence in producing strategic and national policy intelligence. All intelligence reports prepared by the Central Intelligence Group will note any substantial dissent by a participating intelligence agency.

7. As required in the performance of your authorized mission, there will be made available to you or your authorized representatives all necessary facilities, intelligence and information in the possession of our respective departments. Arrangements to carry out this will be made with members of the Intelligence Advisory Board. Conversely, all facilities of the Central Intelligence Group and all intelligence prepared by it will be made available to us and, through arrangements agreed between you and the members of the Intelligence Advisory board, subject to any authorized restrictions, to our respective departments.

8. The operations of the intelligence agencies of our departments will be open to inspection by you or your authorized representatives in connection with your planning functions, under arrangements agreed to between you and the respective members of the Intelligence Advisory Board.

9. You are authorized to request of other Federal departments and agencies any information or assistance required by you in the performance of your authorized mission.

10. You will be responsible for furnishing, from the personnel of the Central Intelligence Group, a Secretariat for this Authority, with the functions of preparing an agenda, reviewing and circulating papers for consideration, attending all meetings, keeping and publishing minutes, initiating and reviewing the implementation of decisions, and performing other necessary secretarial services.

NIA Directive No. 4, Policy on Liquidation of the Strategic Services Unit

2 April 1946

Pursuant to paragraph 1 of the letter from the President dated 22 January 1946 which designed this Authority as responsible for planning, developing and coordinating the Federal foreign intelligence activities so as to assure the most effective accomplishment of the intelligence mission related to the national security, the following policies and procedures relating to the liquidation of the Strategic Services Unit (SSU) are announced:

1. The national interest demands that the complete liquidation of SSU shall not be accomplished until it is determined which of its functions and activities are required for the permanent Federal foreign intelligence program, and should therefore be transferred to the Central Intelligence Group or other agencies in order that its useful assets may not be lost. Such determination and transfers shall be made and the liquidation of the remainder of SSU shall be completed as promptly as possible and prior to 1 July 1947. The Direct or Central Intelligence shall issue the necessary directives to effect the liquidation. He will make recommendations to this Authority as to the intelligence activities permanently required in the peace-time effort.

2. During the period of liquidation the SSU should be administered and operated so as to service, to the extent practicable, the intelligence agencies subject to our coordination. The Director of Central

Intelligence shall issue the necessary directives to the Director of SSU required to accomplish this mission. In addition, the Director of SSU will make available to the Director of Central Intelligence, upon his request, any facilities and services of SSU which may be useful in the performance of an authorized function of the Central Intelligence Group.

3. The Director of Central Intelligence will be responsible for determining which funds, personnel and facilities of SSU are required for the performance of an authorized function of the Central Intelligence group. Such funds, personnel and facilities of SSU will then be transferred to an appropriate War Department unit. The Director of Central Intelligence will be responsible for making the necessary administrative arrangements and for issuing the necessary directives to the Director of SSU.

4. The War Department will take the necessary budgetary action to carry out this program.

5. The War Department shall retain the right to determine what portion of the War Department funds, personnel and facilities can be made available to SSU by the War Department.

CIG Directive No. 6, "Liquidation of Strategic Services Unit" (Top Secret)

8 April 1946

Effectively immediately, you are directed to continue the liquidation of the Strategic Services Unit (SSU) as ordered in paragraph 3 of the Executive Order dated 20 September 1945, subject: "Termination of the Office of Strategic Services and Disposition of Its Functions." The liquidation will be completed not later than 30 June 1947.

The liquidation of SSU will be coordinated with the development of the permanent peace-time intelligence program. You will carry out the liquidation in accordance with the instructions of the Director of Central Intelligence or his designated representative. The Director or his representative will deal directly with you. He will have such staff as he requires working with SSU.

During the period of liquidation you will administer and operate the SSU as so to service, within your capabilities, the intelligence agencies subject to coordination by the National Intelligence Authority in accordance with directives provided by the Director of Central Intelligence or his designated representative. In addition, you will make available, within your capabilities, to the Director of Central Intelligence, upon his request, any facilities and services of the SSU which may be useful in the performance of an authorized function of the Central Intelligence Group.

Enclosure "B"
Pursuant to the provisions of NIA Directive No.4, dated 2 April 1946, it is hereby directed that you administer and operate the Strategic Services Unit, War Department, in accordance with the initial policies set forth herein:

1. Operations.

a. Until otherwise directed, you will continue such operations services and liaisons considered absolutely essential to:

(1) US Armies abroad,

(2) The United States sections of Allied Control Commissions,

(3) Diplomatic missions,

(4) Departmental agencies in the United States now being served.

b. You will perform such collecting missions, distribution, and other intelligence services as may be ordered from time to time by my representative.

c. Nothing contained in sub-paragraph 1-a will be construed as an authority for any expansion of the functions and facilities now operating, nor will additional personnel be assigned to duty outside the continental limits of the United States without the approval of my senior representative.

2. Administration.

a. You will continue the orderly liquidation of the Strategic Services Unit.

b. You will furnish the administrative support to operations indicated in paragraph 1.

c. You will furnish such administrative support to the Central Intelligence Group as may be called for by my representative.

d. You will provide the necessary adminis-trative facilities to effect the transition of personnel, funds, and communications, records, services, and facilities, with the necessary means of maintenance, from SSU to an appropriate group in the War Department or to other appropriate agencies, as subsequently determined.

3. Command Liaison.

Colonel Louis J. Fortier, USA, Assistant Director and Acting Chief of Operational Services, CIG, is designated as my senior representative. Further directives and orders will be issued to you by me or by my senior representative. You will keep my senior representative informed of the progress of the mission outlined herein. Captain Thomas F. Cullen, USNR, will be his deputy.

Appraisal of Operations of OSS and SSU

(1) Introductory Comment

As has been explained, the work of OSS included sabotage, organization of resistance groups, black propaganda against the enemy, and other para-military and subversive operations, as well as various special services for the Joint Chief's of Staff and the theater commanders. The appraisal herein set forth, however, is confined to the work of the intelligence branches—SI (Secret Intelligence, X-2 counterespionage and Research and Analysis.)

(2) General Statement

During the war just ended, OSS accomplished the following:

(i) It established, for the first time in American history, an organized network of secret agents who operated behind enemy lines, and who

penetrated enemy installations in neutral countries, in order to obtain vital intelligence. These agent networks were established in Europe. North Africa, the Near and Middle East, and the Far East.

(ii) It established, for the first time in American history, an organized system of counterespionage which penetrated and neutralized enemy espionage organizations, operating for these purposes in Europe, North Africa, the Near and Middle East, and the Far East.

(iii) It organized the resources of American scholarship to supplement, and integrate into comprehensive studies, the intelligence procured from the various channels and sources available to the national government.

3. Shortcomings

The work of OSS during the war was handicapped by defects in organization, personnel and orientation. Fundamentally, all of these defects derived from the same source: the fact that the United States had no centrally controlled and comprehensive espionage system in being when the war broke out, and no experience in the development and direction of any such system. As in so many other aspects of the war establishment, the nation had to improvise. There were few other phases of the war, however, in which the nation so completely lacked a nucleus around which to build a body of experience upon which to draw as in the field of espionage and counterespionage. As a result:

(a) The personnel of OSS, recruited and brought together in haste under the stress of the emergency, tended to be uneven in quality. Functions which were well-conceived were performed unequally at different points by different people. Unsatisfactory personnel were steadily weeded out, and the highest quality personnel steadily moved into positions of primary control and responsibility. But the effects of haste and improvisation were felt to the end. This could only have been avoided by a careful and orderly preparation for the job during the years of peace.

(b) During the early period of fumbling in the development of the proper relationship of OSS to the War Department, the Navy Department and the State Department, certain of the efforts of OSS tended to be misplaced, in the sense that they were not properly related to the needs and plans of military and political authorities, and was impeded by the failure of OSS adequately to indoctrinate its personnel with respect to the relationship of OSS to Army and Navy.

(4) Appraisal of over-all operations of government intelligence agencies:

(a) Introductory Comment. The OSS and SSU are in no position to offer an appraisal of the performance of other intelligence agencies of the United States during the war. The appraisal herein set forth, therefore, is confined to an appreciation of defects in the inter-relationships among the intelligence agencies or the Government which became manifest in the course of the practical experience of the OSS.

(b) Elements of Duplication and Lack of Coordination. The effectiveness of OSS espionage and counterespionage was seriously handicapped by a failure to receive adequate direction from the military and political authorities as to the categories of information particularly needed. Where, as in the case of U.S. 3rd and 7th Armies and the China Theater under General Wedemeyer, and in the cases of the American Legations in Switzerland and Sweden, intimate relations

were established between OSS and the Army command or diplomatic authorities, and where systematic and intelligence direction of activities existed operations were unusually effective.

A full and free interchange of intelligence among the various intelligence-collecting agencies of the Government—e.g., the War Department, the Navy Department, the State Department, the Navy Department and the State Department, FEA and OSS—was never achieved or even closely approxi-mated. Without an effective mechanism for such interchange, gaps in information at key points and wasteful duplication of effort were inevitable.

There was inadequate team-work in intelligence collection on the American side, and no effective mechanism for an all-American flow and coordinated evaluation of intelligence. For example, certain data obtained through War Department G-2 Special Branch activities, which were vital to certain OSS espionage and counterespionage work, were never made available to OSS by G-2. This failure in collaboration was ironically underscored by the fact that much information of the same type was made available to OSS by British sources. Similarly, certain prisoner-of-war interrogation data which would have facilitated the espionage and counterespionage work of OSS was denied to OSS. Again, data collected by OSS (and by French, Polish, Dutch and other Allied intelligence agencies who made such data available to both OSS and British agencies) sometimes reached the higher echelons of combined command only through British channels as British reports. In China, the intelligence activities of the U.S. Ground Army, the 14th Air Force the Naval Task Group for China, the U.S. Embassy and OSS were for a long time at cross purposes. In the Pacific, the clandestine services of OSS were not permitted to operate. This impeded the mutual support of American intelligence in the Pacific, created a serious void in American knowledge of the Japanese espionage system.

The desire for and practice of cooperation among various intelligence agencies of the Government on the working levels tended often to be impeded and sometimes stopped because of misunderstanding or disagreements at top levels.

Owing to the lack of a central coordinating body, there were gaps and duplications in the dissemination of intelligence.

There was no central mechanism for pooling and comprehensively developing the various bits and pieces of intelligence collected by the various intelligence procurement agencies of the Government.

(c) Additional Comment On Over-All Intelli-gence organization of the U.S. Government. From the standpoint of OSS in its relationship to the combined commands it seemed that the United States military services placed inadequate emphasis, as compared with our Allies, upon the role, position and importance of army and naval intelligence and counterintelligence officers.

(5) Counterespionage

In the field of counterespionage OSS made a number of notable contributions both singly and in cooperation with Allied services. Through its neutral country stations it was instrumental in bringing about the defection of important enemy intelligence service personnel, and exploiting the defection of important enemy intelligence service personnel, and exploiting these defections for the demoralization and neutralization of the enemy service. Thus an important series of defections in Turkey was followed by a sweeping reorganization of German espionage, culminating in the complete incorporation of the

military secret intelligence service (Abwehr) into that of the Nazi Party (RSHA) with resulting friction and loss of efficiency. Neutral country stations also contributed vital information leading to the identification, apprehension, and controlled exploitation of German agents with radio sets left behind in Normandy before the invasion. The field units of OSS counterespionage branch (SCI) set up and operated a considerable number of penetration and deception agents. The former were successful in enticing enemy agents into our control, either as parachutists for line crossers, bringing with them considerable sums of money. By satisfying the enemy with a sufficient amount of true or partly true information, they discouraged him from sending in additional agents who might have operated without coming under our control. The role of OSS-controlled enemy agents with radio sets in assisting the implementation of deception programs has been commended by the competent agencies. It has been learned from interrogations of German intelligence personnel that not one of the OSS controlled agents was ever suspected by the Germans. On the contrary, their information appears to have been believed implicitly, to such an extent that in at least seven cases they were rewarded by the enemy with an Iron Cross.

OSS SCI units operating with T Forces at 6th and 12th Army Groups, seized large quantities of counterespionage material, which was forwarded through Army Documents channel to the Counter Intelligence War Room, London. The head of the War Room estimated that one such T Force operation, concluded in three days, netted identifying information on more than 20,000 German intelligence personnel. This virtually doubled the information on German intelligence personnel which had been made available through all previous Allied counterespionage operations during the war.

The counterespionage branch of OSS has brought together in Washington comprehensive files on the espionage systems of foreign nations, including some 400,000 carded dossiers on individuals known to be, or suspected of being, connected with such activities.

NIA Directive No. 5, Dated 8 July 1946, Functions of the Director of Central Intelligence

Pursuant to the President's letter of 22 January 1946 designating this Authority as responsible for planning, developing and coordinating all Federal foreign intelligence activities so as to ensure the most effective accomplishment of the intelligence mission related to the national security, the functions of the Director of Central Intelligence are hereby redefined as follows, subject to the provisions of said letter:

1. Paragraph 3 of the President's letter of 22 January 1946 defined the functions of the Director of Central Intelligence as follows:

3. Subject to the existing law, and to the direction and control of the National Intelligence Authority, the Director of Central Intelligence shall:

a. Accomplish the correlation and evaluation of intelligence relating to the national security, and the appropriate dissemination within the Government of the resulting strategic and national policy intelligence. In so doing, full use shall be made of the staff and facilities of the intelligence agencies of your departments.

b. Plan for the coordination of such of the activities of the Intelligence agencies of your departments as relate to the national security and

recommend to the National Intelligence Authority the establishment of such overall policies and objectives as will assure the most effective accomplishment of the national intelligence mission.

c. Perform, for the benefit of said intelligence agencies, such services of common concern as the National Intelligence Authority may from time to time direct.

d. Perform such other functions and duties related to intelligence affecting the National Intelligence Authority may from time to time direct.

2. In performing the functions specified in paragraph 3-a of the President's letter, the Director of Central Intelligence is hereby authorized to undertake such research and analysis as may be necessary to determine what functions in the fields of national security intelligence are not being presently performed or are not being adequately performed. Based upon these determinations, the Director of Central Intelligence may centralize such research and analysis activities as may, in his opinion and that of the appropriate member or members of the Intelligence Advisory Board, be more efficiently or effectively accomplished centrally.

3. In addition to the functions specified in paragraph 3-b of the President's letter and in accordance with paragraph 4 of NIA. Directive No. 1, the Director of Central Intelligence is hereby authorized and directed to act for this Authority in coordinating all Federal foreign intelligence activities related to the national security to ensure that the over-all policies and objectives established by this authority are properly implemented and executed.

4. Pursuant to paragraph 3-c of the President's letter, the Director of Central Intelligence is hereby directed to perform the following services of common concern which this authority has determined can be more efficiently accomplished centrally:

a. Conduct of all organized Federal espionage and counterespionage operations outside the United States and its possessions for the collection of foreign intelligence information required for the national security.

b. Conduct all Federal monitoring of press and propaganda broadcasts of foreign powers required for the collection of intelligence information related to the national security.

5. To the extent of available appropriations and within the limits of their capabilities, as determined by the respective Departments, the State, War and Navy Departments will make available to the Director of Central Intelligence, upon his request, the funds, personnel, facilities and other assistance required for the performance of the functions authorized herein. At the earliest practicable date, the Director of Central

Intelligence will submit for approval by this authority any supplemental budget required to perform the functions authorized herein, in addition to the appropriations which can be made available for this purpose by the State, War and Navy Departments.

6. Where the performance of functions authorized herein requires the liquidation, transfer or integration of funds, personnel or facilities for existing activities of the State, War and Navy Departments, the liquidation, transfer or integration will be accomplished at the earliest practicable date as agreed to by the Director of Central Intelligence and the official responsible for such activities so as to involve a minimum

of interruption in the performance of these functions.

House Report No. 2734 of 17 December 1946

A Report on the System Currently Employed in the Collection, Evaluation, and Dissemination of Intelligence Affecting the War Potential of the United States.

Recommendations:

1. That the National Intelligence Authority, established on 22 January 1946, by Presidential Directive, be authorized by act of Congress (This is designed to give the new authority a firmer base).

2. That the National Intelligence Authority shall consist of the Secretaries of State, War, and Navy, or deputies for intelligence. (The Secretaries obviously are too busy to give this highly important subject the attention it deserves.)

3. That the Central Intelligence Group receive its appropriations direct from the Congress. (At present the Group receives its appropriations as grants from the State Department, War Department, and Navy Department, an unwieldy and sometimes awkward procedure).

4. That the Central Intelligence Group have complete control over its personnel. (At present the Group receives drafts from the Department of State, War, and Navy).

5. That the Director of the Central Intelligence Group be a civilian appointed for a preliminary term of two years and a permanent term of ten years, at a salary of at least $12,000 a year. (A civilian would be less subject to the control of criticisms of any military establishment, less likely to have ambitions in another direction, would be more in keeping with American tradition, would be more symbolic of the politico-military nature of the problem posed by intelligence in peacetime; furthermore, there is nothing to keep a qualified Army or Navy officer from accepting the post in civilian clothes, and there is every desire, by setting the tenure of office at ten years and making the salary substantial, to make the post attractive to one who has learned intelligence through the Army, Navy, or Foreign Service of the State Department. Continuity of service is recognized as very important).

6. That the Director of the Central Intelligence Group be appointed by the President by and with the consent of the Senate.

7. That the Director of Central Intelligence shall

(a) accomplish the correlation and evaluation of intelligence relating to the national security, and the appropriate dissemination within the Government of the resulting strategic and national policy intelligence, and in so doing making full use of the staff and facilities of the intelligence agencies already existing in the various Government departments;

(b) plan for the coordination of such of the activities of the intelligence agencies of the various Governments as relate to the national security and recommend to the National Intelligence Authority the establishment of such overall policies and objectives as will assure the most effective accomplishment of the national intelligence mission;

(c) perform, for the benefit of said intelligence agencies such services of common concern related directly to coordination, correlation,

evaluation, and dissemination as the National Intelligence Authority shall determine can be more efficiently accomplished centrally;

(d) perform such other similar functions and duties related to intelligence affecting the national security as the Congress and the National Intelligence Authority may from time to time direct. It is specifically understood that the Director of Central Intelligence shall not undertake operations for the collection of intelligence. (This paragraph is intended to enable the Central Intelligence Group to concentrate on the analysis and evaluation of high-level intelligence for the President and others who have to determine national policy. One should not remove any intelligence from the agencies where day-to-day policies and decisions have to be made; the collection and basic analysis in each field of intelligence should be assigned to the agency having primary responsibility in that field.)

8. That paragraphs 2,4,5,6,7,8,9, and 10 of the Presidential Directive of January 22, 1946, relating to the establishment of a National Intelligence Authority be enacted into law, with such revisions in wording as may seem necessary. (The President's directive was carefully prepared and had at the tine of its publication, the support of the interested agencies).

9. That the Army be requested sympathetically to examine further the question of the establishment of an Intelligence Corps for the training, development and assignment of especially qualified officers.

CONTINUE CHAPTER 3

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ARTIFICE: James Angleton and X-2 Operations In Italy[11]

In the summer of 1943, as Allied forces reached Italian soil, U.S. Army counterintelligence warned GIs, "you are no longer in Kansas City, San Francisco, or Ada, Oklahoma, but in a European country where espionage has been second nature to the population for centuries."

One soldier who did not need this warning was James J. Angleton, a 26-year-old second lieutenant in the Office of Strategic Services (OSS), whose code name was ARTIFICE. Not only had the young man spent the better part of his adolescence in Italy, but in the year since he had joined X-2, the counterespionage branch of the OSS, Angleton had picked up a precocious mastery of the discipline, earning the respect of his British mentors and his American supervisors.

James Jesus Angleton
PHOTO

When Angleton first arrived in Italy, the administrative head of all OSS counterespionage in that country cabled the X-2 office in London: "Air much clearer."[12] Enthusiasm greeted Angleton's assignment to the field, as it seemed to portend an improvement in the condition of X-2's local operations. In early October 1944, X-2's operational headquarters in London had received a series of signals from which Angleton's supervisors concluded that the 17-man X-2 Rome unit needed a firm hand. (see box below)

In the fall of 1943, X-2 London received three ominous signals from the field. The Rome unit's monthly report for September betrayed a sense of having fallen behind events. Though the Germans were sending fewer agents into Allied territory, the local X-2 authorities were describing them as "considerably more dangerous" and had warned Washington that each one therefore required more investigation to pin down. Meanwhile, British MI6 officers, who had three of their own counter-espionage field units in Italy, were reporting low morale among their American counterparts. Finally, London received an urgent plea for help from the overall chief of X-2 in Italy, Maj. Graham Erdwurm, who believed that the working relationship necessary to conduct counterespionage in Italy were lost because of weak management of the unit. The Rome representative of British counterespionage, it was argued, was increasingly reluctant to share his most secret sources. At the time of Angleton's arrival, the name

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of the X-2 field unit in Italy was SCI Z. It was derived from the term, Special Counter-intelligence (SCI) unit, which X-2 employed for its French field teams. In October 1944, SCI Z had one substation, located in Florence.

Unlike the military, which would not reach its next target city, Bologna, for another 5 months, Allied counterespionage was not in a holding pattern in Italy in the fall of 1944, and X-2's responsibilities were expanding.[13] The area under Allied occupation had still to be rid of German informants left behind by the Sicherheitsdienst and the Militarisches Amt when they fled North.[14] In the addition, the counterespionage services bore the burden of identifying, catching, and interrogating the linecrossers that the German military was pushing across no man's land to collect order of battle information.[15] Amid the pressure for more and better information about German spies, the OSS's Italian counterespionage detachment had suffered a crisis of confidence and was losing the respect of other counterespionage services.[16] London wanted Angleton to turn the Rome unit around in 6 weeks so that X-2 could handle the enemy intelligence agents out of the Po Valley and then be able to do its part when it came time to liberate northern Italy.[17]

Nearly half a century later it may seem difficult to understand why the now legendary James Angleton inspired not only the trust of men many years his senior but was viewed as a source of wisdom by those around him. With a very few notable exceptions, the current image of James Angleton is that of a rigid, overrated, ideological menace. (The thesis of Tom Mangold's book, *Cold Warrior, James Angleton: The CIA's Master Spy Hunter*, is that Angleton was an ideological cold warrior whose ability to differentiate between possible threats and probable threats deteriorated after he learned that his British colleague H.A.R. "Kim" Philby was a Soviet penetration agent.)[18] Yet the operational files from his Italian posting, which are now in the National Archives, reveal a different man and leave little doubt as to why he was called to the field in 1944.

Angleton provided an adept field operative. The mission that was only to take 6 weeks lasted 3 years. In the last year of the war, Angleton rose from chief of the X-2 unit in Rome to chief of all OSS counterespionage in Italy. By the age of 28, as bureaucratic initials and superiors were changing in Washington, he became chief of all secret activity, intelligence and counterintelligence, in Italy for the Strategic Services Unit (SSU), the successor of the OSS.[19] Although field promotions are not always dependable indicators of operational success, Angleton's rise to the top of all American secret activity in Italy paralleled a remarkable expansion of U.S. counterespionage capabilities in that strategically important country. By the end of 1946, Angleton, or those directly responsible to him, had amassed over 50 informants and had penetrated 7 foreign intelligence services, including Tito's Otsek Zascita Naroda (OZNA), the French Service de Documentation Exterieure et de Contreespionage (SDECE), and the Italian Naval Intelligence Service, the Servizio Informazione Segreta (SIS).[20] Concur-rently, through liaison channels, Angleton was receiving regular reports from various Italian intelligence services that included intercepts of foreign agent radio traffic and information about Soviet and Yugoslav intelligence ciphers.[21]

In this paper, we will review four representative operations to illustrate and evaluate Angleton's activities in Italy. As will be demonstrated, a general study of these operations delimits the contours of a consistent

approach to counterespionage. Also discernible in these operations is Angleton's understanding of the role of counterespionage in defending U.S. interests. A study of his Italian career therefore serves not only as a primer on what the OSS and the SSU achieved in counterespionage in Italy but also as an introduction to the world view, and professional skills of the man who would come to dominate American counterespionage for a generation.

Angleton's approach can be best understood as the implementation of what might be called "Total Counterespionage." The young Angleton was a political Realist.[22] He assumed that all governments have secrets that other governments want. The nature of a particular government influenced its capacity though not its desire to spy. When Angleton asked why a country spied, he did so not in search of moral justification but because countries often betray intentions in what they spy for.[23] The agnosticism of his view of the threat supported a broad view of the means necessary to protect U.S. interests. He believed that a counterespionage service had to have an insatiable appetite for information about foreign activities so as to be in a position to restrict, eliminate, or control the ways by which other states collected their intelligence.

The operations chosen represent the principal sources of counterespionage, as a form of information and as a type of activity, available to Angleton in the years 1944-46. The first involves Angleton's exploitation of ULTRA-class intelligence. In other word's how he made best use of the fact that he could read many of the radio messages of his adversaries in the German Intelligence Services. The second is the SALTY case. SALTY, aka Capitano di Fregata Carlo Resio, was the pivot of Angleton's broad-based liaison with the Italian Naval Intelligence Service. The SALTY case illustrates how Angleton used cooperation with other services to expand his knowledge of foreign intelligence activities. The third is an example of a successful penetration operation that involved another Italian naval officer, whom we shall call SAILOR. And, finally, a second look will be taken at the notorious Vatican case, VESSEL or DUSTY, which was also a penetration operation but one that failed.

Before turning to these operations, it is useful to note that the end of the Second World War divided Angleton's career in Italy in two. Until August 1945, most of Angleton's operations were the extension of a program of military security.[24] As experts in the personnel and methods of the enemy, X-2 officers assisted the more numerous and large units of the U.S. Army's Counterintelligence Corps in locating and neutralizing German and Italian Fascist agents. X-2 officers were in a position to direct aspects of the Army's security program because of their access to a more extensive archive of counterespionage information. In addition, X-2 case officers had received instruction in the arts of doubling and controlling enemy agents, skills that Army counterintelligence officers did not have. When the army picked up an agent, an X-2 officer was called in to assess the agent's potential as a double agent. If the results of the review were affirmative, the X-2 branch assumed responsibility for the agent. Yet even in these double agent cases, security considerations predominated, and X-2 officers operated with the elimination of the foreign service as their goal.[25]

After the war, Angleton's concern became almost entirely "long-range counterespionage," in effect the surveillance of all foreign intelligence operations in Italy. The rationale for broad coverage was that the cessation of hostilities had brought the replacement of armies by intelligence services as the means by which countries challenged each other. This change in the international system blurred the traditional

lines between positive intelligence and counterintelligence. With threats ill-defined, X-2's penetrations assumed added significance as sources of clues as to the intentions of other states.[26] Angleton noted the case with which the intelligence services of the continental powers adjusted to peacetime. In September 1945 he wrote, "(a)s military commitments are gradually discharged, there is a sharp increase in the number of long-term espionage suspects which is accompanying the transitional phase to normalcy.[27] Angleton found that in the wake of the collapse of Italian power, the unsettled nature of Mediterranean politics invited intervention by secret services. In his reports to Washington, Angleton underlined that the governments of France, Italy, and Yugoslavia were deploying their secret services to maximum their territorial and political advantages before the stabilization of borders and regimes.[28]

Besides providing insight into the way in which states defined their interests, Angleton's adoption of broad counterespionage coverage in peacetime facilitated controls over the movements of likely foreign long-term agents.[29] On the strictly security side, Angleton's principal concern was that members of those long-range networks not be permitted to obtain American secrets either through penetration of an American facility in Italy or through the emigration of part of the network to the United States.

Linking these two periods of Angleton's field career was his talent for exploiting liaison and penetration for counterespionage purposes. Neither activity produced information in hermetically sealed compartments. The sources of counterespionage information available to Angleton interacted constantly to produce a better picture of the adversary. Some hitherto obscure reference in an intercepted message might begin to make some sense, for instance, when compared to an interrogation reported gained from an Allied service. One always hoped for a snowball effect; a deciphered message might lead to penetration operations that brought the release of even more data.[30]

Angleton's most important course of counterespionage was the product of both liaison and penetration. Code-named ISOS or PAIR, this was a steady stream of deciphered German intelligence messages, mostly but not exclusively sent by members of the Abwehr, the German military intelligence service.[31] ISOS or PAIR belonged to the now famous ULTRA family of signals intelligence. These decrypts were a British triumph and came to Americans only as a consequence of the un-precedented Anglo-American collaboration that underwrote the Allied conduct of the Second World War.[32] When the advent of joint military operations in 1942 transformed the security of American field operations into a British concern, the British made the decision to share their best intelligence with Washington.[33] In exchange for this material, the British required that the OSS imitate their own foreign counterespionage organization. In practice this meant establishing X-2, a self-contained unit with separate communications channels, whose management at all levels, from staff to line officer, was indoctrinated into ULTRA.[34] Recalling ULTRA four decades later, Angleton described it as "the superior source" that undergirded all counterespionage operations.[35]

Angleton's own London apprenticeship had exposed him to the conventional wisdom among Allied counterespionage chiefs that, at least in this war, signals intelligence was the basis of all serious counterespionage.[36] From late 1941, readable German intelligence messages were coming to the offices of British counterespionage in

bales. By May 1944 the British were circulating 282 of these decrypted messages a day.[37] These decrypts created a sense of confidence among counterespionage officers who, perhaps for the first time in military history, believed that a complete understanding of the enemy's intelligence resources was within their grasp. Although sometimes incompletely deciphered and when fully deciphered often filled with code names instead of real names, these messages provided a bird's-eye view of the number of agents the enemy sent into the field and the information that his networks were providing him.[38]

In Italy, Angleton made a distinctive contribution to the problem of managing this sensitive information. Like many Allied counterespionage officers, he understood that the British sister services employed ULTRA information. Operationally, this meant striking a balance between the protection of this superior source with the requirement of exploiting it to catch spies. As chief of X-2 Rome, Angleton conceived and produced a series of special manuals for use by Army counterintelligence investigators that went a long way toward solving this problem. Between January and April 1945, Angleton developed the concept of the "Key," an easy-to-revise compendium of information about the various German and Fascist Italian intelligence services that could be shown to officers not indoctrinated into ULTRA.[39] The trick was to comb POW interrogations for corroboration of facts first learned from ULTRA. Once a detail had been found in a less sensitive place_a SECRET interrogation report instead of a TOP SECRET ULTRA decrypt—it could be disseminated more widely.[40]

The fact that ULTRA materials were the most important products of liaison in the war against Fascist agents did not negate the value of the other cooperative relationships formed by Angleton in the field. For intelligence as well as operational reasons, the counterespionage officer had an incentive to develop liaison channels.

Angleton recognized that the requirement of specific information about the real names, aliases, addresses, missions, modes of payment, and weaknesses of foreign agents placed demands that even the miraculous deciphered messages could not meet. Germany signals, of course, revealed only some of what had to be known about espionage activity Mussolini's rump government. But even where it was a matter of detecting a German-trained and German-supplied agent, the intricate details required to track the agent down were less commonly the product of signals intelligence than the interrogations of capture intelligence officers, agents, and subagents. As X-2 was only one cog in the Allied counterintelligence machine, Angleton had to rely on liaison channels for most of these interrogations. The ratio of his small number of interrogators to the number of suspects being processed at any given moment meant that only the most important cases became the direct responsibility of X-2. Accordingly, X-2 had to make its influence felt indirectly, through interrogation aids such as the "Keys," which guided Army interrogators, or through joint operations with other counterespionage services with the effect of maximizing the number of interrogation reports available to X-2.

Angleton's experience in Italy affirmed the principle that liaison is the most efficient way to expand the sources of a counterespionage service. Intelligence cooperation has the potential of opening archives to a service that it could not have created on its own without a massive investment of labor and capital, if at all. Liaison among counterespionage services has the added inducement that it is the only way for a foreign service to have systematic access to the myriad of banalities routinely collected by domestic institutions that often prove

essential in determining the bona fides of a source. Hotel registration lists, airplane manifests, passports and visa information can all be used to detect suspicious activities by individuals or to test the biographical information of suspect agents with whom you have come into contact. The epitome of such liaison is the police file, which, when corrected for the political or cultural biases of the originating institution, can be the most important source of biographical, or "personality," information.[41]

Having learned the value of liaison as a desk officer in London, Angleton wasted no opportunity once in the field to broaden X-2 contacts with Allied and friendly services. Of particular importance to him were the under-developed links to the Italian services. Under certain circumstances a foreign service will decide to put its operational resources at a counterespionage officer's disposal. Until 1946 this was mandated for the Italian police and all Italian military intelligence services.[42] The challenge for X-2 was to provide the basis for a continuation of such collaboration past the life of the mandate.

Angleton's efforts at deepening liaison with the Italians built upon the accomplishments of others, especially those of his own father, Lt. Col. James Hugh Angleton. From late 1943 through half of 1944, the senior Angleton served as X-2's representative in discussions with Marshal Pietro Badoglio and leaders of the Italian military, including the army's intelligence service, the SIM.[43] Over the course of his brief career in X-2 (he had left Italy by the time his son landed in Caserta), Lt. Colonel Angleton drew upon the excellent contacts he had developed in the 1930's as the owner of National Cash Register's Italian subsidiary and as president of the American Chamber of Commerce for Italy.[44] Following the elder Angleton's lead, son Jim's predecessors as unit chief in Rome, Andrew Berding and Robinson O. Bellin, established a measure of collaboration with all five principal Italian intelligence services: the three Italian military services, the police of the Ministry of the Interior (the Pubblica Sicurezza) and the Royal Counterespionage Service, or the Carabinieri.[45]

Young Angleton considered his immediate predecessor, Bellin, overcautious in dealings with the Italians. Angleton's first important policy decision after arriving in late October 1944 was to overturn Bellin's recommendation that the Marine Unit, a maritime paramilitary arm of the OSS, suspend its operations in Italy. The source of the problem was that the unit had earlier recruited a number of Italian naval saboteurs. When one of these recruits was discovered to be a Germany agent, X-2 and the OSS Security Office in Caserta concluded that the OSS Marine Unit was insecure. So daunting was the task of checking the bona fides of the rest of the Italian group, because ULTRA apparently provided very little on the Italian services, it was thought best to close down the entire OSS marine detachment.[46]

Angleton understood these concerns but was willing to take a leap of faith in order to deepen X-2's relationship with the SIS. It was a calculated risk. The war had turned against the Germans, and only the most hardened Fascists would resist the call for assistance from the rejuvenated Italian military. Betrayals were still possible, but their cost had to be weighed against the potential rewards of liaison. The Italian Royal Navy had the key to dismantling the German intelligence and sabotage network north of Florence. ULTRA information showed that the Germans were planning to leave Italians behind in strategic centers with missions to report on Allied military movements to headquarters in northern Italy and Austria.[47] Other information pointed to Prince Valoerio Borghese, a former Italian naval officer, as possibly being

responsible for setting up part of this organization.[48] Borghese, the chief of the naval sabotage unit, the Decima Flotilla MAS, had not surrendered with the rest of the Italian Royal Navy in September 1943. He and most of his men, who were famous for their underwater assaults against British shipping, had stayed in the north to serve Mussolini's Salo Republic. The SIS knew the biographies of Borghese's group and could predict which men might be vulnerable to an approach by an Allied field agent.[49]

Angleton's reversal of policy, implying U.S. confidence in the Italian Royal Navy, opened the door to wide-ranging joint operations with the SIS under Capitano di Vascello Agostino Calosi.[50] Italian Naval Intelligence was eager to work with the OSS as Angleton was with them. In November 1944, Calosi's chief of intelligence, Capitano di Fregata Carlo Resio, approached Angleton with two offers of assistance.[51] First, he said he could provide four trained radio operators for future penetration operations in the north. Second, he urged that the OSS Marine Unit take over the Italian "GAMMA" frogman school at Taranto, which would soon be closed down. Resio suggested that with the equipment and the training staff from Taranto, the OSS could prepare its own naval sabotage group for operations in the Pacific.

By early January 1945, this liaison was producing counterespionage information in addition to operational opportunities. As he began providing reports based on SIS files, Resio earned the sobriquet SALTY.[52] The first batch of SALTY reports dealt primarily with two theme: one was the threat of communist insurgency and Soviets support for same; the other, the existence of a Fascist residue that had to be wiped off the Italian slate.[53]

The SALTY reports brought criticism upon Angleton's head for having exceeded his brief. The references to Soviet activity embarrassed Washington, which, in February 1945, cleaved to a policy of not collecting counterintelligence on allies.[54] In its first assessment of Resio's information, X-2 headquarters lectured young Angleton on the possibility that this information was politically inspired. The SIS, they cautioned, had long been considered royalist and anti-Soviet: "(t)herefore, it seems possible that this information may well be in the nature of a propaganda plant.[55] Moreover, at a time when Washington was eager for information to confirm the governing assumption that the Germans planned to continue a twilight struggle from the mountains of Austria, Resio's information seemed at best premature. Washington was testy:

> *We would rather like to know from you whether you feel that all of this information actually ties in with German activities, either in the present or along the lines of future operations. Without an explanatory tie-in and evaluation, much of this information seems to be rather meaningless.*[56]

Angleton reacted to the upbraiding by never again forwarding to Washington any political intelligence received from SALTY.[57]

Plan IVY, which was the culmination of the wartime collaboration developed between X-2 and SIS by Angleton and Carlos Resio, did meet Washington's criteria. The plan involved the use of Italian naval resources to penetrate Borghese's XMAS network in the north. Resio introduced Angleton to IVY, a source in Florence who had worked in

Borghese's XMAS.[58] IVY provided six radio sets.[59] For the period after the liberation of the north, he offered XMAS scouts who were to dress as U.S. enlisted men and be assigned to target teams being assembled for Genoa, La Spezia, Trieste, and Venice. These scouts were to assist X-2 in tracking down Borghese's stay-behind network.[60]

Plan IVY also involved Pubblica Sicurezza and partisan contacts. The object of using them together with Resio's assets was to extend X-2's coverage in the north. Angleton's plan was to work with the SIS, the Pubblica Sicurezza in Rome, and those branches of the OSS that had been active informants among the partisans with a view to reestablishing contact with as many friendly assets in Fascist territory as possible. Once the liberation had begun, X-2 intended to send its few officers to the north to meet up with these contacts, who were expected to be able to facilitate the "raccolta"(collection) of enemy agents and archives.[61]

Despite the assistance of the Italian SIS, Plan IVY did not live up to its promise. The credit instead went to the British and Italian military intelligence for capturing the heart of Borghese's organization.[62] Plan IVY also incurred unexpected costs that would only have been warranted had there been more operational successes. Because IVY's network had not sufficiently coordinated its activity with the partisans in the north, some of its members were arrested and executed despite their work for the Allies.[63] One positive byproduct of IVY for X-2, however, was that Prince Borghese turned himself over to the OSS.[64] Until the Italian government forced his return for prosecution in the fall of 1945, he served as an X-2 source on the backgrounds of various members of the Italian military and diplomatic elite.[65]

After the war, Angleton intensified his cultivation of the Italian Royal Navy. This took many forms. He offered the use of X-2 as a postal service to Agostino Calosi, whose brother had been taken to the United States to advise the U.S. Navy on building torpedoes.[66] When someone in the Italian SIS requested a copy of the American trade journal that happened to have an article on welding ships, Angleton cabled Washington to have it dug out of the Library of Congress.[67] Another way of currying favor was to sponsor a hard-earned vacation for a friendly naval contact. In the summer of 1945, X-2 sent the head of B Section, the cryptographic service of the Italian Royal Navy, and his wife to the south of Italy.[68]

This minor investment seems to have paid off. By 1946 Angleton could report that as part of an exclusive arrangement with Section B, he had received a partial reconstruction of a Yugoslav cipher table and was likely to see solutions to messages sent by the Soviets to their field agents.[69]

By 1946 Angleton had developed at least 10, and possibly as many as 14, informants in the SIS.[70] This network was inexpensive as it was productive. Angleton reported in the fall of 1945 that he did not pay for anything that he received from the Italian Intelligence Service. Simply by turning over some cigarettes or operational goods, he could gratify his opposite numbers without humiliating them. Angleton wrote in one of his general reports:

> *A few such items represent the equivalent of month's pay to an Italian Intelligence officer. In practice, $500 worth of operational supplies has the operational value of*

$50,000 worth of Lire or more. This method of payment is generally in use by other intelligence services.[71]

Angleton's superiors echoed his pride in the liaison system of X-2 Italy. When taking stock of all liaison relationships in 1946, the leadership of X-2 deemed Angleton's liaison with the Italian intelligence community, including the SIS, the "most spectacularly productive" of any maintained by the organization.[72]

The SALTY case represented how liaison could be used to fill in gaps in ULTRA information. Another way was by means of penetration. Reading the enemy's mail, as typified by signals intelligence like ULTRA, was only one of the forms of penetration available to Angleton. In the handbook of an X-2 officer there were another four ways to penetrate a foreign service; first, by placing an agent within the foreign service; second, by exploiting captured agents; third, by capturing foreign intelligence documents; and finally, by capitalizing on security lapses by enemy representatives in neutral (third) countries.[73]

Angleton's most productive penetration aside from ULTRA in the years 1944-46 involved an agent in place. As Angleton knew, the "agent in place," or mole, has distinct advantages as a means of penetration. This kind of operation can potentially combine the virtues of access to high-level information and operational flexibility. Signals intelligence has the former, but it is also a static penetration. The agent in place, on the contrary, can direct his activities in conformity with the shifting priorities of the counterespionage service. Like signals intelligence, the last three kinds of penetration — captured documents, interned enemy personnel, the fortuitous security breach — lack the dynamism of the agent in place. While excellent sources, they can provide only snapshots of the foreign service. The double agent is the only form of penetration that can compete with the flexibility of the agent in place. But since, by definition, he or she is not an officer of the foreign service and operates only in the field, there is little chance of parlaying the agent's new loyalties into a high-level penetration.

Angleton expected that, like the other forms of penetration, the penetration agent could serve an important epistemological function. In practice, the responsibility of the X-2 officer to protect the integrity of the U.S. intelligence community meant checking the channels of information to headquarters to weed out deception or just bad intelligence. Angleton's term for this was "controlling information."[74] OSS field stations were beset with streams of information, of varying accuracy, from agents of uncertain credibility. Without a system of knowledge, a field officer found himself blindly picking and choosing among these details. There could be little certainty at the best of times for the analyst of current events, but for Angleton there was a way to reduce the possibility of error. If one could control another agent in the same office, or at least one likely to receive similar information, then the veracity of the first source's reports could be tested. The game of multiple penetration required patience and meticulousness—traits associated with Angleton's later hobbies of orchid-breeding and fly-fishing.

Angleton's prize agent in place realized the epistemological potential of his type. An SIS officer, he provided a check on the products of the important liaison with Italian naval intelligence. Angleton code-named him JK1/8, but for simplicity's sake, we shall refer to him as SAILOR.[75]

The passionate debate over the future of the monarchy in Italy, which followed the defeat of Nazi Germany and the Fascist puppet state in northern Italy, undermined the unity of the Italian Royal Navy. Many in the navy, which Angleton himself described as "the stronghold of Monarchism," opposed an Italian republic.[76] Angered by the militant monarchism of his superiors, a young republican in Carlo Resio's intelligence section took matters into his own hands and offered a confidential liaison to Angleton. From the summer of 1945, this officer supplied X-2 with information that cut across the grain of what was received from official Italian Royal Navy sources.

SAILOR represented the ideological agent. Apparently, he was not paid for is information.[77] Nor is there evidence that SAILOR intended this connection with Angleton to advance his own career in intelligence. On the contrary, 8 months into his work as a penetration agent, SAILOR mused about resigning from the navy to join his brother in South Africa.[78] SAILOR's reports betray an antimonarchist bias, reflecting a deep suspicion of his colleagues and concern for the future of the Italian republic.[79]

In the year for which there is evidence of his work for X-2, SAILOR strengthened Angleton's ability to monitor Italian efforts to rebuild an intelligence capability.[80] Notably, on three occasions, he revealed secret Italian intelligence activities and then maneuvered himself into a position from which he could act as X-2's eyes and ears.

As his first operational contribution, SAILOR disclosed contacts between the Italian and the Soviet intelligence services after the Italian Armistice. At the start of his work for Angleton, SAILOR had offered to turn over the files on his meetings with his Soviet counterpart in Istanbul, Akim Nihailov.[81] A few months later, this offer matured into a prospective penetration of the Soviet services. The Soviets attempted to reestablish contact with SAILOR in Rome in the fall of 1945. SAILOR informed X-2, which then monitored the relationship.[82]

The second major disclosure attributable to this penetration came when SAILOR warned the Americans that anti-Communist Albanians had approach the Italian Royal Navy for money and weapons to attempt the overthrow of Enver Hoxha's regime. Angleton's official contacts also reported this approach. Thus Angleton found himself being asked by both SAILOR and the Italian partners for guidance as to what the Italian response should be. In order to control this relationship between the SIS and the Albanian dissidents, Angleton risked disclosure of his own penetration by boldly recommending that SAILOR be the liaison between the two groups. SAILOR's superiors agreed, and for nearly a year, X-2 was able to monitor these discussions through SAILOR.[83]

Finally, SAILOR revealed an old secret to Angleton that he had learned while serving in the codes and ciphers section of Italian naval intelligence. He told the story of DURBAN, a mysterious source who had supplied British and French codes to the Italian in 1939 and 1940 through a cut out, or intermediary, known as Max Pradier. SAILOR recalled this case because in 1945 Max Pradier attempted to reestablish contact wit the Italians, and SAILOR thought the United States might wish to participate.[84] When the Italians later decided to reactivate Pradier, SAILOR was well-positioned to report on the kinds of ciphers that Rome was requesting.[85]

These operational gifts aside, SAILOR's principal value lay in enabling James Angleton to master the important liaison with Resio (SALTY)

and the rest of the SIS. SAILOR was in a position to reveal weaknesses in the service for Angleton to exploit.

In January 1946, SAILOR told Angleton that the Italian Minister of the Navy had announced in a meeting with his chiefs of staff that the United States was "the only friend of CB-Land (Italy)."[86] As it was U.S. policy on the terms of a peace treaty with Italy that had occasioned this comment, Angleton reacted to this intelligence by requesting from Washington all speeches by U.S. Secretary of State James F. Byrnes and other significant U.S. foreign policymakers that highlighted the American predisposition to a soft peace. Intending to mount a serious campaign, Angleton asked to be forewarned by cable of any government speech seemingly favorable to Italy that he could use to convince the Italian intelligence services that "their loyal collaboration with our service works to better their dubious position at the peace table."[87] Thinking past the peace treaty, Angleton felt that this close liaison could be preserved if the Italians believed that the United States had done everything possible to limit reparations to be paid by Rome and to rescue the eastern province of Venezia Guilia, even if neither demand was met in the treaty.[88]

Additionally, SAILOR improved the value of the X-2/SIS liaison by providing a filter through which Angleton could assess the quality of the information he was receiving from the Italian Royal Navy. Intelligence from SAILOR confirmed that the elite of the SIS was actively supporting the Italian monarchy.[89] This put Angleton on his guard in dealings with his naval informants. While many factors may have contributed to this caution, SAILOR's reports no doubt influenced Angleton's growing suspicion of the quality of political intelligence from the Italian Royal Navy. By the fall of 1945, Angleton's reports to headquarters began to reflect the reserve that Washington had earlier shown, without much cause, toward SALTY. Lumping the SIS with all other Italian intelligence services in a criticism of the political biases of the Italian intelligence community, Angleton cautioned his desk chief in Washington:

> *The services have used every event, incident to the Italian Revolution, as propaganda material to indicate Russia's subversive intentions of preventing the reestablishment of "law", "order", and democracy in Italy. At no time have the various items of intelligence (when submitted to the test) been proven to be other than consciously composed for the purposes of provocation.*[90]

SAILOR was a successful operation. But not all of Angleton's attempts at penetration produced positive results. Whereas SAILOR could be considered a complete penetration by Angleton, the notorious VESSEL case illustrated the problems associated with an incomplete penetration. This case pushed Angleton to the limits of his ability to meet his own high standards of counterespionage, with severe consequences for U.S. intelligence.

The rough outlines of the VESSEL case are well known to students of the OSS.[91] In the fall of 1944, Col. Vincent Scamporino, the head of the Secret Intelligence Branch (SI) of the OSS in the Mediterranean, began to receive reports from a man who purported to be in touch with an information service in the Vatican. The reports drew the interest of policymakers in Washington, among whom was President Franklin d. Roosevelt, who took the reports to be reproductions of actual Vatican documents. When the documents turned out to be fabrications, the OSS suffered some humiliation.

What is less well known is that this humiliation might have been avoided had bureaucratic politics not prevented James Angleton from assuming control of this operation from the start. Shortly after Scamporino had brought his first Vatican reports, James Angleton began to receive nearly identical reports from his own cut-out, or intermediary, Fillippo Setaccioli, alias DUSTY.

The source of all this Vatican information, both that received by Angleton through Setaccioli and what Scamporino was sending to Washington as VESSEL information, was a former journalist named Virgilio Scattolini, who directed the Social Center of Catholic Action in the Vatican.[92] Scattolini had sold bogus Vatican information to various newspaper wire services before the war and with the liberation of Rome sought to reestablish this lucrative trade.[93]

Shortly after his introduction to Setaccioli, Angleton learned that DUSTY was not Scattolini's sole middleman. When Angleton shared the first reports from Setaccioli with SI Italy, Scamporino revealed that his service had been receiving almost identical information from two other sources, one of which SI had code-named VESSEL.[94]

Two considerations rendered the Scattolini case a matter of the highest importance to Angleton. First, if, as then appeared likely, the Vatican material was genuine, it represented a leakage of secrets about U.S. activities in the Vatican.[95] Scattolini had boasted to Setaccioli of being able to report on Myron Taylor, the U.S. representative to the Holy See. Second, the fact that Scattolini was not the only middleman complicated any attempt to control Scattolini and U.S. secrets.

Angleton believed that his case required at least limiting Scattolini's Vatican operation to one middleman, DUSTY, whom he believed he should control. Angleton had three good counterespionage reasons to want to restrict the information to one channel. The OSS could thus screen all of Scattolini's outgoing reports for information detrimental to Allied interests. With this channel under its control, X-2 would acquire the capability to uncover all of Scattolini's clients, most of whom were foreign intelligence officers in Rome. At some later date, X-2 could employ this channel to plant information on selected foreign intelligence services.[96]

Scamporino rejected Angleton's plan.[97] The risk inherent in shifting from the middleman VESSEL to Angleton's middleman, Scattolini, made the plan seem inadvisable. The pressure on Scamporino not to fail was great. VESSEL's information gave the OSS the ear of President Roosevelt, who from January 1945 received reports that were entirely the raw intelligence "take" from this source in the Vatican.[98] The traditional rivalry with X-2_based on SI's ignorance of ULTRA and subsequent mistrust of X-2's aloofness__encouraged the conclusion, moreover, that Angleton's approach to handling the Vatican information was a veiled attempt to monopolize Scattolini.

As a consequence of Scamporino's decision to defer to DUSTY, from January 1945 until August 1945 the OSS paid two middlemen for the same information.[99] Had a doubling of OSS expenses on Vatican information been its only cost, this interbranch rivalry might have been excusable. The actual damage was much greater because the squabbling between the SI and X-2 prevented the OSS from controlling Scattolini directly. The preclusion of an inside check on the quality of the VESSEL material rendered even more difficult the already challenging task of evaluating information from the Vatican. Since the departure of the German intelligence bureaucracy from

Rome and the internment of Germany's diplomatic corps in the Italian capital, ULTRA could provide very little to Scattolini's information. From the ease with which Scattolini's lies were accepted, one can conclude that the American intelligence community had few other sources on Vatican affairs.[100]

Angleton tried unsuccessfully to "control" the Vatican information. At the time that he had suggested putting all of the Vatican middlemen out of business save one, Angleton had also advocated direct contact with Scattolini.[101] Given Scattolini's Fascist past, Angleton was confident that the fabricator could be compelled to work for the U.S. government. Angleton never had the chance to test this proposition, however, because of SI's opposition to anything that might threaten the VESSEL operation. In the hope of overturning SI's veto, Angleton spent a good deal of time in February, March, and April 1945 fruitlessly arguing the case for turning Scattolini into a double agent. Finally, even fate conspired against Angleton. When it appeared that Gen. William J. Donovan, the Director of OSS, might agree at least to let X-2 place an American penetration officer in the Vatican to watch over Scattolini, President Roosevelt's unexpected death caused Donovan to cancel his trip to Rome, and the whole plan fell flat.[102]

Fortunately for the U.S. government, Scattolini ultimately made a mistake that took the luster off his material. In mid-February, Scattolini, who apparently did not know the identities of all of his consumers, passed a report through VESSEL on a meeting between Myron Taylor and the Japanese representative at the Vatican, Harada Ken.[103] The State Department was astonished when it received this VESSEL report because Taylor had not reported this particular contact. When Taylor denied ever having met the Japanese representative, the VESSEL material finally fell under suspicion, and the OSS decided to curtail its distribution severely.[104] President Roosevelt, however, continued to receive VESSEL reports on the Far East, as did the other Washington consumers of this material.[105] For no apparent reason, it was thought that, though unreliable about European matters, VESSEL could be trusted when it came to Japan.

Neither Angleton nor X-2 bore direct responsibility for the fact that the President of the United States received a weekly diet of fabricated reports up to the closing down of SI's VESSEL operation in the summer of 1945. A counterintelligence service is ill-equipped to judge the merits of political intelligence. In short, X-2 could better evaluate the messenger than the message. Primarily at fault were analysts in the OSS Research and Analysis Branch in Washington, whose access to more political information put them in the best position to discredit this material.

While the course of the VESSEL case validated his operational approach, Angleton should not retrospectively escape personal responsibility in the Scattolini case. Despite his admonitions to Scamporino, he shares SI's trust in the basic veracity of what Scattolini was selling. Only he can be blamed for the decision to continue disseminating Scattolini's material after VESSEL, the OSS middleman, was fired in the summer of 1945. Thereafter Setaccioli was the sole source of these so-called "Vatican cables to Angleton.[106] Instead of simply using them to detect foreign intelligence officers in Rome, Angleton held at the view that Scattolini's material was a valuable source of political intelligence. He gave the Vatican reports a high evaluation, shared them with the U.S. Embassy in Rome, and decided to leave Scattolini alone.[107] Why Angleton passed up his long-awaited chance to employ Scattolini as an U.S. agent, at least to bolster his

confidence in the man's access to information, is unclear. As a result, a final reckoning for the Vatican material was delayed at least until 1946. Ultimately, a CIA postmortem on the case concluded that Scattolini's reports had contributed to "informing, misinforming and thoroughly confusing those individuals responsible for analyzing Vatican foreign policy during the period involved."[108]

The counterespionage officer who emerged from the four preceding X-2 operations is at odds with the fabled James Jesus Angleton of the Mole-Hunt of the 1960s.[109] As evidenced by his treatment of information gained through liaison with salty and other Italians, Angleton did not view World War II has a hiatus in the struggle against international communism.[110] In fact, at no time was the young second lieutenant transfixed by a single enemy, Communist or Fascist.[111] His instinctual reaction to DUSTY, it will be recalled, had been to control him in order to monitor all foreign intelligence activities in Italy.

Further evidence of Angleton's pragmatism was the healthy skepticism with which he treated his sources. Aware of the political context in which he was working, Angleton was sensitive to the twin needs of collecting from sources of all political persuasions and correcting for their political biases. In October 1945, with the benefit of information from SAILOR, he regretfully remarked that the doctrine of military necessity had led to an almost exclusive set of intelligence-producing liaison relationships with the Italian military services, which represented the monarchist right wing of the Italian political spectrum.[112] Since it was likely that Italy would become a republic with the center-left inheriting power, Angleton articulated his worry that X-2 faced being shut out of important Italian information.[113]

The success or failure of a counterespionage unit is not a simple determination. One ought to resist the tendency to award laurels to Angleton and X-2, for example, simply because the OSS and the rest of the U.S government escaped serious Fascist penetration.[114] After all, the avoidance of penetration may be more the reflection of the weakness of the opponent's intelligence service, or more appropriately in wartime, it may likely be the consequence of one side's military prowess. Nevertheless, standards of competence can be set. If they are exceeded, then the service or the individual counterespionage officer can be said to have been truly exceptional.

In his use of ULTRA material and other products of liaison and penetration operations, Angleton demonstrated a firm grasp of the principles of effective counterespionage. He knew both how to make use of the intelligence that he had and how to develop new sources. Throughout, his objective was to extend his coverage of foreign activities likely to affect U.S. interests. This implied an exacting definition of counterespionage, which obliged the field officer to monitor all foreign intelligence-gathering in strategic areas and to control every possible channel through which an adversary might acquire American secrets.

This sureness of touch also had its negative side. It nourished a self-confidence that occasionally led Angleton astray. The VESSEL debacle showed that Angleton could relax his principles if he became personally involved in a case. Once Scamporino and the rest of SI had lost their claim to the Vatican material, Angleton backed away from his previous bureaucratic position of stringent checks on Scattolini and ran the operation through the man whom he believed, Setaccioli (DUSTY). Perhaps, too, some arrogance contributed to his decision not to secure

the coordination of the IVY plan with the Parisians in the spring of 1945.

Angleton's mistakes in Italy, however, did not diminish his role as exemplar in the development of counterespionage as an American profession. As demonstrated through his operations with X-2 in Italy, Angleton's concept of total counterespionage discouraged the myopia that can lead intelligence services astray. His approach to counterespionage neither necessitated a principal enemy nor was biased politically to expect a great threat from any particular country. Grounded in empirical evidence and historical memory, the world according to Angleton was flexible, open-ended. Though not looking for threats, Angleton as a young man was in a position to perceive them whenever and wherever they arose.

END OF CHAPTER 3

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- Message: The specified key does not exist.
- Key: ops/ci/docs/ci1/ch4time.htm
- RequestId: G1X3FQAZG571YHD4
- HostId: qczugQDuaCYCdUsPy8Iv7hWecO7+tUEZmgRRv4VyKvPJ7Bz7ib4yENaxb66Q30URzzB59DVLIZ4=

An Error Occurred While Attempting to Retrieve a Custom Error Document

- Code: NoSuchKey
- Message: The specified key does not exist.
- Key: error.html